The right to free, prior and informed consent in an international context

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For decades, if not centuries, Indigenous Peoples have understood that giving or withholding their consent was a key dimension of their right to self-determination. Consent was one way of providing a clear context and benchmark for their relations with all others, including other Indigenous Peoples, nations and communities. Fortunately, international law and the Indigenous-specific human rights standards affirmed in the *UN Declaration on the Rights of Indigenous Peoples* reflect and support this pivotal element of their fundamental human rights. These developments reveal the continuing relevance of free, prior and informed consent and its central role in the efforts of Indigenous Peoples to define, re-set, and re-conceptualize their relations with states, corporate interests, industry, environmental organizations, and all others.

In this article I would like to highlight the normative standards and international law concerning the right of Indigenous Peoples to free, prior and informed consent (FPIC). In particular, I will focus on the right to FPIC as affirmed in the *UN Declaration*, as well as touch on the customary international law provisions of the *UN Declaration* that reach into the neighborhood of free, prior and informed consent, and the crucial need for its implementation.

I was one of the key Indigenous persons engaged in the drafting of the *UN Declaration* on behalf of the Inuit Circumpolar Council, and I was involved directly for the period from 1984-2007. I was also one of the few Indigenous representatives engaged in the revision process of International Labour Organization Convention's *Indigenous and Tribal Populations Convention, 1957* (No. 107), which resulted in the adoption of the *Indigenous and Tribal Peoples Convention, 1989* (No. 169). Convention 169 was the forerunner for the *UN Declaration*. During this time, I focused on the provisions related to the right to self-determination; collective rights; free, prior and informed consent; and a host of other provisions now affirmed in the *UN Declaration*.

Throughout the drafting process, I was fortunate to have good rapport with a number of government representatives, but in particular with Ambassador Tyge Lehmann of Denmark. Before the *Declaration* was adopted by the Human Rights Council in 2006 and later when it shifted to the General Assembly, Ambassador Lehmann made a point of asking the representatives of the Inuit Circumpolar Council whether or not they approved of the *Declaration* in the form that it appeared during every interval – such a question was especially critical immediately before its adoption by the Human Rights Council and by the General Assembly.

I believe that this is an extraordinary example of the exercise of the right of the Inuit to free, prior and informed consent at the international level. It represents ongoing dialogue, good faith, intellectual honesty, and genuine confidence-building measures between a member state and the beneficiaries of the rights affirmed in the *UN Declaration*. There was never a single doubt about the actions that Ambassador Lehmann would take publicly or privately to advance the *UN Declaration*, consistent with the human rights, views, and interests of the Inuit.

Another example of free, prior and informed consent has been displayed in the framework of comprehensive land claims agreements in Canada. If one studies the procedural aspects of the decades-long negotiations to affirm Inuit rights to lands, territories and resources throughout the James Bay and Northern Quebec Agreement, Inuvialuit Agreement, Nunavut Land Claims Agreement, and the Labrador Inuit Land Claim Agreement, the right and principle of free, prior and informed consent emerges. Each of these agreements involved the *free and direct participation* of Inuit in the negotiations, relying on public information as well as a comprehensive understanding of the terms of the agreements *prior* to a *referendum* by those concerned and eligible to vote. These Inuit groups were expressing their *consent* to the overall final agreement. I know that none of these agreements are perfect and that problems with implementation have emerged. However, the ratification and enumeration provisions are a unique example of how the state and Indigenous Peoples can ultimately achieve free, prior and informed consent.

International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

1. All peoples have the right of *self-determination*. By virtue of that right *they freely determine* their *political status* and freely pursue their economic, social and cultural *development*.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Box 1: Article 1 of the International Covenants (emphasis mine) and Article 3 of the UN Declaration are about choice. Essentially, these few words encapsulate much of what we are concerned about as Indigenous Peoples.

Normative Standards, FPIC, and the Right to Self-Determination

Turning to the normative standards, it is important to establish that the source of the right to free, prior and informed consent is the right to self-determination. Free, prior and informed consent is derived from this primordial, pre-existing right.

The principle of self-determination is affirmed in the *United Nations Charter* and explicitly affirmed in common Article 1 of the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (see Box 1), as well as within Article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples*. It is crucial to underscore the fact that the collective, political right to self-determination affirmed in each of these international law instruments is exactly the same right. Indeed, to invite any distinction between the right of self-determination of Indigenous Peoples and the right of self-determination of other peoples would be racially discriminatory.

Furthermore, legal scholars have expressly affirmed that the right to self-determination is a pre-requisite to the exercise and enjoyment of all other human rights. This means that the recognition of, and respect for, the right to self-determination is required because it is inter-related, inter-connected, indivisible and inter-dependent with the exercise of the right to free, prior and informed consent as well as all other rights affirmed by the *UN Declaration* (Box 2).

Naturally, the provisions of the ICCPR and the ICESCR relate to various other *UN Declaration* provisions concerning our relationship to the environment [Article 25], the integrity and productive capacity of the environment [Article 29], traditional knowledge [Article 31], and the development and use of our lands, territories and resources [Article 32]. All of these provisions are fundamental elements of the right to self-determination. Such an understanding is consistent with the inter-related nature of human rights and the linkage between the exercise of the right to self-determination and the right of Indigenous Peoples "to own, use, develop and *control* the lands, territories and resources."[1] In this way, one must interpret every provision of the *UN Declaration* in the context of the "whole of the *UN Declaration* and other international human rights law,"[2] including the *UN Declaration's* overall spirit and intent.

The UN Declaration on the Rights of Indigenous Peoples and International Law

According to the Statute of the International Court of Justice, customary international law is one source of international law.[3] In contrast to legal obligations that arise from international treaties, customary international law results from a general, consistent or established practice of states that they follow from a sense of legal obligation. Indeed, in some cases, it was on the basis of the consistent practice of states that Indigenous Peoples were able to successfully argue for inclusion of particular articles of the *UN Declaration*. For example, numerous states, well before the adoption of the *UN Declaration*, affirmed the rights of Indigenous Peoples to their lands, which reflects an established or widespread practice. Therefore, as a source of international law, human rights standards of a customary international law nature create legally binding obligations upon states.

Article 20 of the *UN Declaration*

1. Indigenous Peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous Peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Box 2: Common Article 1, paragraph 2 of the ICCPR and the ICESCR makes important reference to natural wealth and resources. This language corresponds with the provisions of the UN Declaration pertaining to the rights of Indigenous Peoples to their lands, territories, and resources. The final sentence of common Article 2, paragraph 2 concerning our own means of subsistence is really about our traditional economies, which is the essence of Article 20 of the UN Declaration.

According to both the International Law Association and the former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, the *UN Declaration* does in fact include such customary international norms. Both the ILA and Anaya have asserted that although the whole of the *Declaration* cannot be considered as an expression of customary international law, some of its key provisions can reasonably be regarded as corresponding to *established principles of general international law*, therefore implying the existence of equivalent and parallel international obligations to which states are *bound* to comply. Therefore, it is indisputable that "customary norms concerning Indigenous Peoples and their pull toward compliance"[4] are a reality in the context of the contemporary international legal order.

The *UN Declaration* includes six provisions that explicitly comprise the normative standards related to free, prior and informed consent.[5] Two of the provisions relate to forcible removal [Article 10] and storage and disposal of hazardous materials [Article 29(2)] without the free, prior and informed consent of Indigenous Peoples'. The other two relate to redress for cultural property [Article 11(2)] and lands, territories and resources [Article 28(1)] taken without the free, prior and informed consent of Indigenous Peoples. Articles 19 and 32 make a clear connection between the duty of states to "*consult and cooperate in good faith* with the Indigenous Peoples…*in order to obtain their free, prior and informed consent*" in legislative and administrative matters [Article 19] and in the approval of projects affecting the lands, territories and resources of Indigenous Peoples [Article 32], respectively. In addition, other *UN Declaration* provisions trigger the need for "consent" of the Indigenous Peoples concerned where "free, prior and informed consent" is not explicitly referenced.[6]

Because of the reality of historical and ongoing contention between states and Indigenous Peoples specifically over lands, territories, and resources and the abuse of Indigenous Peoples rights related to forced development or the exercise of development by others, namely colonial forces and powers, the part of the *UN Declaration* concerning lands, territories, and resources was one of the most difficult to negotiate. At one point, the proposed wording of Article 32 was that States would only have to "seek" Indigenous Peoples' consent, rather than to "obtain" consent.

Fortunately, the matter was resolved in the Working Group on the draft *Declaration* and what emerged is the present wording of Article 32(1) affirming that Indigenous Peoples have the right to determine and develop strategies for the development or use of their lands, territories and other resources. In accordance with Article 32(2), states must consult and cooperate with Indigenous Peoples in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The International Context for Implementing FPIC

As stated above, there is an important linkage between free, prior and informed consent and the duties and obligations of states, especially in the context of the rights affirmed in the *UN Declaration* that are of a customary international law nature. Furthermore, UN member states have legally binding obligations to promote and protect the human rights of Indigenous Peoples as affirmed in the purposes and principles of the UN Charter. However, too often, the right of Indigenous Peoples to be consulted with respect to laws or projects that affect them, — this human right — is grossly violated or fully denied.

For these reasons and many others, the matter of free, prior and informed consent has been and

continues to be the subject of growing concern for the supervisory bodies of a number of legally binding UN human rights treaties. In fact, some of these important jurisprudential decisions by treaty bodies were being made well before the adoption of the *UN Declaration* in 2007, demonstrating that the *UN Declaration*, in its draft form, held the force of legal and moral imperatives in regard to the conditions Indigenous Peoples were facing and their distinct status and human rights.

Specifically, the Human Rights Committee has made the link between Article 27[7] and the protection of Indigenous life ways (as a matter of culture) and "control" over their lands and resources, to a state duty to consult with Indigenous Peoples prior to any development activities.[8] The Committee on Economic, Social and Cultural Rights, in elaborating upon the rights of Indigenous Peoples to maintain their "cultural life"[9] in both country-specific cases as well as a General Comment have affirmed a link between participation, consultation, and the duty of states to "obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk."

In the context of equality, the Committee on Elimination of Racial Discrimination adopted a General Recommendation[10] outlining the right of Indigenous Peoples to participate in decision making effecting them and that no decisions relating specifically to them should be taken without their free, prior and informed consent. This was further elaborated in various country-specific Concluding Observations.[11] Finally, within the UN system, a range of special procedures, including the Permanent Forum on Indigenous Issues, the Special Rapporteur on the rights of Indigenous Peoples, UN agencies and specialized agencies[12] as well as the General Assembly have all embraced and affirmed the right of Indigenous Peoples to free, prior and informed consent.

In addition to the United Nations' human rights regime, the International Labor Organization,[13] the Inter-American Human Rights system, and the African Commission on Human and Peoples' Rights have also pronounced important interpretive jurisprudence on the matter of the right of Indigenous Peoples to free, prior and informed consent.

In my view, it has become clear that all consultation should be undertaken with the objective of obtaining Indigenous Peoples' free, prior and informed consent and that, especially in cases of large-scale development or investment projects that may have a major, severe or adverse impact on Indigenous Peoples' territories, consent is *necessary*. Moreover, consultation must be undertaken in good faith, with the participation of Indigenous representatives, and the state must provide all relevant information well in advance of the decision making.

In summary, in addition to the explicit reference to the right to free, prior and informed consent in the *UN Declaration*, there is a clear consensus in international human rights law that there is a state duty to consult with the goal of reaching consent. This is especially true in the area of development projects and extractive industry activities in relation to the lands, territories and resources of Indigenous Peoples. More often than not, these circumstances require the consent of the peoples concerned. A critical element of the operationalization of this right is for member states to dialogue and negotiate in good faith in order to achieve consent.

Furthermore, there are numerous other provisions affirmed in the *Declaration* that require states to undertake actions "in conjunction with" Indigenous Peoples and "in consultation and cooperation with" Indigenous Peoples. In addition, the language of Article 26(2), as noted above, affirms:

> Indigenous Peoples have the right *to own, use, develop and control the lands, territories and resources* [emphasis added] that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

Here, the term used is "control," which in its plain meaning suggests: to have power over, to influence, manage, restrain, limit or prevent something from taking place. This term has been wrongfully confused by some states.

Human Rights and the End of Unilateral Action

This in no way translates to a purported right of Indigenous Peoples to a "veto" as some states, including Canada, have suggested. There is a major distinction between the procedural and substantive aspects of free, prior and informed consent and the notion of the power to veto an action. The latter is often outlined and reserved to a legislative or constitutional authority and vested in a political leader such as the president or a governor [of a state]. In contrast, free, prior and informed consent entails dialogue, negotiation between the parties concerned, in good faith, and again, with the objective of achieving consent. Even then, the peoples concerned may choose to assert the right to give or withhold consent in regard to what may or may not take place within their territory.

In this regard, states must recognize that human rights are not absolute and that there is a constant tension between the rights and interests of Indigenous

Peoples and all others. And, in some cases, this constant tension is manifested amongst and between the Indigenous Peoples concerned.

The right of Indigenous Peoples to free, prior and informed consent and its actual practice and implementation is where we must focus our energy to determine its full content. The contours of and procedural operations or implementation of the right to FPIC must be sorted out by those who are the "self" in self-determination and addressed on a case by case basis according to the conditions and "situation" of the Indigenous Peoples concerned.[14] The overarching principles of negotiation, dialogue, partnership, consultation, and cooperation in order to achieve consent is the overall framework that must be recognized and respected. This requires a demonstration of good faith by all parties concerned, the government, industry, and Indigenous Peoples.

The days of unilateral state action are over. We have arrived at a place and time wherein unilateral actions by states are no longer acceptable, where a human rights-based approach provides a positive road map for the resolution of competing rights and interests while at the same time recognizing and respecting the human rights of Indigenous Peoples. This can and should be done on the basis of genuine partnership and mutual respect. When this happens, people like Ambassador Tyge Lehmann, who understood the content of free, prior and informed consent, can freely and openly demonstrate the political will that creates such genuine partnership and mutual respect. ◉

Endnotes

1 Article 26(2) of the *UN Declaration on the Rights of Indigenous Peoples*.

2 See Joffe, Paul. *United Nations Declaration on the Rights of Indigenous Peoples Provisions Relevant to "Consent,"* 14 June 2013 [on file with author] p. 11.

3 Article 38(1)(b), Statute of the International Court of Justice.

4 See, Anaya, S. James. (2004). *Indigenous Peoples in International Law*, 2nd ed., *cit.*, p. 70.

5 Articles 10, 11, 19, 28, 29 and 32 of the *UN Declaration on the Rights of Indigenous Peoples*.

6 See Joffe, supra note 3, p 13: Without specifically referring to FPIC, numerous provisions in the *UN Declaration* contain phrases or words that can entail a need for Indigenous Peoples' "consent." Such terms include: "in conjunction with," "in consultation and cooperation with", "control" and "treaties, agreements and other constructive arrangements."

7 ICCPR, Article 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, *to enjoy their own culture*, to profess and practise their own religion, or to use their own language."

8 Human Rights Committee, General Comment No. 23, 1994.

9 In its General Comment No. 21 [2009], *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, the Committee on Economic, Social and Cultural Rights (CESCR) indicated that the following minimum "core obligation is applicable with immediate effect":
(e) To allow and encourage the participation of ... Indigenous Peoples ... in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk (para. 55(e)).

10 Committee on Elimination of Racial Discrimination, General Recommendation 23, 1997.

11 Committee on Elimination of Racial Discrimination, Concluding Observations, 2008, in relation to Ecuador, Namibia, and USA.

12 For example, International Fund for Agricultural Development Executive Summary on Engagement with Indigenous Peoples Policy: "In its engagement with Indigenous Peoples, IFAD will be guided by nine fundamental principles: (a) cultural heritage and identity as assets; *(b) free, prior and informed consent;* (c) community-driven development; (d) land, territories and resources; (e) Indigenous Peoples' knowledge; (f) environmental issues and climate change; (g) access to markets; (h) empowerment; and (i) gender equality." Food and Agricultural Organization of the United Nations (2014) document entitled "Respecting free, prior *and* informed consent: Practical guidance for governments, companies, NGOs, Indigenous Peoples and local communities in relation to land acquisition" and FAO's Forest Stewardship Council Guidelines for implementation of FPIC;

13 The International Labour Organization did not consider the right to self-determination when it negotiated the Indigenous and Tribal Peoples Convention, 1989 (also known as C169). The ILO felt it did not have the mandate to consider self-determination and left it to the UN. Thus, C169 should now be interpreted together with *UN Declaration on the Rights of Indigenous Peoples*. See for example the UN-Indigenous Peoples' Partnership (UNIPP), "For democratic governance, human rights and equality," *Multi-Donor Trust Fund, Terms of Reference* ILO, OHCHR, UNDP, *Framework Document*, 15 February 2010, at 4: "With the adoption of the *UN Declaration*, the international normative framework regulating the protection of the rights of Indigenous Peoples has been firmly strengthened. The [*Indigenous and Tribal Peoples Convention, 1989*], is fully compatible with the *UN Declaration on the Rights of Indigenous Peoples* and the two instruments are mutually reinforcing."

14 *UN Declaration*, preambular paragraph 24: *Recognizing* that the situation of Indigenous Peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration