International Law and Indigenous People: Self-Determination, Development, Consent and Co-Management

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Abstract
The principle of self-determination in international law can refer to political aspirations as well as territorial aspirations. Regarding the latter, the maturation of the discourse on self-determination has provided indigenous peoples with control over their own destiny. This has come about due to an evolutionary development of the principle of self-determination in international law. Self-determination has provided an efficient platform for indigenous peoples to claim their rights to their territories. The true spirit of self-determination has manifested itself as respect for their land without which indigenous peoples cannot fully enjoy their economic and cultural identity. The adoption of the UN Declaration on the Rights of Indigenous Peoples is a vivid illustration of such an outcome. The article analyses the extent to which self-determination encompasses territorial rights for indigenous peoples. This analysis illustrates to what extent self-determination has served as a positive force in the quest of indigenous peoples to territorial rights and how their territorial claims have altered the modern approach to the right to self-determination. Under recent developments indigenous peoples have gained access to international law as 'actors' gaining greater control over their own future based on the notion of consent between states and indigenous peoples.

INTRODUCTION

In terms of international law when addressing indigenous peoples, the right to self-determination can be seen through the lens of political aspirations or through the lens of *territorial aspirations.* When approached through the latter lens the right to self-determination has proven to be an efficient platform for indigenous peoples to assert their rights to land and territories. This article will attempt to indicate to what extent the right to self-determination has served as a positive force in the quest of indigenous peoples to territorial rights and how the territorial claims of indigenous peoples remain significant in interpreting the right to self-determination.

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Implied in this interpretation of self-determination is that the concept ensures that land rights are guaranteed and protected when exploitation of natural resources takes place on indigenous territories. It implies further that indigenous peoples have a right to participate in decisions that directly affect their territories. It will be seen how indigenous peoples have created a contemporary interpretation of the right to self-determination as encompassing claims to territorial resources as an essential element of the international law concept of self-determination.

The United Nations Declaration on the Rights of Indigenous Peoples

A decade has passed since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[1] on 13 September 2007 by the General Assembly of the United Nations (UN). UNDRIP was supported by 144 states. Four states[2] initially voted against it and eleven states abstained. Adopted sixty years after the Universal Declaration of Human Rights (UDHR)[3], UNDRIP could be seen to be the last significant international human rights document established by the UN and once implemented could conceivably be mentioned in the same breath as the International Covenant on Civil and Political Rights (ICCPR)[4] and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[5]

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1 Annexed to GA Res UNGAOR 61st Sess No 49, vol III, UN Doc A/61/49 (2008) 15. See in general George Barrie, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2013) Tydskrif vir die Suid-Afrikaanse Reg 292; Jackie Hartley, Paul Joffe and Jennifer Preston (eds), *Realising the UN Declaration on the Rights of Indigenous Peoples* (UBC Press 2010).

2 Australia, Canada, New Zealand and the United States. In 2010 Canada declared that it would take steps to endorse UNDRIP in a manner fully consistent with Canada's Constitution and laws (*House of Common Debates* No 074 (8 April 2008) 4656). In 2010, New Zealand announced its support for UNDRIP (Human Rights Council report of the *Working Group on the Universal Periodical Review: New Zealand* UN Doc A/HRC/12/8 (4 June 2009) para 15). Australia reversed its opposition and endorsed UNDRIP in 2009 (Statement on the United Nations Declaration on the Rights of Indigenous Peoples delivered at Parliament House, Canberra 3 April 2009). The United States endorsed UNDRIP in 2010. See Mark Tushnet, Mark Graber and Sanford Levinson (eds), *The Oxford Handbook of the US Constitution* (Oxford University Press 2015) 712.

3 GA Res 217 (AIII) of 10 December 1948. See Hersch Lauterpacht, 'The Universal Declaration of Human Rights' (1948) 25 British YIL 354; Burns Weston and Stephen Marks, *The Future of International Human Rights: Thirty Years After the Universal Declaration* (Ardsley New York 1999).

4 999 UNTS 171; 1967 *ILM* 368. For an incisive commentary on the ICCPR see Manfred Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary* (NP Engel 1993).

5 993 UNTS 3 (1967); 1967 *ILM* 350. For an overview and the texts of the most important international human rights conventions see George Barrie, 'International Human Rights Conventions' in *Bill of Rights Compendium* (LexisNexis 2012) (looseleaf publication) 1B to 1B-90. For the texts of the most important international human rights conventions see Patrick Mzolisi Mtshaulana, John Dugard and Neville Botha, *Documents in International Law* (Juta 1996).

Despite UNDRIP being a Declaration of the UN and *prima facie* a non-binding instrument it is not without any standard-setting significance. At its adoption in the UN, as set out above, UNDRIP received 144 affirmative votes. The four states who voted against all reversed their opposition.[6] Cognisance must be taken of the major influence on the development of international law by UN Declarations such as the UDHR;[7] the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space;[8] and the Declaration on the Granting of Independence to Colonial Countries and Peoples.[9] In *Filartiga v Pena-Irala*[10] the United States Second Circuit Court of Appeals declared that UN Declarations are significant because they specify with great precision the obligations of member states under the UN Charter. UNDRIP is unarguably the primary international instrument which specifically addresses the rights of indigenous peoples.

It is opportune at this juncture to define or describe the term 'indigenous'. There is no generally acceptable legal definition of 'indigenous peoples'. Put in broad terms 'indigenous peoples' refers to living descendants of pre-colonial invasion inhabitants now dominated by others. They are culturally distinctive groups that find themselves engulfed by 'settler societies' born of conquest and imperialism. They are self-defined descendants of the original inhabitants of territories with which they share a strong bond. Indigenous peoples in most instances desire to be socially, culturally and economically distinct from the dominant groups in society, at the hands of which they have experienced, in the past or present, a pattern of subjugation, dispossession, exclusion and marginalisation. Of crucial and fundamental importance to indigenous people is their historical connection with their territories.

It can be generally accepted that the decolonisation process worldwide saw the territories of the subjugated indigenous peoples subsumed within the borders of the newly formed states, and the emergence of the modern legal, social and political category of 'indigenous peoples' to describe those culturally distinct peoples descended from the original populations of post-colonial states. In general, the colonisers' interpretations of the indigenous peoples' customs and conceptions of ownership was that they allowed common access to their lands and lacked the will to exploit such lands. This led to the widespread exploitation of such territories by the colonisers with disastrous consequences for the indigenous peoples. This exploitation, according to indigenous peoples, remains in operation today and is seen to be the clearest remaining vestige of the colonial past leading to escalating

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6 See (n 2).

7 See (n 3).

8 GA Resolution 1962 (XVIII) 1963.

9 GA Resolution 1514 (XIV) 1960.

10 630 F 2d (876) 1980 882. *Filartiga* is comprehensively discussed in Jeffrey Davis, *Justice Across Borders: The Struggle for Human Rights in US Courts* (Cambridge University Press 2008) 17–22.

tensions and conflicts between indigenous peoples and governments. Indigenous peoples for purposes of this article can be defined as:

> communities, peoples and nations … which, having a historical continuity with pre-invasion and pre-colonial societies that *developed on their territories,* consider themselves distinct from other sectors of the societies now prevailing in those *territories or parts of them.* They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations *their ancestral territories,* and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[11]

A central feature of this definition is the connection of indigenous peoples to their territories. The definition emphasises three levels of the territorial attachment. First, indigenous societies have an historical continuity with pre-invasion and pre-colonial societies that subsequently developed on their territories. Second, indigenous peoples live on these territories. Third, indigenous peoples are determined to transmit to future generations their ancestral territories.

Article 1 of UNDRIP affirms that indigenous people are 'peoples' with the right to self-determination and the right to full enjoyment, as a collective or as individuals, of all the human rights and fundamental freedoms recognised by the Charter of the UN, the UDHR and international human rights law. Articles 10, 11, 18 and 32 of UNDRIP makes it clear that indigenous peoples should consent to decisions affecting their lands and resources. Article 32 of UNDRIP states:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions 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 their mineral, water or other resources.

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[11] [Emphasis added]. This definition was proposed by Cobo in his Study of the Discrimination against Indigenous Populations (UN Doc E/CN.4/Sub 2/1983/21/Add 8) and can be accepted as being authoritative. See Jérémie Gilbert, *Indigenous Peoples' Land Rights Under International Law* (Transnational Publishers 2016) 3; Benedict Kingsbury, 'Indigenous Peoples in International Law' (1998) 92 American J of Intl L 414*;* Article 1.1(b) of ILO Convention 169: Convention Concerning Indigenous and Tribal Peoples in Independent Countries Official Bull 59 (1989), reprinted in (1989) 28 *ILM* 1382; James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 1996); Jock Brookfield, *Waitangi and Indigenous Rights* (Auckland University Press 2006) 77.

Self-determination has been an evolving right and has manifested itself in different ways.[12] It has played a major role in the decolonisation process. It is interpreted by some as the right to break away from colonial states and establish an own entity. It is also interpreted as a right to effective political participation within states' borders and the right to participate in decisions affecting indigenous people's territories. It is also integral to indigenous peoples' control over their lands and territories, to enjoy and practice their cultures and to make choices over their own economic, cultural and social development.

Article 32 of UNDRIP emphasises the right of indigenous peoples to freely determine the way the natural resources located on their lands are used. Article 32 of UNDRIP is but a more recent exposition of what is stated in common Articles 1 of the ICCPR and the ICESCR that 'all peoples have the right to self-determination' and 'may, for their own ends, freely dispose of their natural wealth and resources.' This interpretation of self-determination is reiterated by the Inter-American Court of Human Rights in *Case of the Samaraka People v Suriname*[13] where it was held that indigenous peoples property rights must be interpreted so as not to restrict their right to self-determination by virtue of which indigenous peoples may 'freely dispose of their natural wealth and resources'. The 'right to freely dispose of their natural wealth and resources' implies *consent* to decisions affecting the territories of indigenous peoples and is pivotal to the idea of a right of indigenous peoples to freely dispose of their natural resources. Seen from this perspective, the affirmation of the right to *free, prior* and *informed consent* before the exploitation of any natural resources contained on indigenous territory constitutes a concrete application of the right to self-determination.[14]

DEVELOPMENT

Currently on a worldwide scale, there is great pressure to extract and exploit primary natural resources. Investors, global private actors and transnational corporations are for this purpose increasingly encroaching on indigenous

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[12] Rigo Sureda, *The Evolution of the Right to Self-Determination: A Study of the United Nations Practice* (Sijthoff 1973); Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47 Intl Comp L Quarterly 537; Gerry Simpson, 'The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age' (1996) 32 Stanford J of Intl L 255; George Barrie, *Self-Determination in Modern International Law* (Konrad Adenauer Stiftung 1995).

[13] IACrtHR Judgement of 28 November 2007. Series C No 172, para 93. For a compilation of indigenous peoples' views on land and its resources see TC McLuhan (ed) *Touch the Earth: A Self-Portrait of Indians Existence* (Outerbridge & Dienstfrey 1971).

[14] Gilbert (n 11) 242. The UN Human Rights Committee in *General Comment 23(50) to Article 27 Paragraph 4 of the ICCPR* UN Doc CCPR/C/21/Rev1/Add 5 (1994) para 7 understands that Article 27 of the ICCPR requires the effective participation of indigenous peoples in any decision that affects their ties to their lands and natural resources.

territories. This is putting greater pressure on indigenous peoples' rights to lands. In this way, the global economy is having a negative impact on indigenous peoples living in areas rich in natural wealth. Large-scale exploitation of natural resources and development projects entails the development of transportation infrastructures that degrade the lands. Economic globalisation is pushing the quest for natural resources to new levels and few indigenous communities remain immune. This so-called global land grab is decidedly having a negative impact on indigenous peoples who due to discrimination, lack of recognition of land tenure and marginalisation are experiencing a loss of access to their own lands and territories.

Article 32 of UNDRIP, as seen above, has three references to development. Two years before the adoption of UNDRIP in 2007, the UN General Assembly in 2005[15] affirmed that development and human rights are interlinked and mutually reinforcing. This was articulated by the UN Secretary-General as follows: 'we will not enjoy development without security … we will not enjoy either without respect for human rights.'[16] Hereby the relevance of the human rights approach to the right to development and security of land tenure and access and management of natural resources for indigenous peoples was forcefully made.

In practice, how is the right to development, security of land tenure, and access and management of natural resources for indigenous peoples manifested? States often argue that they have a duty to support the development and modernisation of indigenous peoples. This is an excuse to justify their encroachment on the territories of indigenous peoples. This excuse is used to justify the removal of indigenous peoples from their lands on the precept that development could be undermined by allowing indigenous peoples a right to control the use of natural resources contained on those lands. This rhetorical argument is clearly very state-centric and is a reminder of the previous waves of colonialism.[17] States seldom consulted the indigenous peoples who had to take a back seat to a so-called overriding national interest. The latter's objective being new economic activities and the maximising of profits and productivity. Saugestad aptly describes this in the case of Botswana where such national policies were based on

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15 2005 World Summit Outcome GA Res 60/1, UN GAOR, 60th Sess; Supp No 49, Vol I, UN Doc A/60/49 (2006).

16 General Assembly in Larger Freedom: Towards Development and Human Rights for All (Report of the Secretary-General) UN Doc A/59/2005 (21 March 2005) para 17.

17 Cartha Doyle and Jérémie Gilbert, 'Indigenous Peoples and Globalization: From Development Aggression to Self-Determined Development' (2011) 8 European Yearbook on Minority Issues 219. Phillip Curtin (ed), *Imperialism* (Palgrave McMillan 1971) 1–40 refers to original nineteenth-century texts explaining the inherent inferiority of backward cultures and the need for trusteeship which will follow as a result of colonialism. The objective of this trusteeship, he states, was to wean indigenous peoples from their backward ways and to civilise them.

an 'authoritarian and patronizing model for development, elevating the preferred lifestyle of the majority to the national norm.'[18]

Despite this attitude adopted by states the right to self-determination and the concomitant right to development is rooted in Articles 1 and 57 of the UN Charter,[19] Common Article 1 of the ICCPR and the ICESCR and in the elaboration thereof by the UN Independent Expert on the Right to Development.[20] To this can be added Articles 3, 5, 18, 20, 23, 32 and 34 of UNDRIP, ILO Convention 169[21] which in several provisions relates to indigenous peoples' right to development and their connection to land rights and Article 22 of the African Charter on Human and Peoples' Rights (African Charter)[22] which refers to the right to development. In this regard the 2010 decision of the African Commission on Human Rights in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*[23] is a milestone, where it focused on the practical implementation of the right to development. This case was concerned with indigenous peoples' property rights as espoused by Article 14[24] of the African Charter and also on the meaning of the scope of the right to development of indigenous peoples.

The Endorois were a community of approximately 60 000 people who had lived in the Lake Bogoria area for centuries. Following Kenyan independence in 1963, the British Crown's claim to the Endorois' land

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18 Sidsel Saugestad, 'Impact of International Mechanisms on Indigenous Rights in Botswana' (2011) 15 The Intl J of Human Rights 54. See the comments of Phumaphi J in *Sesana v Attorney-General Botswana* [2006] BWHC I para 79.

19 Mtshaulana and others (n 5) 16.

20 The Right to Development Report of the Independent Expert on the Right to Development, Dr Arjun Sengupta pursuant to GA Resolution 54/175 and Commission on Human Rights Resolution E/CN4/RES/2000/5, 11 September 2008, UN Doc E/CN4/2000/WG18/CRPL para 67.

21 ILO Convention 169 (n 11) Articles 6, 7.1.

22 (1982) 21 *ILM* 58. See Thomas Kwasi Tieku, 'African Union Promotion of Human Security in Africa' (2007) 16 African Security Review 28.

23 (2010) 49 *ILM* 858; IHRR Vol 18 No 1 (2011). This decision is discussed in detail by Margaret Beukes, 'The Recognition of 'Indigenous Peoples' and their Rights as "A People": An African First' (2010) 35 SA Yearbook Intl L 217; and George Barrie, 'The Quest for Indigenous Land Rights Intensifies: *Mabo (No2), Delgamuukw, Richtersveld* and Now the Endorois of Kenya' (2011) 26 SA Public L 497.

24 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance, with the provisions of appropriate laws.' Regarding this Article the African Commission concluded (para 208) that traditional possession of land by indigenous people has the equivalent effect as that of state-granted full property title. This conclusion resonates strongly with the South African decision of the Constitutional Court in *Alexkor Limited v Richtersveld Community* 2003 (12) BCLR 1301 (CC) para 29 (also reported as 2004 (5) SA 460 (CC)) where it was held that the substantive content of the interest in land of the Richtersveld community was a right to exclusive occupation and use, akin to that held under common law ownership. See Stephanie Patterson, 'The Foundations of Aboriginal Title in South Africa? *The Richtersveld Community v Alexkor Ltd* Decisions' (2004) 30 Indigenous Law Bulletin 18.

was passed on to county councils, which, under Article 115 of the Kenyan Constitution, held the land in trust for the Endorois community. In 1973, the land was re-gazetted and in 1978 a game reserve was created around Lake Bogoria. The Endorois' elders were told that the families would be compensated with plots of fertile land; twenty-five per cent of the tourist revenue from the game reserve and eighty-five per cent of the employment generated. They were also promised cattle dips and fresh water dams to be provided by the state. The complainants claimed that none of these promises were implemented and that the community was forced to live around the periphery of the game reserve. They claimed further that parts of their ancestral land were sold to third parties and mining concessions were granted which threatened to cause pollution to the waterways they used.

The respondent (government of Kenya) justified the removal of the Endorois (indigenous community) from their ancestral territory on the grounds that the territory was needed to support national development as the land was to be used to support tourism and mining. The government submitted that tourism and exploitation of the natural resources (mainly the mining of ruby) was important for the region itself and the country. The government intended to promote tourism in the Lake Bogoria area and develop a game reserve that would support development projects to be carried out by the local county council. The government emphasised the value of proper wildlife management and the benefits of mining to the community. The government was of the view that in a participatory democracy the well-being of society at large was more important than to selfishly care for a single community. The Endorois in contrast argued that such developmental projects violated Article 22 of the African Charter because they were not involved in the developmental projects and were not benefiting from it. Article 22 states that 'all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.' The Endorois put forward that due to the development on their lands they were forced to leave Lake Bogoria and had no choice in the matter. This, they submitted, violated *their right to development* which should be equitable, non-discriminatory, participatory and transparent. The Endorois emphasised that the government did not embrace a rights-based approach to economic growth, which insists on development in a manner consistent with, and instrumental to, the realisation of human rights and the *right to development* through adequate and prior consultation. Importantly, the Endorois submitted that 'self-determination includes the ability to dispose the natural resources as a community wishes, thereby requiring a measure of control over the land.'[25] Further that they had suffered a loss of

[25] *Endorois* (n 23) para 129.

well-being through the limitations on their choice and capacities, including effective and meaningful participation in projects that will affect them.

The African Commission, in balancing the two competing claims, adopted a procedural test and a substantive test. Procedurally, it had to be determined whether the community was consulted prior to the developmental plans (tourism and wildlife reserve). Substantively, it had to be determined whether the development provided benefits to the community. The African Commission concluded[26] that the consultations undertaken with the community were inadequate and did *not* constitute effective consultation; there was *no prior and informed consent* with the Endorois. Also that the Endorois community was not empowered by any benefits and were left out of the development process. The *Endorois* decision can be summarised as emphasising an effective right of participation which includes free, prior and informed consent. Additionally, the decision emphasised that indigenous peoples should benefit from *developmental* projects taking place on their territories. The decision is also important in that it looked at the evolution of the right to development in international law. Here the African Commission cast its net wide analysing *Case of the Mayagna (Sumo) Awas Tigni Community v Nicaragua*;[27] *Malawi African Association v Mauritania*;[28] *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*[29] (the *Ogoni* case); *Huri-Laws v Nigeria*;[30] *The Samaraka People v Suriname*[31] and *Yakey Axa v Paraguay.*[32] What emerges from the *Endorois* case and the cases referred to above is that the right to development is of fundamental importance in ensuring the right of indigenous people to effectively participate and provide their informed consent to any development on their territories.[33]

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26 Id para 277.

27 IACrtHR Ser C no 79 (31 August 2001). This case is published in an abridged version in (2002) 19 Arizona J Intl and Comp L 395 and discussed in detail in Anaya (n 11) 266–271.

28 8 IHRR 285 (2001).

29 10 IHRR 289 (2003).

30 9 IHRR 240 (2002).

31 16 IHRR 1045 (2009).

32 15 IHRR 926 (2008).

33 James Anaya, 'Indigenous People's Participatory Rights in Relation to Decisions about Natural Resource Extraction' (2005) 28 J Intl and Comp Law 7.

CONSENT

ILO Convention 169[34] puts great emphasis on indigenous peoples' rights to *consultation, participation* and *consent.* Article 6(2) declares that consultations carried out in the application of the Convention shall be undertaken in good faith with the objective of achieving agreement or consent to the proposed developmental measures. The object is to establish a dialogue between the state and the indigenous peoples in finding appropriate solutions in an atmosphere of mutual appreciation and full participation. The duty of states to consult indigenous peoples in decisions that affect them and to ensure their participation is reflected in various provisions of UNDRIP.[35] Article 32, as seen above, affirms free and informed consent of the concerned indigenous peoples prior to the approval of any project affecting their lands or territories and other resources. The Human Rights Committee of the ICCPR in its General Comment 23 pointed out that it is an obligation of a state party under Article 27 of the ICCPR to see to it that indigenous communities have effective participation in decisions that affect the indigenous community.[36] The monitoring body of the ICESCR is also of the view that free, prior and informed consent must be in place when decisions affect the economic, social and cultural rights of indigenous peoples.[37] The monitoring body of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD)[38] in its General Recommendation 23 on indigenous peoples emphasised that states have to ensure that members of indigenous peoples have equal rights and that no decisions are taken directly relating to their rights and interests without their informed consent.[39] Similarly the monitoring body of the ICESCR in its general comments on New Zealand in 2012 was concerned that New Zealand

> [d]oes not give sufficient protection of the inalienable rights of indigenous people to their lands, territories waters and maritime areas and other resources as manifested by the fact that Maori free, prior and informed consent on the use and exploitation of these resources has not always been respected.[40]

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34 See (n 11); Manuela Tomei and Lee Swepston, *Indigenous and Tribal Peoples: A Guide to ILO Convention No 169* (1996) (Geneva International Labour Organisation 1996) 8 emphasise that the ILO has affirmed that consultations with indigenous and tribal peoples are compulsory prior to any exploration or exploitation of mineral and/or other natural resources within their lands. Also when it might be necessary to remove indigenous or tribal communities for resettlement. See Andrea Carmen, 'The Right to Free, Prior and Informed Consent' in Hartley and others (n 1) 120.

35 UNDRIP (n 1) Articles 10, 11, 15, 17, 19, 20, 28, 29, 30, 32, 36, 37 and 38.

36 *Länsman et al v Finland* (Communications No 511/ 1992) UN Doc CCPR/C/52/D/511/1992 at 9.5.

37 General Comment No 21, UN Doc E/C12/GC21 (2009).

38 (1996) 5 *ILM* 352; 660 UNTS 195.

39 CERD General Comment XXIII (51st Sess) para 4(d) (1997).

40 New Zealand UN Doc E/C12/NZL/CO/3, 31 May 2012, para 11.

CO-MANAGEMENT

The establishment of specifically dedicated protected areas for the protection of nature and wildlife has in many instances had negative consequences on the rights of indigenous peoples and clearly affects the principle of free, prior and informed consent. The philosophical rationale and political background has been that conservation areas had to be protected against human involvement in order to ensure their survival. The involvement of indigenous peoples living on such areas has been seen as being a nuisance rather than an asset.[41] This approach has seen the forced displacement of indigenous communities in the majority of instances without any consultation or compensation. Furthermore, this approach has seen the removal of indigenous peoples from their lands ignoring the fact that for many centuries these communities have inhabited these areas in harmony with their natural environment.

This approach of removing indigenous peoples from their lands took an important U-turn with the 1992 Convention on Biological Diversity,[42] which paid attention to the protection of indigenous peoples living within conservation or protection areas. Mention must also be made of the 2003 World Parks Congress organised in Durban, South Africa, by the International Union for Conservation of Nature (IUCN) and the World Commission on Protected Areas which emphasises the position of various stakeholders including indigenous peoples.[43] The World Wildlife Fund (WWF) has acknowledged that without recognition of the rights of indigenous peoples, no constructive agreements can be drawn up between conservation organisations and indigenous groups.[44] Article 8(j) of the Convention on Biological Diversity states that each state shall 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.' Article 10(c) indicates that states shall 'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.' The

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41 Bertus de Villiers, 'Democratisation of Conservation: Involvement in the Management of National Parks' (2000) 15 SA Public L 176. See Dermot Smythe and Johanna Sutherland, *Indigenous Protected Areas: Conservation Partnership With Indigenous Landholders* (Canberra, Environment Australia 1997) 8.

42 (1992) 31 *ILM* 818. The Convention on Biological Diversity recognises the interrelationship between the natural environment, sustainable development and the well-being of indigenous peoples; their right to be consulted; their right to have their natural resources safeguarded and their right to participate in the conservation of these resources. These aspects are discussed in Patricia Birne and Alan Boyle, *International Law and the Environment* (Oxford University Press 2002) 579. South Africa ratified the Convention on Biological Diversity on 2 November 1995.

43 Gilbert (n 11) 284.

44 WWF International, *Indigenous Peoples and Conservation: WWF Statement of Principles* (WWF International 2008).

relationship between nature conservation and the rights of indigenous peoples was also affirmed in the 1992 Rio Declaration on Environment and Development,[45] which in Principle 22 declared that 'indigenous peoples and their communities … have a vital role in environmental management and development because of their knowledge and traditional practices.' Section 29 of UNDRIP affirms that indigenous peoples have the right to the protection of the environment and the productive capacity of their lands or territories and resources. ILO Convention 169 declares that governments shall take measures in cooperation with the peoples concerned to protect and preserve the environment of the territories they inhabit.

In the *Case of the Kalina and Lokono People v Suriname*[46] the issue of conservation of nature and indigenous peoples' land rights was at the heart of the litigation. Following the establishment of the different nature reserves on parts of ancestral territories the indigenous communities lost access to their lands and essential natural resources. The Inter-American Court of Human Rights emphasised that the protection of nature and establishment of the nature reserves should be compatible with the rights of indigenous peoples. To ensure this, the court held, there had to be effective participation, the right to access and use of traditional territories and the possibility of receiving benefits from conservation. The court also emphasises the need to ensure *co-management* between public authorities and indigenous peoples in their management of nature reserves. This would enable the state to maintain its sovereignty, protect its borders where necessary and allow the participation of the indigenous communities in the conservation of the environment as part of the exercise of their rights as indigenous communities.

How have these latter views of the Inter-American Court of Human Rights been manifested in practice? South Africa and Australia are good examples of such joint-management, co-management or participatory management agreements. On 30 May 1998 an historic agreement known as the Makuleke Agreement[47] was signed between the South African National Parks (SANP) and the Makuleke community. The key elements of the agreement were the following: (i) ownership of the land is returned to the Makuleke people with a community property association holding it on behalf of the community; (ii) the land remains part of the Kruger National Park on a contractual basis for at least twenty-five years; (iii) a joint management board is established to manage and control the area; (iv) all commercial activities within the area will accrue to the community while the SANP will be responsible for conservation matters; (v) the community may dispose of the land provided

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45 (1992) 31 *ILM* 874.

46 IACrtHR Judgement of 25 November 2015 (Merits, Reparations and Costs).

47 Bertus de Villiers, *Land Claims and the National Parks: The Makuleke Experience* (HSRC Press 1999); De Villiers (n 41) 188. *See Makuleke Community v Pafuri Area of the Kruger National Park and Environs, Soutpansberg District Northern Province* 1998 JOL 4264 (LCC).

the SANP is afforded the right of first refusal. In 2001 the South African government concluded a settlement with the Khomani San people providing for the recognition of their land rights over a large area of the Kalahari Transfrontier Park.[48] In January 2014 a settlement between the South African government and the N'wandhamhlarhi indigenous community[49] regarding the Malamala game reserve bordering on the Kruger National Park was finalised. The essence of the agreement (Londolozi Co-operation Agreement) was to entrench ownership for the indigenous community with a lease provision that would run for twenty-five years with the option to renew it for a further twenty-five years.

Australia can be seen to be a world leader in joint management arrangements with the Aborigines. The Kakadu and Uluru National Parks are two primary examples where a joint management agreement has been concluded with the Aboriginal owners of the land.[50] Ownership in the land in Kakadu and Uluru was restored to the Aboriginal owners on condition that the land is leased back to the conservation authorities to ensure its continued protection. The respective communities receive an annual rent, some of their members are employed within the park as rangers and guides and they undertake certain tourism activities for their own account. In Uluru the community receive a fixed percentage of entrance fees but no other income. Various daily management activities such as fee collection, camping area management, garbage collection and other maintenance work are contracted to private businesses. The management of both national parks is the responsibility of a joint Board of Management that is comprised as follows: representatives selected by Aboriginal owners to serve on joint management structures; the Director of the Australian Nature Conservation Agency or his or her representative; an employee of the state government's tourism commission; and a person prominent in nature conservation. At the centre of a particular joint management structure is the Plan of Management that is drafted by the Board of Management. The Plan of Management involves extensive consultation with members of the respective Aboriginal communities as well as other interested parties. It is reviewed every five years to ensure that it remains current. The Plan of Management serves as the basis upon which the authorities manage the park.

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48 Roger Channells, 'The Khomani San Land Claim' (2002) 26 Cultural Survival Quarterly 51; Steven Robins, 'Whose Culture, Whose Survival? The Khomani San Land Claims and the Cultural Politics of Community in the Kalahari' in Allan Barnard and Justin Kenrich (eds), *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalised Minorities'?* (Steven Robins Centre of African Studies, University of Edinburgh 2001) 229.

49 For litigation prior to the settlement, see *Mhlanganisweni Community v Minister Rural Development and Land Reform* (2012) ZALCC 7.

50 De Villiers (n 41) 184; Terry de Lacy and Bruce Lawson, 'The Uluru-Kakadu Model: Joint Management of Aboriginal Owned Parks in Australia' in Stanley Stevens (ed), *Conservation Through Cultural Survival: Indigenous Peoples and Protected Areas* (Island Press 1997) 27.

Although Zimbabwe, unlike Australia and South Africa, does not have formal joint management arrangements for national parks there is close interaction between indigenous communities, the Campfire programme (Communal Area Management Programme for Indigenous Resources) and conservation authorities. This has increased the voice of the indigenous peoples in the management affairs of game parks. Conservation authorities have also come to realise the importance of a coordinated approach to land management within and outside national parks. Areas known as 'buffer zones' have been created round national parks where the emphasis is on land-use schemes that are compatible with conservation management. It should also be kept in mind that in parts of Africa there is a greater percentage of game outside national parks than within national parks. Campfire is therefore not limited to communities adjacent to national parks but includes all rural communities where natural resources can be utilised. The success of Campfire is based on the partnerships that have been forged between government, non-governmental organisations, donor organisations and organised Campfire associations. Indigenous communities have become involved in conservation management, research, game census, and anti-poaching activities in a way that could not have been imagined before.

CONCLUSION

The efforts of indigenous peoples, together with the above evolutionary developments in international law, have created a new and more comprehensive understanding of self-determination. This new understanding of self-determination declares that states are no more the only actors in deciding how indigenous peoples' lands and their natural resources should be used. This new understanding of self-determination puts indigenous peoples in the forefront in that they have the right to freely determine the way their lands and its natural resources should be used, protected and respected on their own terms. In times of scarcity of essential commodities and increased marketisation and exploitation of natural resources this is an important development regarding indigenous peoples.

The right to self-determination has matured towards a right for indigenous peoples to control their lands and territories, and supports indigenous peoples to be direct actors in their future.