insights

American Society of International Law

November 28, 2012 Volume 16, Issue 35

The Duty to Consult in the Inter-American System: Legal Standards after *Sarayaku*

By Lisl Brunner and Karla Quintana

Introduction

Throughout the Americas, large-scale development projects are underway that affect the lands of indigenous peoples who may have played no role in the decision-making process that led to their approval. In a decision issued on June 27, 2012, the Inter-American Court of Human Rights declared the international responsibility of the State of Ecuador for failing to consult the Sarayaku indigenous community when it granted oil concessions in the community's ancestral lands. Several elements of the decision are noteworthy: for the first time, the Court acknowledges the violation of the collective rights of the Sarayaku rather than the individual rights of the community's members. The Court held that the duty to consult with indigenous communities about legal or administrative measures that will affect them directly has become a general principle of international law. The decision also further elucidates the source of the duty to consult in the Inter-American system, a point that this *Insight* will explore.

The Facts and Issue Presented in *Sarayaku*

In 1992, Ecuador confirmed the Sarayaku's ancestral title by awarding an undivided parcel of land in the Amazonian region to twenty-eight communities along the Bobonaza River, among them the Sarayaku Kichwa indigenous people. Three years later, the state convened the eighth international call for proposals for exploration and exploitation of hydrocarbons on lands that included this parcel. On July 26, 1996, Ecuador and an Argentinean oil company (Compañía General de Combustibles ("CGC")) signed the contract for exploration of oil for that block, 65% of which was within the ancestral territory of the Sarayaku community. The CGC's obligations included, among others, preparation of an Environmental Impact Assessment ("EIA") and obtaining from third parties permits needed. The EIA for the seismic prospecting phase was approved in 1997, but it was never executed. In 2002, an updated EIA plan was approved, and the project started.

Between 2002 and 2003, the CGC's activity within the block advanced 29% into the Sarayaku territory, destroying part of their *Kausa Sawach* (living rainforest). In that period, the CGC placed approximately 1433 kg of explosives in wells, where they remain buried. In February 2003, the CGC suspended the seismic prospecting work for *force majeure*.

As a result of the oil exploration, the Kichwa People were unable to practice their traditional

RELATED ASIL INSIGHTS

The UN General Assembly adopts the Declaration on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples

A New United Nations Subsidiary Organ: The Permanent Forum on Indigenous Issues

The UN Rio+20 Conference on Sustainable Development—What Happened?

The New United Nations Human Rights Council

Insights Archive>>

DOCUMENTS OF NOTE

Kichwa Indigenous Community of Sarayaku v. Ecuador

American Convention on Human Rights

American Declaration of the Rights and Duties of Man

Convention Concerning Indigenous and Tribal Peoples in Independent Countries

UN Declaration on the Rights of Indigenous Peoples

International Covenant on Economic, Social and Cultural Rights

International Covenant on Civil and Political Rights

Human Rights Committee, General Comment No. 23: The Rights of Minorities

ASIL EISIL>>

ORGANIZATIONS OF NOTE

Organization of American States

Inter-American Court of Human Rights

Inter-American Commission on Human Rights

United Nations

Copyright 2012 by The American Society of International Law ASIL

means of subsistence within their territory, and their freedom of movement within their land and outside of it was limited. The Sarayaku also had to defend their territory from the military, which had signed an agreement to protect the oil companies in Amazonia and consequently set up four military bases. Neither the Sarayaku nor the neighboring communities were consulted by Ecuador regarding the oil exploitation project, as the state acknowledged before the Inter-American Court. The Sarayaku's efforts to redress their grievances in the Ecuadorian courts were unsuccessful.

The most contentious issue before the Inter-American Court was the date on which the state's obligation to consult with the indigenous community attached. The petitioners and the Inter-American Commission on Human Rights argued that consultations should have taken place from the moment that the contract was signed with CGC in 1996. According to the Ecuador, the duty did not exist until 1998 or 1999, when it ratified the International Labor Organization ("ILO") Convention No. 169 and reformed its constitution to recognize the right of indigenous peoples to consult prior to the exploitation of natural resources in their lands. While the petitioners cited the American Convention on Human Rights and evolving international legal norms, Ecuador based its argument on the Vienna Convention on the Law of Treaties and the specific enunciation of the obligation to consult provided in ILO Convention No. 169.

Origins of the Duty to Consult in International Law

In the Inter-American system of human rights, the state's duty to consult with indigenous and tribal communities prior to taking action likely to affect their traditional lands, and to obtain their prior consent in certain cases, has been expressed as the right to effective participation in decision-making that has an impact on these communities' lifestyles. The Inter-American Commission and Court have defined the contours of this right in harmony with principles of international law that have evolved since the 1960s and 1970s. The right has its origins in the right to self-determination contained in Common Article 1 of the Human Rights Covenants, which came into effect in 1976.[1] It has also been interpreted as an aspect of the right of minorities to practice their culture and to be free from discrimination, as expressed in Article 27 of the International Covenant on Civil and Political Rights ("ICCPR") and in the International Convention on the Elimination of All Forms of Racial Discrimination.

In 1989, ILO Convention No. 169 enshrined the rights of indigenous peoples to enjoy the full measure of human rights, including economic, social, and cultural rights, without discrimination, and to participate in decision-making when state actions may directly affect them.[2] It also recognized indigenous and tribal peoples' rights of ownership to the lands that they traditionally occupy and established the state's duty to consult them "in good faith and . . . with the objective of achieving consent" when decisions affecting their lands or the resources contained therein are being made. The Convention clearly requires that indigenous peoples give "free and informed consent" if it is necessary to relocate them from their traditional lands.[3] In a General Comment issued in 1994, the UN Human Rights Committee also recognized the right of indigenous peoples and other minorities to effective participation in decisions that could have an impact on their lands and resources,[4] and three years later, the Committee on the Elimination of Racial Discrimination ("CERD") also indicated that development and use of indigenous lands and resources should only take place with their "free and informed consent."[5] These principles have been enunciated with increasing frequency in UN reports since 2001.[6]

The Inter-American Commission on Human Rights has consistently looked to ILO Convention No. 169 and UN doctrine in interpreting the scope of indigenous and tribal peoples' rights to effective participation in decision-making that concerns their lands and

The purpose of ASIL Insights is to provide concise and informed background for developments of interest to the international community. The American Society of International Law does not take positions on substantive issues, including the ones discussed in this Insight. Educational and news media copying is permitted with due acknowledgement.

The Insights Editorial Board includes: Cymie Payne; Tania Voon; and David Kaye. Djurdja Lazic serves as the managing editor.

lifestyles since the 1990s.[7] Because it has been seen as deriving from the right to property (enshrined in Article 21 of the American Convention and Article XXIII of the American Declaration of the Rights and Duties of Man), the right to be free from discrimination, and the right to participate in government (Article 23 of the American Convention), a state's ratification of ILO Convention No. 169 has not been determinative in fixing the scope of its obligations. In its 1998 report, the Commission found that Nicaragua had violated Article 21 of the American Convention by granting a concession in the indigenous Awas Tingni community's lands without its consent.[8] In the *Dann* case— involving the encroachment of the U.S. government on Western Shoshone lands beginning in the 1970s—the Commission found that the American Declaration on the Rights and Duties of Man required the state to take "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation."[9] Neither state had ratified ILO Convention No. 169 at the time of the Commission's report.

The Inter-American Court has also used the interpretive guidelines contained in Article 29(b) of the American Convention and "an evolutionary interpretation of international instruments for the protection of human rights" in its decisions on indigenous communities' rights to land and to effective participation in decision-making.[10] Taking a similar approach to that of the Commission, it has paid little heed to whether or when a state has ratified ILO Convention No. 169. In 2005, the Court looked to ILO Convention No. 169 to determine that Paraguay had violated the Yakye Axa community's right to property with regard to events that occurred almost a year before that convention took effect in Paraguay.[11] In the *Saramaka People* decision of 2007, the Court elucidated the scope of the right to effective participation, holding that Suriname should have consulted the Saramaka, a tribal community, "at the early stages of a development or investment plan" that would have a major impact on its territory. Suriname had granted third parties forestry and mining concessions within the traditional lands of the Saramaka between 1997 and 2004. Suriname was not a party to ILO Convention No. 169, but the Court looked to this instrument in conjunction with the recently adopted UN Declaration on the Rights of Indigenous Peoples[12] (which Suriname had voted to adopt), the right to self-determination, and UN reports in interpreting its obligations under the American Convention. Because the Court found that no consultations with the Saramaka had taken place, it did not comprehensively examine the issue of consent or the consequences of the failure to obtain it.[13]

The Inter-American Court's Decision in *Sarayaku*

Ecuador ratified ILO Convention No. 169 after granting the concession in Sarayaku territory and after the completion of the EIA, but before updating the assessment and before the entry into the Sarayaku territory and the placing of explosives.[14] Retreating from its approach in the *Saramaka* case, the Court took an intermediate position in the *Sarayaku* case by stating that while Ecuador had the "duty [before the ratification of the ILO Convention 169] to ensure the Sarayaku people the right to enjoyment of their property as their communal tradition, taking into account the particularities of their indigenous identity in relation to their territory," it had international obligations regarding the right to consultation "at least" since it ratified that convention and enacted the constitutional reforms of 1998.[15] Finally, the Court added, basing its reasoning on a Committee of Experts of the ILO,[16] "at least" from the date of ratification of the Convention No. 169, Ecuador should have applied the provisions of the Convention when implementing the project, even if the project started before ratification.[17]

According to the Court, the obligation to consult is "a general principle of international

law."[18] The Court suggested that, regardless of whether states have ratified specific international conventions, "there is currently a clearly recognized right to consultation"[19] based on developments within the Inter-American system on the property rights of indigenous peoples, other international instruments, and case-law of the highest domestic courts in the Americas.

The Court was explicit in explaining what is required to ensure indigenous and tribal peoples' right to consultation.[20] The Court stated that the obligation to consult is the responsibility of the state; therefore, planning and conducting the consultation process cannot be delegated to a private company or a third party.[21] The Court also considered that the consultation process should entail a "genuine dialogue as part of a participatory process in order to reach an agreement,"[22] and it should be conceived as "a true instrument of participation," done in "good faith," with "mutual trust" and with the goal of reaching a consensus.[23]

While in the *Saramaka* case the Court had already referred to the need for indigenous and tribal peoples to give their consent to large-scale projects affecting their territories, in the *Sarayaku* case the Court took a different approach. The Court recalled that "consultation must take into account the traditional practices in decision making of the indigenous people or community,"[24] and it cited a paragraph in the *Saramaka* judgment that stated that "when it comes to development plans or large-scale investment that would have a major impact within [the indigenous community's] territory, the state has an obligation not only to consult [the indigenous group], but also to obtain the free, prior and informed consent according to their customs and traditions." Moreover, in the *Sarayaku* judgment, the Court also noted that the purpose of the EIA is not only to have an objective measure of the impact on the land and people but also to ensure that the members of the community can decide "whether to accept the proposed development or investment plan "knowingly and voluntarily."[25] The Court also consistently referred to the need to seek and reach agreements, to maintain dialogue, and to reach consensus.[26]

The Court appeared to find it unnecessary to make specific reference to the requirement of consent in *Sarayaku* because Ecuador did not satisfy the preliminary obligation to consult; thus, it was unnecessary to reach the issue of consent. The Court may have considered that where there is no prior and informed consultation with all the requirements established under international law, it is unnecessary to delve into the concept and application of consent.[27]

Implications for Future Cases Involving Prior Consultation With Indigenous Communities in the Americas

The *Sarayaku* decision has implications for state and non-state actors in the Americas and beyond. Where large-scale development projects affecting indigenous communities are already underway in the Americas, *Sarayaku* indicates that a state's ratification of the American Convention will be the most significant factor in defining its obligations and the legal consequences that flow from the failure to adhere to these. The Court and the Commission will also consider whether and when a state has ratified ILO Convention No. 169, giving some deference to findings made by the ILO Committee of Experts about the situation. However, the Court's conclusion that the obligation to consult is a general principle of international law, coupled with the Commission's decision in the *Dann* case, demonstrate that ratification of the two conventions need not be determinative in finding that a state is internationally responsible for violating an indigenous community's right to effective participation.

The *Sarayaku* decision also has implications for non-states parties to the American Convention, as the UN Human Rights Committee, the CERD, and the African Commission

on Human and Peoples Rights all look to the Court's jurisprudence in further developing their interpretations of the rights of indigenous and tribal peoples.[28] The Court's conclusion that the obligation to engage in consultations with indigenous communities has become a general principle of international law is therefore likely to be influential beyond the Court's geographic reach.[29] Finally, the decision has implications for multinational corporations, whose transnational operations are increasingly being held to standards that mirror the duties of states.[30] Because of the far-reaching impact of litigation that may result from cases involving improper consultations, the evolution of international standards on the duty to consult is relevant for a wide range of actors.

About the Authors:

Human Rights Specialists, Inter-American Commission on Human Rights. The opinions expressed in this paper are exclusively those of the authors and do not necessarily represent the view of the OAS General Secretariat or those of the Inter-American Commission on Human Rights. The authors would like to thank Fergus McKay for his comments in this paper.

Endnotes:

[1] G.A. Res. 1803 (XVII), U.N. Doc. A/5217 (Dec. 14, 1962); International Covenant on Civil and Political Rights art. 1, 999 U.N.T.S. 171, 6 I.L.M. 368 (1967); International Covenant on Economic, Social and Cultural Rights art. 1, 993 U.N.T.S. 3, 6 I.L.M. 368 (1967).

[2] Convention Concerning Indigenous and Tribal Peoples in Independent Countries arts. 3, 2(2)(b), 5(a), 6(1)(b), 72 ILO Official Bull. 59, 28 I.L.M. 1382 (1989) [hereinafter ILO Convention No. 169].

[3] *Id*. arts. 14(1), 6(2), 15(2), 16(2).

[4] Human Rights Committee, General Comment No. 23: The Rights of Minorities (Art. 27), CCPR/C/21/Rev.1/Add.5, ¶ 7 (1994).

[5] CERD, General Recommendation No. 23: Indigenous Peoples, Official Records of the General Assembly, 52d Sess., Supp. No. 18 (A/52/18) annex 5, ¶ 5 (1997).

[6] *See*, *e.g*., Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, ¶ 73, E/CN.4/2003/90 (Jan. 21, 2003); Committee on Economic, Social and Cultural Rights, Concluding Observations on Colombia, ¶ 12, E/C.12/1/Add. 74 (Dec. 6, 2001); Concluding Observations on Ecuador, ¶ 16, CERD/C/62/CO/2 (June 2, 2003); Committee on Economic, Social and Cultural Rights, Concluding Observations on Ecuador,¶ 12, E/C.12/1/Add.100 (June 7, 2004); Secretariat of the Convention on Biological Diversity (2004); Expert Mechanism on the Rights of Indigenous Peoples, Human Rights Council**,** Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-making, A/HRC/15/35 (Aug. 23, 2010); Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Extractive Industries Operating Within or Near Indigenous Territories, A/HRC/18/35 (July 11, 2011).

[7] *See*, *e.g*., IACHR, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 Doc. 10 rev. 1 (Apr. 24, 1997), chs. VIII-IX; Mary & Carrie Dann v. United States, Inter-Am. Comm'n H.R., Report No. 75/02 (Dec. 27, 2002) ¶¶ 124-27 [hereinafter *Dann*].

[8] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. Comm'n H.R., Report No. 27/98 (Mar. 3, 1998) (cited in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 25 (Aug. 31, 2001) [hereinafter *Awas Tingni*]).

[9] *Dann*, *supra* note 7, ¶ 131.

[10] *Awas Tingni, supra* note 8, ¶¶ 147–53. Article 29(b) reads: "No provision of this Convention shall be interpreted as: (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party." *See* ILO Convention No. 169, *supra* note 2, art. 29(b).

[11] Yakye Axa Indigenous Community v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 84, 127–37, 141, 156 (June 17, 2005).

[12] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, A/RES/61/295 Annex (Sept. 13, 2007). The Declaration establishes that states should engage in prior consultation in good faith with indigenous peoples to obtain their free and informed consent prior to the approval of development projects that will affect their lands and resources. *Id.* art. 32(2).

[13] Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 93-95, 130-34, 146, 154 (Nov. 28, 2007) [hereinafter *Saramaka People*].

[14] Kichwa Indigenous Community of Sarayaku v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 176 (June 27, 2012).

[15] *Id.* ¶ 172, 176, 183.

[16] The Committee of Experts was set up in 1926 to examine the government reports on ratified conventions. According to the ILO, the Committee's role is "to provide an impartial and technical evaluation of the state of application of international labour standards."

[17] *Sarayaku, supra* note 14, n.234 & 266.

[18] *Id.*¶ 164.

[19] *Id.* ¶ 165.

[20] The Court noted (i) that indigenous peoples must be involved in the projects that may affect the territory where they sit or other rights essential to their survival as a group; (ii) the need for communities to be involved in all the phases of the planning and project development; (iii) the right of indigenous people to be informed of potential benefits and risks of the projects; (iv) the duty of the state to monitor the EIA; (v) the duty to consult according to indigenous customs and traditions; (vi) the prohibition of coercion against the community and its leaders; and (vii) the duty of the state to demonstrate that it had guaranteed the prior consultation. See *Sarayaku, supra* note 14, ¶¶167, 186, 177, 179, 181, 200, 206.

[21] *Id.* ¶ 187.

[22] *Id*. ¶¶ 167, 200.

[23] *Id*. ¶ 186.

[24] *Id.* ¶ 177.

[25] *See Saramaka People*, *supra* note 13, ¶ 134. The Court still has not addressed how exactly it will consider the necessary consent based on the interpretation and application of the terminology used in the *Saramaka* case, incorporated via footnote in the *Sarayaku* judgment.

[26] See *Saramaka People*, *supra* note 1, ¶ 134. A question that remains unanswered by the Court is how exactly will it consider the consent to be obtained based on the interpretation and application of the terminology used in the *Saramaka* case and that was incorporated via footnote in the *Sarayaku* judgment.

[27] Nonetheless, the Court avoids the question of when is consent required. According to international law, a court should consider—after an EIA—whether there are major impacts or the integrity of the territory is affected. The Court again avoided specifying what will happen in both scenarios, that is, in situations that meet the abovementioned criteria and those that do not.

[28] *See*, *e.g*., African Commission on Human and People's Rights, Communication 276/2003, Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v. Kenya (Nov. 25, 2009).

[29] *Sarayaku*, *supra* note 14, ¶ 164.

[30] Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, ¶¶ 70-72, E/CN.4/2003/90 (Jan. 21, 2003); Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, Extractive Industries Operating Within or Near Indigenous Territories, A/HRC/18/35 (July 11, 2011); Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Eterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, A/HRC/17/31 (Mar. 21, 2011); International Finance Corporation, Environmental and Social Performance Standards (Jan. 2012), Performance Standard 7; European Bank for Reconstruction and Development, Environmental and Social Policy (May 2008), Performance Requirement 7; World Bank Operational Manual, Operational Policy 4.10, Indigenous Peoples (July 2005); World Bank Legal Department, Legal Note on Indigenous Peoples (April 2005); Inter-American Development Bank, Operational Policy on Indigenous Peoples and Strategy for Indigenous Development, OP-765

(July 2006).