IN THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Case No. 12.465

Kichwa People of Sarayaku and its members

v.

Ecuador

WRITTEN COMMENTS OF:

THE ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS CLINIC

YALE LAW SCHOOL

21 July 2011

James J. Silk, Esq.
Allyson A. McKinney, Esq.

On the brief:
Sirine Shebaya
Sarah El-Ghazaly
Rebecca Wolitz

Allard K. Lowenstein International Human Rights Clinic
Yale Law School
P.O. Box 208215
New Haven, CT 06520-8215
Phone: 203-432-7480
Fax: 203-432-8260

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Conventions, Treaties, and Statutes

Other Authorities

INTRODUCTION

The Allard K. Lowenstein International Human Rights Clinic at Yale Law School ("the Lowenstein Clinic") respectfully submits for the Court's consideration this *amicus curiae* brief regarding indigenous communities' right of consent to development projects affecting their human rights.

The Lowenstein Clinic is a Yale Law School course through which students gain first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Lowenstein Clinic undertakes a number of litigation, research, and advocacy projects each term on behalf of human rights organizations and individual victims of human rights abuse. Clinic projects are designed to contribute to efforts to protect human rights by providing valuable assistance to organizations and individual clients while giving students practical experience in the range of activities in which lawyers engage to promote respect for human rights. The Lowenstein Clinic has regularly analyzed and addressed issues of human rights and resource exploitation, as well as the protection of the rights of indigenous peoples.

The present case before the Court raises the important issue of when state or third-party developers have a duty to obtain the consent of indigenous peoples in order to proceed with a project that may affect the group. While the Court has held that States have a duty to obtain consent where large-scale development projects will have a major impact within an indigenous or tribal community's territory, it has not yet defined the full scope of this duty's application or of the corresponding right of indigenous peoples to fulfillment of this duty before such projects may proceed (hereinafter "right of consent"). This brief argues, on the basis of the principles enunciated in the Court's decision in *Saramaka v. Suriname*, that the duty to obtain consent is an important procedural safeguard necessary to guarantee indigenous peoples the full enjoyment of their rights within their territories whenever decisions on or affecting such territories entail a threat to the communities' fundamental rights.

DISCUSSION

In *Saramaka People v. Suriname*, this Court held that states must seek and obtain the consent of tribal peoples for development projects that would have a significant impact within their territory.[1] In doing so, the Court recognized the crucial role a legal requirement of consent plays in safeguarding the rights of tribal or indigenous peoples. As the ruling in *Saramaka* reflects, the consultation requirements enshrined in international instruments concerning

[1] Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 172, ¶ 134 (Nov. 28, 2007).

indigenous peoples are intended to be meaningful, effective protections of indigenous rights. It follows that consultation without consent is insufficient in situations where development projects threaten the fundamental rights of indigenous peoples.

International law requires consultation with the goal of achieving consent whenever consideration is given to measures that would affect indigenous peoples.[2] The International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries ("ILO 169") provides in Article 6(2) that consultation with indigenous peoples over measures that affect them shall have "the objective of achieving agreement or consent."[3] Likewise, the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") requires states to consult with indigenous peoples over any decision that affects them, including state decisions to approve development projects affecting their lands or resources.[4] Moreover, both instruments explicitly require consent in circumstances where specified fundamental rights of indigenous peoples are affected. For example, ILO 169 and the UNDRIP both provide that the relocation of indigenous peoples may not occur without their free, prior, and informed consent.[5] The UNDRIP also provides that no storage or disposal of hazardous materials may occur on indigenous lands without the consent of the indigenous peoples occupying those lands.[6] The principle that emerges from these provisions is that states must always consult with indigenous peoples about development projects affecting their lands, with the objective of obtaining free, prior, and informed consent, and that the requirement of *achieving* consent depends on the degree of the proposed project's impact on the rights of indigenous peoples. Where the impact on indigenous peoples' lives or interests is significant, this principle prohibits a measure from going forward without the affected indigenous peoples' consent.[7]

Consistent with this understanding, the Inter-American Commission on Human Rights ("the Commission") has invoked a broad reading of the right to consultation in cases where

---

[2] International Labour Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries Articles 6(2), *adopted* June 27, 1989, ILO C169 [hereinafter ILO 169]. *See also* United Nations Declaration on the Rights of Indigenous Peoples art. 19 and 32(2), *adopted* Sept. 13, 2007, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 [hereinafter UNDRIP].

[3] ILO 169, *supra* note 2.

[4] UNDRIP, *supra* note 2, Arts. 19 & 32(2).

[5] ILO 169, *supra* note 2, Art. 16; UNDRIP, *supra* note *2*, Art. 10.

[6] UNDRIP, *supra* note 2, Art. 29(2).

[7] *See* Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (*prepared by* James Anaya), ¶ 47, U.N. Doc. A/HRC/12/34 (July 15, 2009) [hereinafter 2009 Special Rapporteur Report] ("Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved. A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent; in certain contexts, the presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.").

property rights are threatened, stating that "consultation *and consent* are required before reaching any decision that could modify, reduce, or extinguish indigenous property rights," including resource-exploitation concessions.[8] The Commission has also stated that the right of consent is necessary to protect rights to property and to participation in government and that exploiting natural resources affecting indigenous lands absent the consent of the affected indigenous peoples violates their rights to property and to political participation.[9] Similarly, this Court in *Saramaka People v. Suriname* articulated a consent requirement for "development or investment projects"[10] likely to have a "major impact" within indigenous territories.[11]

This *amicus curiae* argues that the principle underlying a consent requirement, the protection of indigenous peoples' rights, applies not only to decisions that threaten the right to property, but also to situations where other fundamental rights of indigenous peoples are threatened. Development projects that affect the land or rights of indigenous peoples generally undermine the security of indigenous peoples' enjoyment of fundamental rights protected by the American Convention on Human Rights ("the Convention"), including the right to effective participation, the right to property, the right to life, and the right to culture. They also have the potential to threaten other rights that are well established in international law, such as the right to self-determination and the right to a healthy environment. The requirement of consent is thus a necessary procedural safeguard to guarantee indigenous and tribal peoples the full enjoyment of these and other protected rights within their territory. Without this requirement, states cannot fulfill their obligations under Article 1(1) and Article 2 of the Convention "to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms" recognized in the Convention and to "adopt . . . such legislative or other measures as may be necessary to give effect to those rights or freedoms."[12] This Court should, therefore, obligate states to obtain consent in at least the wide range of situations where fundamental rights of indigenous peoples are at risk, most evidently but not exclusively where the threat comes from resource-exploitation projects.

---

[8] Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, Report, Inter-Am. Comm'n H.R., OEA/Ser.L/V.II, doc. 56/09 ¶ 281 (2009) (emphasis added) [hereinafter 2009 Commission Report] (citing Maya Indigenous Communities of the Toledo District (Belize), Case 12.053, Inter-Am. Comm'n H.R., Report No. 40/04, OEA/Ser.L/V.II.122, doc. 5 rev. 1 at 727 ¶ 142 (2004) ("In the Commission's view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.")).

[9] 2009 Commission Report, *supra* note 8, at ¶ 289 (citing Maya Communities of Toledo Commission Report, *supra* note 8, at ¶ 144).

[10] The Court includes exploration and extraction projects in the category of "development or investment" plans. Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶ 129.

[11] *Id.* at ¶ 134.

[12] Organization of American States, American Convention on Human Rights "Pact of San Jose, Costa Rica," *adopted* Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, [hereinafter the Convention], Arts. 1(1), 2.

I. THE RIGHTS TO MEANINGFUL CONSULTATION AND EFFECTIVE PARTICIPATION REQUIRE OBTAINING THE FREE, PRIOR, AND INFORMED CONSENT OF INDIGENOUS PEOPLES FOR DEVELOPMENT PROJECTS THAT AFFECT THEIR PROPERTY RIGHTS OR OTHER FUNDAMENTAL RIGHTS.

The right of indigenous groups to consultation about decisions affecting them is widely recognized in international and inter-American law.[13] Consultation is a procedural right of key importance to indigenous communities. It arises from the recognition of indigenous peoples' historical and continuing exclusion from regular modes of social and political participation in the state.[14] Consultation is well established in international instruments as an independent right and is also reinforced by related provisions in international instruments that impose on the state the duty to provide for the effective participation of indigenous peoples.[15] In light of indigenous peoples' continuing social and political exclusion, consultation is, under international law, the primary means of realizing indigenous peoples' participation. This participation is, furthermore, necessary to adequately enable indigenous peoples to exercise their right to self-determination.[16] To protect against a denial of indigenous communities' right to self-determination, those communities must be able to participate, in a way that is meaningful—that is, a way that assures not just talk, but an effect on the outcome—in decisions about projects having a significant impact on them.[17]

---

[13] *See, e.g.*, the following: ILO 169, *supra* note 2, Art. 6(a); Saramaka, Inter-Am. Ct. H.R., No. 172, at ¶¶ 133-37; UN General Assembly, *Programme of Action for the Second International Decade of the World's Indigenous People*, U.N. Doc. A/60/270 (Aug. 18, 2005); UNDRIP, *supra* note 2, Arts. 19, 32(2), 38; Committee on the Elimination of Racial Discrimination, Gen. Rec. 23, ¶ 4(d) (Aug. 18, 1997), contained in *Report of the Committee on the Elimination of Racial Discrimination*, U.N. Doc. A/52/18 (1997); Human Rights Committee, *Views: Communication No. 1457/2006,* Annex at ¶ 7.6, U.N. Doc. CCPR/C/95/D/1457/2006 (April 24, 2009); and U.N. Development Group, *Guidelines on Indigenous Peoples' Issues*, 11, 13, 21, 25 (Feb. 2008).

[14] *See generally* U.N. Development Group, *Guidelines on Indigenous Peoples' Issues* 12 (Feb. 2008) (discussing the need for "special positive measures" as a result of the unequal treatment and social exclusion indigenous peoples have often suffered). *See also* 2009 Special Rapporteur Report, *supra* note 7, at ¶ 41 ("[T]he duty of states to consult with indigenous peoples in decisions affecting them is aimed at reversing the historical pattern of exclusion from decision-making, in order to avoid the future imposition of important decisions on indigenous peoples, and to allow them to flourish as distinct communities on lands to which their cultures remain attached.").

[15] *See, e.g.*, Organization of American States, Proposed American Declaration on the Rights of Indigenous Peoples, *approved by* the Inter-Am. Comm'n H.R. on Feb. 26, 1997 [hereinafter Proposed American Declaration], Arts. XIII(2), XIII(7), XVIII(5), XXI(2); UNDRIP, *supra* note 2, Art. 41; the Convention, *supra* note 12, Art. 23.

[16] U.N. Development Group, *Guidelines on Indigenous Peoples' Issues* 13 (Feb. 2008). *See also* Theodore Macdonald, *Amazonian Indigenous Views on the State: A Place for Corporate Social Responsibility?*, 33 SUFFOLK TRANSNAT'L L. REV. 439, 456 (2010).

[17] Andrea Carmen, *The Right to Free, Prior, and Informed Consent, in* REALIZING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: TRIUMPH, HOPE, AND ACTION 120 (Jackie Hartley et al. eds., 2010).

This Court has found that the state's obligation to guarantee the enjoyment of political rights requires that it "adopt all necessary measures" to secure indigenous communities' effective participation "in decision-making on matters and policies that affect or could affect their rights and the development of these communities."[18] Consultation provides indigenous groups with a means of participating in decision-making that affects their rights. The requirement of meaningful consultation is thus an important measure for protecting indigenous communities' participation in governance. Without consent, however, consultation cannot provide for the effective participation that is essential when decisions threaten indigenous peoples' fundamental rights. When such threats are present, anything less than fully effective participation constitutes a failure to protect indigenous peoples' right to participation. Only by requiring consent can the consultation process guarantee the ability of indigenous communities to affect decisions affecting their fundamental rights.

This Court has consistently affirmed that states are obligated, under Article 1(1) and Article 2 of the Convention, to ensure that human rights protections are effective and meaningful. In *Sawhoyamaxa v. Paraguay*, for example, the Court, held the state to its Article 1(1) and Article 2 obligations,[19] stating that governments must take actions to effectuate the rights protected under the Convention in order "to ensure the actual existence of an efficient guarantee of the free and full exercise of human rights."[20] The Convention provides for every citizen's right to participate in government,[21] as does the American Declaration of the Rights and Duties of Man.[22] The Convention provision, like its forerunner in the American Declaration, "protects the right of all citizens to participate in public affairs of concern to them."[23] For indigenous peoples, this creates a consultation requirement for proposed matters that would affect them.[24] The Proposed American Declaration on the Rights of Indigenous Peoples ("Proposed American Declaration") would, in addition to requiring consultation and consent in certain identified circumstances,[25] provide indigenous communities with the right to participate in all decision-making that affects them.[26] The Proposed American Declaration thus advances a

---

[18] YATAMA v. Nicaragua, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 127, ¶ 225 (June 23, 2005).

[19] Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 248 (March 29, 2006).

[20] *Id.* at ¶ 167.

[21] The Convention, *supra* note 12, Art. 23.

[22] Organization of American States, American Declaration of the Rights and Duties of Man, art. XX, *adopted* May 2, 1948, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 13 (2010).

[23] Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia, Report, Inter-Am. Comm'n H.R., OEA/Ser.L/V/II., doc. 34 ¶ 246 (2007).

[24] *Id.*

[25] Proposed American Declaration, *supra* note 15, Arts. XIII(2), XIII(7), XVII, XVIII(5), XXI(2).

[26] *Id.* Art. XV(2).

framework for interactions between the state and indigenous peoples that allows for these communities to participate meaningfully in matters of consequence to them.

The means of realizing the right to consultation differ depending on the circumstances of the proposed administrative or legislative action, the likely consequences of the action on the indigenous community, and the rights that the proposed action would affect.[27] Where the proposed action would severely restrict the indigenous group's rights in such a way as to threaten the group's ability to maintain its way of life, international and inter-American law requires a consultation process that secures the group's consent.[28] *Saramaka* applied this consent requirement to development projects that "would have a major impact" within an indigenous people's territory.[29] Thus, to fulfill an indigenous community's right to consultation before a decision that will have a significant impact on the community's rights and way of life, the state must provide for a consultation process that leads to the community's free, prior, and informed consent.

International instruments establishing a requirement of consultation all refer to consent as the desired objective, and some require consent for decisions that would affect particular rights. ILO 169, which requires consultation before any legislative or administrative measure that may affect an indigenous community,[30] also requires that consultation be undertaken "in good faith" and "with the objective of achieving agreement or consent to the proposed measures."[31] More recently, the UNDRIP provided for consent as the goal of consultation. It calls on states to consult with indigenous communities "in order to obtain their free, prior and informed consent before adopting legislative and administrative measures that may affect them."[32] It also requires consultation in order to obtain the indigenous group's consent prior to the approval of any development or resource-exploitation project on its lands.[33] Furthermore, the UNDRIP explicitly provides that States have a duty, not only to consult, but to actually obtain *consent* in the case of relocation,[34] storage or disposal of hazardous materials in their territories,[35] and military activities on their lands when those activities are not necessary to the public's interest.[36] In a general recommendation on indigenous peoples, the Committee on the Elimination of Racial

---

[27] 2009 Special Rapporteur Report, *supra* note 7, at ¶ 46 ("The character of the consultation procedure and its object are also shaped by the nature of the right or interest at stake for the indigenous peoples concerned and the anticipated impact of the proposed measure.").

[28] *See, e.g.*, UNDRIP, *supra* note 2, Arts. 10, 29(2); Proposed American Declaration, *supra* note 15, Arts. XIII(7), XVIII(6), XXI(2).

[29] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶ 134.

[30] ILO 169, *supra* note 2, Art. 6(1)(a).

[31] *Id.* Art. 6(2).

[32] UNDRIP, *supra* note 2, Art. 19.

[33] *Id.* Art. 32(2).

[34] *Id.* Art. 10.

[35] *Id.* Art. 29(2).

[36] *Id.* Art. 30(1).

Discrimination ("CERD Committee") went further, calling upon states to ensure "that no decisions directly relating to [indigenous peoples'] rights and interests are taken without their informed consent."[37] The overall thrust of these key international law sources is that indigenous peoples have a right of consent, at the very least, for projects affecting their fundamental rights.

Within the inter-American system, the Proposed American Declaration would obligate states to consult and secure the consent of indigenous peoples when facilitating their national incorporation,[38] changing titles to their property,[39] causing their relocation,[40] or engaging in natural-resource development in conservation areas within their territories.[41] Furthermore, the Proposed American Declaration would prohibit states, except in exceptional circumstances, from advancing any development project "affecting the rights or living conditions of indigenous peoples" without their free and informed consent.[42] This provision of the Proposed American Declaration reflects the increasingly clear establishment in the inter-American system of a strong consent requirement for projects that would affect the fundamental rights of indigenous communities.

These instruments reflect an evolution from requiring consultation with consent as the objective to consent as an explicit requirement. U.N. Special Rapporteur James Anaya has found that the UNDRIP's language

> suggests a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.[43]

Consistent with this approach, the Proposed American Declaration requires consent for measures that would affect certain indigenous rights. ILO 169, the UNDRIP, the Proposed American Declaration, and the CERD Committee's recommendation, when taken together, create a requirement that consultation result in an arrangement satisfactory and beneficial to both parties. Together, they establish a state duty to secure the indigenous group's consent before proceeding with projects or measures that significantly affect the community.

---

[37] Committee on the Elimination of Racial Discrimination, Gen. Rec. 23, *supra* note 13, ¶ 4(d).
[38] Proposed American Declaration, *supra* note 15, Art. XVII.
[39] *Id.* Art. XVIII(3)(ii).
[40] *Id.* Art. XVIII(6).
[41] *Id.* Art. XIII(7).
[42] *Id.* Art. XXI(2).
[43] 2009 Special Rapporteur Report, *supra* note 7, at ¶ 46.

The Commission has affirmed the ILO 169 and the UNDRIP standard that consultations have the purpose of obtaining the consent of indigenous groups.[44] According to the Commission, consultation has "the objective of achieving a mutual agreement."[45] In pursuit of such agreement, consultation procedures, "as a form of guaranteeing indigenous and tribal peoples' right to participate in matters which can affect them, 'must be designed to secure the free and informed consent of these peoples, and must not be limited to notification or quantification of damages'."[46] The Commission also noted the U.N. Special Rapporteur's conclusion that when a proposed action affects indigenous interests, consent should "in some degree" be the consultation's objective. The Rapporteur has stated that this "does not provide indigenous peoples with a 'veto power', but rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned."[47] The Commission articulated its adoption of the same approach to consultation established by the international instruments, requiring consent to be the objective of consultations whenever a proposed measure will affect the rights of indigenous peoples.

In the case of Mary and Carrie Dann of the Western Shoshone, the Commission concluded that the state had an obligation to ensure that a project affecting significant interests of the indigenous community, protected by law, could proceed only with the community's consent.[48] In the Dann case, the state had held "open council meetings" with some members of the Western Shoshone, but the Dann sisters had argued that those meetings "were not democratically fostered and controlled by the Western Shoshone people" and that they were not held in advance of reaching the decision affecting them.[49] The Commission found that only a segment of the indigenous community favored and pursued compensation from the state instead of a land title claim to the Western Shoshone territory that the state had condemned.[50] The Commission also found that there was no evidence "that appropriate consultations were held within the Western Shoshone at the time that certain significant determinations were made."[51] The Commission concluded that the state had not met "its particular obligation to ensure that the status of the Western Shoshone traditional lands was determined through a process of informed and mutual consent on the part of the Western Shoshone people as a whole."[52] The Commission's report in the Mary and Carrie Dann case emphasizes the duty, when a proposed

---

[44] Follow-up Report – Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia, Annual Report, Inter-Am. Comm'n H.R., OEA/Ser/L/V/II.135, doc. 40 ¶ 157 (2009).
[45] 2009 Commission Report, *supra* note 8, at ¶ 285.
[46] *Id.* at ¶ 285 (quoting Access to Justice and Social Inclusion Report, *supra* note 23, at ¶ 248).
[47] 2009 Commission Report, *supra* note 8, at 116 n.736 (quoting 2009 Special Rapporteur Report, *supra* note 7, at ¶ 48).
[48] Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, doc. 1 rev. 1 ¶¶ 140-41 (Dec. 27, 2002).
[49] *Id.* at ¶ 71.
[50] *Id.* at ¶ 140.
[51] *Id.*
[52] *Id.* at ¶ 141.

project puts significant indigenous rights in jeopardy, to consult appropriately with the indigenous community and to ensure that the consultation process results in mutual consent before the project can proceed.

When the CERD Committee subsequently issued its decision in the same case, it expressed "particular concern" that the state had planned the activities at issue "without consultation with and despite protests of the Western Shoshone peoples."[53] It then recommended that the state "take immediate action to initiate a dialogue with the representatives of the Western Shoshone peoples in order to find a solution acceptable to them."[54] The CERD Committee similarly found that the consultation was inadequate because it did not obtain the entire community's consent. The CERD Committee thus called for future dialogue to produce a result satisfactory to the indigenous group.

This Court's description of consultation procedures in *Saramaka* also establishes a requirement of rigorous and collaborative consultation and, in cases of development projects significantly affecting indigenous territories, a requirement of consent.[55] In *Saramaka*, the Court stated that the duty to consult requires the state to "accept and disseminate information, and entails constant communication between the parties."[56] The Court further found that consultation must occur during a proposed project's "early stages" and "not only when the need arises to obtain approval from the community."[57] The Court determined that consultation requires good faith collaboration between the indigenous community and a state committed to protecting the indigenous group's interests. Compliance with this norm necessitates that consultation consist of all possible efforts to achieve a solution to which *all* parties can agree[58]– that is, the consent of the indigenous community is generally required.

Only consent can adequately provide for indigenous peoples' right to effective participation where significant interests or rights are at risk. The U.N. Special Rapporteur on the Rights of Indigenous Peoples has observed "frequently and in a wide variety of situations, a lack of adequate implementation of the duty of States to consult with indigenous peoples in decisions affecting them."[59] This is, in large part, due to the fundamental imbalance between states and the often disenfranchised indigenous communities potentially affected by the proposed measures. Moreover, without a consent requirement, consultation fails to embody the right incentives for

---

[53] CERD Early Warning and Urgent Action Procedure Decision 1 (68) decision, 68th Sess., U.N. Doc. CERD/C/USA/DEC/1, at ¶ 7(d) (March 8, 2006).
[54] *Id.* at ¶ 9.
[55] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶¶ 133-34.
[56] *Id.* at ¶ 133.
[57] *Id.* at ¶ 133.
[58] *See id.* at ¶ 133.
[59] 2009 Special Rapporteur Report, *supra* note 7, at ¶ 36.

all parties to approach it with the expectation that it will and must result in agreement. [60] Because the requirement of good faith consultations exists largely in order to ensure indigenous peoples' physical and cultural survival,[61] the risk of inadequate protection of an indigenous people's way of life should mandate that the state's duty of consultation comprises an obligation to secure consent where fundamental rights are at stake.

Consultation without consent also does not adequately ensure that the state meets its obligation to share the economic benefits of development projects with the affected indigenous community. In *Saramaka*, this Court articulated a second safeguard, reasonable benefit-sharing, to protect indigenous peoples from property-rights violations that threaten their survival.[62] This obligation cannot properly be met without adequate prior consultation with the indigenous group about the project's benefits and how they can be equitably shared. A state cannot assure that a proposed project will benefit an indigenous group unless it has consulted with the group about the project's consequences. Requiring consent would ensure that the state has ascertained that the proposed project will produce benefits to the indigenous population, since the indigenous group is unlikely to consent if it does not expect to realize benefits. Thus, the state's obligation to share benefits with the indigenous community reinforces the requirement that consultation result in consent. Only a consent requirement can offset the imbalance inherent in interactions between the state and an indigenous group by requiring the state to certify that, if the project advances, benefits will accrue to the indigenous group.

In order to comply with the express provisions on consultation in the international instruments discussed above[63] and to ensure the effective participation of the indigenous group, decisions that will affect fundamental indigenous rights require the indigenous community's agreement before they can be implemented.[64] In order to effect meaningful consultation in practice and to correct for the power imbalance between the state and the indigenous group, the state should be obliged to obtain consent before proceeding with any proposed measure that will affect the group's fundamental rights. The requirement of consent where the proposed project will affect an indigenous people's fundamental rights is the only means of ensuring proper protection of an indigenous community's way of life.

---

[60] *Cf.* Carmen, *supra* note 17 at 124 ("The term 'consultation' is too often interpreted by states in a self-serving manner that involves an exchange of views, but excludes decision-making on the part of the indigenous peoples concerned.").

[61] *See* Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶¶ 129, 158.

[62] *Id.* at ¶¶ 129, 138-40.

[63] *See supra* notes 30-42and accompanying text.

[64] *See generally* James Anaya's explanation that "the principles of consultation and consent are aimed at avoiding the imposition of the will of one party over the other, and at instead striving for mutual understanding and consensual decision-making" (2009 Special Rapporteur Report, *supra* note 7, at ¶ 49.).

II. MEASURES THAT THREATEN ANY FUNDAMENTAL RIGHT OF AN INDIGENOUS COMMUNITY REQUIRE THE COMMUNITY'S CONSENT.

The requirement of obtaining consent provides indigenous peoples with a procedural right necessary to protect them against threats to their substantive rights. This Court has held that states owe members of tribal or indigenous communities special protective measures to guarantee them the full exercise of their rights.[65] In doing so, the Court has placed special emphasis on property rights because of their cultural and spiritual importance for indigenous communities and because of the relationship that property rights have to the physical and cultural survival of those groups.[66] Consequently, this Court has held that consent is required for large-scale development or investment projects that would have a major impact within the territory of a tribal or indigenous community.[67] This same reasoning applies to other rights that are central to the physical and cultural survival of indigenous peoples. Development or investment projects, particularly resource-exploration or -exploitation projects, almost always pose a threat to the exercise of at least some fundamental rights, including, for example, the right to property, the right to life, and the right to culture, all guaranteed by the American Convention, and the rights to self-determination and to a healthy environment, which are well established in international law. A requirement of free, prior, and informed consent for all resource-exploration and -exploitation projects affecting the territory of indigenous groups is a necessary safeguard against substantial interference with the ability of indigenous peoples to fully exercise their basic rights.

---

[65] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶¶ 85-86 (stating that indigenous peoples and tribal communities have "distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival" ¶ 86). *See also* Sawhoyamaxa, Inter-Am. Ct. H.R., No. 146 at ¶ 167.

[66] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶¶ 85 ("This Court has previously held, based on Article 1(1) of the Convention, that members of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival."); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149 (Aug. 31, 2001) ("Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."); Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 131 (June 17, 2005) ("[T]his Court has underlined that the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations.").

[67] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶ 134.

A. This court held in *Saramaka* that consent is required where an indigenous people's right to property is threatened.

Indigenous peoples have a collective right to ownership of their traditional lands and resources.[68] In its first major decision on the rights of indigenous peoples, the Court found that the Nicaraguan government's failure to recognize indigenous ownership of land and the government's grant of a logging concession that affected the Awas Tingni community's use or enjoyment of its land violated the right to property.[69] In its previous judgment in the same case, the Court also noted the Commission's finding that Nicaragua had violated the right to property of the Awas Tingni people when it granted the concessions "without the consent of the Awas Tingni community."[70] In subsequent decisions, the Court has confirmed the special relationship of indigenous peoples to their land[71] and has held, based on Articles 1(1) and 2 of the Convention, that special measures are required to ensure for indigenous peoples the full exercise of their rights, particularly with respect to property.[72]

Although the Court has held that property rights are not absolute, the State may restrict those rights only under "very specific, exceptional circumstances."[73] Permissible restrictions to property rights "a) … must be established by law; b) … must be necessary; c) … must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society."[74] In assessing whether a restriction of an indigenous community's full enjoyment of the right to property is justified,

> States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.
>
> Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to

---

[68] *See* Yakye Axa, Inter-Am. Ct. H.R., No. 125 at ¶ 131; Awas Tingni, Inter-Am. Ct. H.R., No. 79 at ¶ 149; Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶¶ 86, 90.

[69] Awas Tingni, Inter-Am. Ct. H.R., No. 79 at ¶ 153.

[70] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 66, ¶ 22 (Feb. 1, 2000) (internal citations omitted).

[71] *See, e.g.*, Yakye Axa, Inter-Am. Ct. H.R., No. 125 at ¶ 131; Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶¶ 85-86, 90.

[72] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶¶ 85-86.

[73] Saramaka People v. Suriname, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 49 (Aug. 12, 2008).

[74] Yakye Axa, Inter-Am. Ct. H.R., No. 125 at ¶ 144. *See also* Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶ 127.

cultural identity and to the very survival of the indigenous communities and their members.[75]

Thus, even where restrictions to property may be justified, the balance of rights must take into account the particular importance of property for indigenous peoples and how infringements on those property rights may affect other basic rights.

The Commission has stated that "consultation and consent are required for the adoption of any decision that can affect, modify, reduce or extinguish indigenous property rights;" such decisions include resource-exploitation concessions.[76] According to the Commission, "Natural resource exploitation in indigenous territories without the affected indigenous people's consultation and consent violates their right to property and their right to participate in government."[77] The Commission thus emphasized the importance both of consultation *and* of consent in the natural resource exploitation context.

This Court, in its most recent ruling on this issue, *Saramaka v. Suriname*, elaborated further on the standard articulated in *Yakye Axa*, noting that when considering the lawfulness of restrictions on indigenous peoples' property rights, "another crucial factor to be considered is whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and its members."[78] Consequently, the Court held that permissible restrictions to property rights not only must pass the four-prong test articulated in *Yakye Axa*, but also must not endanger the survival of a group. Thus, "the State may restrict the Saramakas' right to use and enjoy their traditionally owned lands and natural resources only when such restriction complies with the aforementioned requirements *and, additionally, when it does not deny their survival as a tribal people*."[79] The Court articulated three safeguards to ensure that restrictions on property rights conform to this requirement.[80]

Most relevant in this context is the first safeguard the Court requires: that "the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction

---

[75] Yakye Axa, Inter-Am. Ct. H.R., No. 125 at ¶¶ 146-147.

[76] 2009 Commission Report, *supra* note 8, at ¶ 281; Maya Communities of Toledo Commission Report, *supra* note 8, at ¶ 142 ("In the Commission's view, these requirements are … applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.").

[77] 2009 Commission Report, *supra* note 8, at ¶ 289 (citing Maya Communities of Toledo Commission Report, *supra* note 8, at ¶ 144).

[78] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶ 128.

[79] *Id.* (emphasis added).

[80] *Id.* at ¶ 129.

plan (hereinafter 'development or investment plan') within Saramaka territory."[81] In order to meet the requirement of effective participation, the State has a duty to "actively consult" with the community in a culturally appropriate manner "at the early stages of a development or investment plan."[82] Moreover, "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions."[83] The Court concluded that

> in addition to the consultation that is always required when planning development or investment projects within traditional Saramaka territory, the safeguard of effective participation that is necessary when dealing with major development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory must be understood to additionally require the free, prior, and informed consent of the Saramakas, in accordance with their traditions and customs.[84]

The Court made it clear that a critical factor in its reasoning was the existence of a threat to the physical or cultural survival of the group.[85] Thus, it required states to obtain consent where a threat to the right to property exists and where, because of the special relationship between indigenous peoples and their land, that threat could affect an indigenous or tribal community's ability to survive as a group. By instituting a requirement of consent in this case, the Court protected, not simply an indigenous people's right to property, but, more importantly, their physical and cultural survival.

B. The court's reasoning in *Saramaka* should apply to require consent when decisions threaten any fundamental right of indigenous peoples.

1. Right to Life

This Court has emphasized the fundamental importance of the right to life. In *Yakye Axa*, the Court observed that "[w]hen the right to life is not respected, all the other rights disappear, because the person entitled to them ceases to exist."[86] The Court interpreted the right to life as encompassing more than mere existence, holding that "this right includes not only the right of

---

[81] *Id.* The other two safeguards are that "the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory" and that "a prior environmental and social impact assessment" be conducted.
[82] *Id.* at ¶ 133.
[83] *Id.* at ¶ 134.
[84] *Id.* at ¶ 137.
[85] *See id.* at ¶¶ 90, 128, 129.
[86] Yakye Axa, Inter-Am. Ct. H.R., No. 125 at ¶ 161.

every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated."[87] The Court noted in this context that "[o]ne of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it."[88]

Development or investment projects, particularly natural-resource exploitation projects, have the potential to threaten indigenous peoples' right to a dignified existence, by, for example, restricting their access to sources of livelihood, creating circumstances that cause or exacerbate poverty, or interfering with their means of economic subsistence.[89] The Commission, in its report on the rights of indigenous peoples over their ancestral lands, observed that the

> life of members of indigenous and tribal communities "fundamentally depends" on the subsistence activities—agriculture, hunting, fishing, gathering—that they carry out in their territories . . . . The State violates article 4.1 of the American Convention in relation to article 1.1, when it does not adopt "the necessary positive measures within its powers, which could reasonably be expected to prevent or avoid risking the right to life of the members of [an indigenous community]".[90]

States have an obligation to adopt measures that would help prevent the breach of the right to life. In the context of development and resource-exploitation projects affecting indigenous communities, requiring the consent of indigenous peoples would help prevent breaches of the right to life. Such threats to the right to life would also constitute a direct threat to an element central to the Court's reasoning in *Saramaka*: the physical and cultural survival of an indigenous community.[91] A consent requirement is, therefore, required in such contexts in order to guarantee an indigenous people's enjoyment of the right to life within their territory.

---

[87] *Id.*

[88] Yakye Axa, Inter-Am. Ct. H.R., No. 125 at ¶ 162 (citation omitted).

[89] For example, if a community's economic subsistence depends on hunting and a development project in a neighboring or adjacent territory will result in the death or flight of most animals, such a project will have a significant impact on the indigenous community even if it is not undertaken within their territory. Consent is important to ensure that the communities who are negatively affected by a development project have a say in whether it can go forward.

[90] 2009 Commission Report, *supra* note 8, at ¶ 154 (quoting Awas Tingni, Inter-Am. Ct. H.R., No. 79 at ¶ 140(f) and Sawhoyamaxa, Inter-Am. Ct. H.R., No. 146 at ¶ 178).

[91] The Court in Saramaka required, in addition to consultation and consent, a prior environmental and social impact assessment to be undertaken before the approval of a development project. *See* Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶129. One reason such impact assessments are important is that they may reveal potential threats to the rights of a community to a healthy environment and a dignified existence; for that reason, the only way to safeguard indigenous communities against violations of those rights is to require states to obtain their free, prior, and informed

2. Right to Culture

Nearly thirty international or regional human rights instruments and documents articulate a right to culture.[92] Within the inter-American system, Article 26 of the American Convention on Human Rights requires that "[t]he States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the . . . cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."[93] The Charter firmly establishes that Member States are to promote and protect culture.[94] Article 14 of the Protocol of San Salvador also explicitly protects a right to culture, mandating, among other things, that "[t]he States Parties to this Protocol recognize the right of everyone: a. [t]o take part in the cultural and artistic life of the community . . . ."[95] Protecting a right to culture, moreover, is so important to the very foundations of the inter-American human rights regime that the preamble to the OAS Declaration of the Rights and Duties of Man imposes a general duty on "man to preserve, practice and foster culture by every means within his power."[96] Article XIII of the OAS Declaration explicitly protects a right to culture, affirming: "Every person has the right to take part in the cultural life of the community . . . ."[97]

---

consent after the impact assessments have been conducted and full information about projects' effects have been disseminated to affected indigenous communities.

[92] *See* Marina Hadjioannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law,* 8 CHAP. L. REV. 201 (2005). This article mentions the following as having provisions related to the protection of culture: ICESCR; ICERD; Convention Against Discrimination in Education; ICCPR; OAS Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; UNESCO Declaration of the Principles of International Cultural Co-operation; UNESCO Universal Declaration on Cultural Diversity; Convention on the Rights of the Child; Convention on Biological Diversity; Convention for the Safeguarding of the Intangible Cultural Heritage; American Convention on Human Rights; American Declaration of the Rights and Duties of Man; Charter of the Organization of the American States; Protocol of San Salvador; Protocol on the Cultural Integration of Mercosur; Cartagena Agreement of the Andean Community; Final Declaration of the Moncton Summit of Francophonie; Cultural Treaty of the Arab League; European Cultural Convention; Charter of the South Asian Association for Regional Cooperation; Charter of Civil Society for the Caribbean Community; Cultural Charter for Africa; Declaration of Machu-Picchu on Democracy the Rights of Indigenous Peoples and the Fight Against Poverty; and Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples.

[93] The Convention, *supra* note 12, Art. 26.

[94] Organization of American States, Integrated Text of the Charter of the Organization of American States, *amended* by the Protocols of Buenos Aires and Cartagena de Indias, June 10, 1993, 33 I.L.M. 981.

[95] Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador), Nov. 14, 1988, 28 I.L.M. 1341.

[96] American Declaration of the Rights and Duties of Man, *supra* note 22.

[97] *Id.*

Cultural rights are protected not only by inter-American law, but also under international law more broadly. Several international instruments, most prominently the UNDRIP and ILO 169, are specifically concerned with protecting the cultural rights of indigenous peoples. Eleven of the UNDRIP's forty-six articles mandate protection or state sensitivity to the cultural rights of indigenous peoples.[98] Many articles in both instruments impose specific duties upon states to protect indigenous culture and indigenous peoples' way of life.[99] These sources demonstrate broad international consensus that indigenous peoples possess robust cultural rights and that States must take affirmative measures to protect them.

The Court's judgment in *Saramaka* is consistent with this well-established principle of international law.[100] The Court in *Saramaka* affirmed the obligation of States to protect cultural identity and cultural survival; state restrictions on property rights must not deny indigenous peoples' right to cultural identity nor threaten the survival of the group or its members.[101] The Court defined "survival" not only in physical, but in cultural terms, observing that "the phrase 'survival as a tribal people' must be understood as the ability of the Saramaka to 'preserve, protect and guarantee the special relationship that [they] have with their territory', so that 'they may continue living their traditional way of life, and that their distinct cultural identity, social

---

[98] *See* UNDRIP, *supra* note 2, Arts. 3, 5, 8, 11, 12, 14, 15, 16, 31, 32, 36. These provisions include indigenous peoples' rights to: "freely pursue … cultural development"; "maintain and strengthen their distinct … cultural institutions"; "not be subjected to forced assimilation or destruction of their culture"; "practise and revitalize their cultural traditions and customs … includ[ing] the right to maintain, protect and develop the past, present and future manifestations of their cultures"; and "maintain, protect, and have access in privacy to their religious and cultural sites."

[99] *See e.g.*, UNDRIP, *supra* note 2, Arts. 8, 11 (For example, Article 11.2 mandates that States provide redress for "cultural, intellectual, religious and spiritual property taken without [indigenous peoples'] free, prior and informed consent or in violation of their laws, traditions and customs." Similarly, Article 8, which prohibits the destruction of indigenous cultures, imposes on States an obligation to "provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources."); *see also* ILO 169, *supra* note 2, Arts. 2(2)(b), 4(1) (Article 2(2)(b) provides that governments must "promot[e] the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions." Article 4(1) states, "Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.").

[100] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶ 91. Moreover, Article 21, combined with Article 1(1) and Article 2 of the American Convention, "places upon states a positive obligation to adopt special measures that guarantee members of indigenous and tribal peoples the full and equal exercise of their right to the territories they have traditionally used and occupied." *Id.* This positive obligation arises, in part, from the recognition of the "special relationship" between indigenous peoples' territories and their cultural survival. *Id.*

[101] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶¶ 121, 128.

structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected'."[102]

Development projects having a major impact on the territory or environment in which indigenous communities live will almost always also threaten cultural rights. For indigenous communities, cultural practices are usually inextricable from identity and existence.[103] Damage to one will harm or threaten the other. The cultural practices, identity, and existence of indigenous communities are, in turn, frequently defined by relationships to natural resources and the environment.[104] As one author notes, "culture and the environment are intertwined and for many indigenous peoples, they are indivisible. Any harm to one is almost certain to damage the other and injury to both is a substantial threat to identity and therefore, even survival."[105] The UNDRIP and ILO 169 similarly note that cultural harm and destruction can result from interference with indigenous land.[106]

The Court, like other international bodies,[107] has long recognized the dependence of indigenous culture upon secure property rights.[108] The Court has held that indigenous peoples "require special measures that guarantee the full exercise of their rights, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural survival."[109] Similarly, in *Yakye Axa*, the Court concluded that an indigenous community's "relationship with the land is such that severing that tie entails the certain risk of an irreparable ethnic and cultural loss."[110] In light of the dependence of indigenous identity, culture, and

---

[102] Saramaka Interpretation of the Judgment, Inter-Am. Ct. H.R., No. 185 at ¶ 37 (quoting Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶¶ 91, 121, 129).

[103] *See* Hadjioannou, *supra* note 92, at 207-08.

[104] *See, e.g.*, Yakye Axa, Inter-Am. Ct. H.R., No. 125 at ¶ 216.

[105] Lawrence Watters, *Indigenous Peoples and the Environment: Convergence from a Nordic Perspective*, 20 UCLA J. ENVTL. L. & POL'Y 237, 239-240 (2001).

[106] *See, e.g.*, UNDRIP, *supra* note 2, Art. 8 (links dispossession of land, territories, or resources with cultural destruction); ILO 169, *supra* note 2, Art. 13 (admonishes states to "respect the special importance . . . of their [indigenous culture and land's] relationship").

[107] *See, e.g.,* Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, African Commission on Human and Peoples' Rights, Comm. 276/2003 (May 2009, *approved* Jan. 2010 by the African Union) (The African Commission ruled that Kenya violated the cultural rights of the Endorois community when the community was displaced from ancestral lands surrounding Lake Bogoria. The African Commission found that: "*By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have* [sic] *created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory.*" (italics in original)).

[108] *See, e.g.*,Yakye Axa, Inter-Am. Ct. H.R., No. 125.

[109] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶ 85 (citations omitted).

[110] Yakye Axa, Inter-Am. Ct. H.R., No. 125 at ¶ 216. *See also id.* at ¶ 120(c) (The "protection of the right of indigenous peoples to their ancestral territory is an especially important matter, as its enjoyment involves not only protection of an economic unity but also protection of the human rights of a collectivity whose economic, social and cultural development is based on its relationship with the land.").

existence on land and the environment and the consequent importance placed on secure indigenous property rights, safeguarding the right to culture itself requires the procedural protection of a right of consent, just as safeguarding the right to property does.

The *Saramaka* principle requires an indigenous community's free, prior, and informed consent where development or investment projects would have a major impact within the community's territory.[111] The Court in *Saramaka* articulated the requirement of consent as a procedural protection for the substantive right to property, making clear that it was protecting the physical and cultural survival of the community more broadly.[112] As activities by state or third parties affecting the natural resources or property of an indigenous community may threaten or violate a community's right to culture, the principle set forth in *Saramaka* should be applied to directly protect the cultural rights of indigenous communities when they are threatened by others' activities. In order to fulfill its obligation to ensure that the protection of indigenous rights is effective, a state must require that development or resource-extraction projects that threaten to have a significant impact on indigenous culture may proceed only with the indigenous community's consent. A consent requirement would provide protection for the right to culture and ensure that states fulfill this obligation. Such a requirement of consent for activities that threaten indigenous culture follows logically from the *Saramaka* decision, which, motivated by concern for the cultural and physical survival of indigenous peoples, articulated a consent requirement for major impacts within indigenous territory.

Requiring the consent of indigenous peoples for decisions that have the potential to threaten their right to culture is an urgent matter. Preservation of indigenous culture is at a crossroad. As one legal scholar's work has suggested, whether judicial and policy decisions mandate robust protections for the right to culture of indigenous communities will significantly affect whether these communities persist, intact, into the future.[113] Indigenous peoples are vulnerable to becoming a "'footnote to globalization.'"[114] Existing and projected climate change and rapid globalization place indigenous cultures under great strain and threaten their destruction.[115] As the Inuit Petition to the Commission made clear, indigenous communities already suffer harms to culture caused by climate change.[116] Unlike threats from climate change,

---

[111] *See* Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶ 134.

[112] *See id.* at ¶¶ 121, 128, 129, 134.

[113] Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination,* 4 ENVT'L & ENERGY L. & POL'Y J. 188 (2009).

[114] *Id.* at 191-2.

[115] *Id.*

[116] Petition to the Inter-Am. C.H.R. Seeking Relief from Violations Resulting from Global Warming caused by Acts and Omissions of the United States 48 (Dec. 7, 2005) (citations omitted) ("As climate change has reduced the capacity to travel, access to game, and safety, the Inuit have been forced to modify their traditional travel and harvest methods, damaging the Inuit culture. The changes in traditional subsistence harvest activities have interfered with one of the most important opportunities to educate the younger generation in fundamental cultural values and traditions, and have diminished the role of elders in the younger generation's lives.").

which pose unique challenges for legal systems due to the lack of specific, identifiable proximate causes, threats from resource extraction and development are the result of concrete actions carried out by specific, identifiable actors. Consequently, at a time when the harms of climate change constitute a threat to indigenous peoples for which remedies are difficult to devise, the Court, by taking this opportunity to clarify that the *Saramaka* principle requires indigenous peoples' consent to decisions or projects that would affect their right to culture, would provide direct and immediate protection for such harms in contexts where it has the authority and competence to do so.

This Court can explicitly help abate and redress cultural harms through the *Saramaka* principle's consent requirement. The inter-American system's jurisprudence clearly opposes making indigenous communities mere "'footnotes to globalization.'" Especially in light of growing threats to culture from the effects of changing climate, this Court must reaffirm and strengthen its expressed commitment to protecting indigenous peoples by making explicit a robust right to culture that itself requires a right of consent for indigenous peoples. The crucial and timely importance of safeguarding the right to culture bolsters the imperative that the procedural protection of a consent requirement must be implemented for any measure that threatens this right.

3. Right to a Healthy Environment

As this Court noted in *Saramaka*, the safeguards against illegitimate restrictions on the right to property "are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, *which in turn ensures their survival as a tribal people.*"[117] To achieve the purpose of protecting tribal communities, the *Saramaka* principle must apply to restrictions of rights other than the right to property, to the extent that the exercise of those rights constitutes or protects an important aspect of a community's way of life. Thus, the protections articulated by the Court must ensure not only the right to property, but also, more generally, indigenous and tribal communities' rights that are necessary to their ability to preserve their way of life and to pass it on to future generations. In *Yakye Axa*, the Court, discussing an indigenous community, noted the importance of safeguarding "the preservation of their cultural identity and its transmission to future generations."[118] Thus, the basis for the strong protection of indigenous groups' right to property necessarily applies to other rights critical to a community's ability to maintain its way of life.

---

[117] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶ 129 (emphasis added).
[118] Yakye Axa, Inter-Am. Ct. H.R., No. 125 at ¶ 124.

Resource-exploitation projects always have the potential to cause significant damage to the environment.[119] The Commission has found that

> extractive concessions in indigenous territories, in having the potential of causing ecological damage, endanger the economic interests, survival, and cultural integrity of the indigenous communities and their members, in addition to affecting the exercise of their property rights over lands and natural resources. The activities of logging companies in indigenous or tribal peoples' territories, for example, are highly destructive and produce massive damage to the forest and its ecological and cultural functions, causing water pollution, loss of biodiversity, and the spiritual disruption of the forest to the detriment of indigenous and tribal peoples.[120]

Environmental damage resulting from concessions on indigenous groups' traditional lands and even in adjacent territories has the potential to severely threaten an indigenous people's right, enshrined in the San Salvador Protocol, to a healthy environment.[121] Mining activities that release noxious gases, for instance, or activities that cause the destruction of adjacent plots of land may have a severe impact on the environmental conditions in which indigenous peoples reside, even where the harmful activities are not taking place on the community's territory. As the Commission has stated, "several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality, and are profoundly affected by the degradation of natural resources."[122] The Commission further noted "the critical link between human beings' subsistence and the environment"[123] and the importance of protecting "the natural resources that are present in ancestral territories, *and . . . such territories' environmental integrity.*"[124] The right to a healthy environment is central both to an indigenous community's ability to preserve its way of life and to its ability to exercise other rights and should, therefore, be afforded protection through a requirement of consent.

In the same way that threats to indigenous peoples' property rights may affect their physical and cultural survival, threats to their right to live in a healthy environment may do so as well. Thus, in the same way that consent is required to safeguard indigenous peoples' physical

---

[119] *See, e.g.*, Maya Communities of Toledo Commission Report, *supra* note 8, at ¶ 27 (describing Petitioners' contention that logging and oil concessions have caused "substantial environmental harm and threatens long term and irreversible damage to the natural environment upon which the Maya depend").

[120] 2009 Commission Report, *supra* note 8, at ¶ 206 (citations omitted).

[121] Protocol of San Salvador, *supra* note 95, Art. 11 ("Right to a Healthy Environment: 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment.").

[122] 2009 Commission Report, *supra* note 8, at ¶ 190.

[123] *Id.* at ¶ 192.

[124] *Id.* at ¶ 194 (emphasis added).

and cultural survival where property rights are endangered, consent should be required to safeguard that survival where the right to a healthy environment is at risk. The Court in *Saramaka* defined survival to mean "much more than physical survival" and to encompass indigenous peoples' ability to "continue living their traditional way of life, and [to ensure] that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected."[125] A healthy environment is integral to that ability. Therefore, the consent of indigenous communities to decisions that would affect their environment should be required in order to safeguard that right.

4. Right to Self-Determination

Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) provides:

> 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 to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[126]

In *Saramaka*, the Court explicitly adopted the finding of the Committee on Economic, Social, and Cultural Rights that Common Article 1 is applicable to indigenous peoples and affirmed that the rights protected by the American Convention may not be interpreted in a manner that restricts the right to self-determination of indigenous peoples.[127] The right to self-determination gives

---

[125] Saramaka Interpretation of the Judgment, Inter-Am. Ct. H.R., No. 185 at ¶ 37.

[126] International Covenant on Economic, Social and Cultural Rights, art. 1, G.A. Res. 2200 (XXI) A, U.N. Doc A/6316 (Dec. 16, 1966); International Covenant on Civil and Political Rights, art. 1, G.A. Res. 2200(XXI)A, U.N. Doc A/6316 (Dec. 16, 1966).

[127] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶¶ 93-95 (The Court noted that "[t]he Committee on Economic, Social, and Cultural Rights ... has interpreted common Article 1 of [the ICCPR and the ICESCR] as being applicable to indigenous peoples. Accordingly, by virtue of the right of indigenous peoples to self-determination recognized under said Article 1, they may 'freely pursue their economic, social and cultural development', and may 'freely dispose of their natural wealth and resources' so as not to be 'deprived of [their] own means of subsistence'. Pursuant to Article

indigenous peoples the right to exercise control over their property and to be involved in a meaningful way in decision-making that affects their communities.[128] Interpreting the right to property (Article 21 of the American Convention) in light of indigenous peoples' right to self-determination, the Court held that members of indigenous and tribal communities have the right "to freely determine and enjoy their own social, cultural and economic development."[129]

The right to self-determination for indigenous peoples entails the right to consent to decisions and projects affecting them, since without this right, indigenous peoples are deprived of their ability to exercise their right to control their own fate. Moreover, depriving indigenous peoples of their right to self-determination denies them the ability to prevent development projects that would threaten their physical and cultural survival. The right to consent is, therefore, necessary to protect indigenous peoples' right to self-determination, the exercise of which forms an integral part of their continued survival.

CONCLUSION

A consent requirement renders meaningful indigenous peoples' rights to consultation and to effective participation and ensures their full enjoyment of fundamental rights guaranteed by the American Convention on Human Rights and by other international law. Natural resource exploration and exploitation projects consistently threaten several fundamental rights of indigenous peoples, including their right to property, their right to life, their right to culture, their right to a healthy environment, and their right to self-determination. The *Saramaka* principle assures an important safeguard against threats to the survival of indigenous communities but is explicit only in its application to situations where the right to property is threatened. The Court should take this opportunity to clarify that this principle not only applies to decisions that threaten the right to property, but necessarily applies wherever a decision would constitute a threat to the community's fundamental rights and thus to its physical or cultural survival.

29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants." *Id.* at ¶ 93 (citations omitted). The Court went on to note that "the rights recognized under common Article 1 and Article 27 of the ICCPR … may not be restricted when interpreting the American Convention." *Id.* at ¶ 95.). *See also* Human Rights Committee, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Norway, ¶¶ 10, 17, U.N. Doc. CCPR/C/79/Add.112 (Nov. 1, 1999).

[128] *See* JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 85-88 (1996).

[129] Saramaka, Inter-Am. Ct. H.R., No. 172 at ¶ 95.

Respectfully submitted,

THE ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC,
YALE LAW SCHOOL

James J. Silk, Esq.
Director & Clinical Professor of Law

Allyson A. McKinney, Esq.
Fellow in International Human Rights Law

Dated: 21 July, 2011