

International and Regional Consultation

International Instruments

The United Nations' **Declaration on the Rights of Indigenous Peoples** (UNDRIP or Declaration) of 2007 is an international human rights instrument that calls upon States (national or federal governments) to consult with Indigenous peoples and obtain their free, prior, and informed consent (FPIC) before taking actions that have legal effects on Indigenous peoples or affect Indigenous resources.¹ UNDRIP is not legally binding but nonetheless is significant as it stands as an "authoritative statement of human rights by the U.N. General Assembly" and is understood as representative of the obligation to promote and respect Indigenous rights.² Commentators have suggested that the instrument affirms existing principles of customary international law, while others have disputed this position.³ Despite the lack of consensus, UNDRIP nonetheless establishes the core rights of Indigenous peoples and articulates principles of self-determination, non-discrimination, and the duty of national governments to respect the autonomy and self-governance of

¹ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP]; see also UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, *Indigenous Peoples, Indigenous Voices Factsheet*, https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (last visited Feb. 3, 2022). The United Nations System has not adopted an official definition of the term **Indigenous**, but it is understood to include those who self-identify "as indigenous peoples at the individual level and [are] accepted by the community as their member" as well as those with a "strong link to territories and surrounding natural resources" with "resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities."

² Kristen Carpenter et al., *Conference Report: Implementing the United Nations Declaration on the Rights of Indigenous Peoples in the United States*, U. COLO. L. REV. 47, 59 (2019); see also CESCR, General Comment No. 21: Right of Everyone to Take Part in Cultural Life (Art. 15, Para. 1(a), of the International Covenant on Economic, Social and Cultural Rights), P 37, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009). The UN Office of the High Commissioner for Human Rights links the declaration to Art.1 in the Human Rights Covenants that affirms the right to self-determination. The Committee on Economic, Social and Cultural Rights (CESCR) has further expanded on free, prior, and informed consent in general comment No. 21. In its interpretation of cultural rights, the Committee outlines that the right to participate in cultural life includes the right of indigenous peoples to restitution or return of lands, territories and resources traditionally used and enjoyed by indigenous communities if taken without the prior, and informed consent of the affected peoples. It also calls on States parties to "respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights" and to "obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk."

³ Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. J. INT'L HUM. RTS. 54, 58 (2011).

Indigenous peoples.⁴ The terms *consultation* and *free, prior, and informed consent* are not explicitly defined in UNDRIP.⁵ However, UNDRIP in Article 32(2) directs States to consult with and obtain the free and informed consent of Indigenous peoples “prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”⁶ States are also, under Article 19, instructed to consult with Indigenous peoples “before adopting and implementing legislative or administrative measures that may affect them.”⁷

The International Labour Organization’s (ILO) **Indigenous and Tribal Peoples Convention** No. 169 (Convention) of 1989 is a legally binding international treaty requiring governments to consult with Indigenous and Tribal peoples in decision-making processes that affect them.⁸ As with other ILO Conventions, States that are parties to Convention No. 169 must bring their domestic laws into conformity with its mandates subsequent to ratification.⁹ Article 6(2) of the ILO Convention requires that States undertake consultation with Indigenous peoples whenever consideration is being given to legislative or administrative measures that directly affect them and do so “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures”.¹⁰ Under Article 15(2):

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests

⁴ U.N. OFFICE OF THE HIGH COMM'R ON HUMAN RIGHTS, *Indigenous Peoples and the United Nations Human Rights System*, 8-9 (2013), <https://www.ohchr.org/documents/publications/fs9rev.2.pdf>.

⁵ See FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, *Free Prior and Informed Consent Manual for Project Practitioners*, 13 (2013), <https://www.fao.org/3/i6190e/i6190e.pdf>. In other documents, the United Nations (defines **free, prior, and informed consent** (FPIC) as a specific right that allows Indigenous people to give, withhold, or withdraw “consent to a project that may affect them or their territories” and “enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated.”

⁶ UNDRIP, *supra* note 1, art. 32(2).

⁷ UNDRIP, *supra* note 1, art. 19; *see also* art. 18 (providing that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights”); *see also* art. 30 (requiring consultations “prior to using their lands or territories for military activities”); *see also* art. 36(1) (requiring consultations to facilitate activities for “spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders”). UN Human Rights Programs have elaborated on FPIC,

⁸ ILO, *Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, *International Labour Organization*, June 27, 1989, 28 I.L.M. 1382 [hereinafter ILO Convention No. 169]. The Convention has been ratified by 24 countries.

⁹*Id.* at art. 38.

¹⁰ ILO Convention No. 169, *supra* note 8, at art. 6(2).

would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.¹¹

Additionally, Indigenous peoples “shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community” under Article 17(2).¹² The ILO’s Committee of Experts clarified that *consultations* “must be formal, full and exercised in good faith; and there must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord.”¹³

Regional Instruments and Bodies

The obligation to consult with Indigenous peoples has been affirmed and advanced at the regional level through the Inter-American Human Rights System. The System functions under the auspices of the Organization of American States (OAS), a regional organization composed of 35 independent States in the Western hemisphere. The System includes a series of international human rights instruments, including the American Declaration on Rights of Indigenous Peoples and two organs with aims to safeguard those rights: The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The OAS General Assembly adopted the **American Declaration on the Rights of Indigenous Peoples** in 2016.¹⁴ Although the Declaration is not legally binding, it stands as “a moral and political tool to guide countries’ laws, policies, and practices toward indigenous peoples and to interpret other relevant international laws.”¹⁵ The Declaration calls on States to consult with Indigenous peoples to obtain their FPIC “prior to the

¹¹ ILO Convention No. 169, *supra* note 8, at art. 15(2).

¹² ILO Convention No. 169, *supra* note 8, at art. 17(2); *see also* ILO, Indigenous & Tribal Peoples’ Rights in Practice, at 99 (2009), https://pro169.org/res/materials/en/general_resources/IPsRightsInPractice-singlepages.pdf. The Convention does not describe the types of circumstances meriting consultation pursuant to this provision. However, “in the preparatory work for the Convention, many delegates took the position that lands owned by indigenous persons, and especially communal lands, should be inalienable.” The Conference Committee in a closed decision resolved that “Article 17 should continue the line of reasoning pursued in other parts of the Convention, according to which indigenous and tribal peoples shall decide their own priorities for the process of development (Article 7) and that they should be consulted through their representative institutions whenever consideration is being given to legislative or administrative measures which may affect them directly (Article 6).”

¹³ CEACR, *General Observation Concerning Indigenous and Tribal Peoples Convention*, 1989 (No. 169) Ecuador, ILO Doc. 062010ECU169, 10 (2010).

¹⁴ OAS, *American Declaration on the Rights of Indigenous Peoples*, AG/RES.2888 (XLVI-O/16) (June 15, 2016), <https://www.oas.org/en/sare/documents/DecAmIND.pdf> [hereinafter *American Declaration*].

¹⁵ INDIAN LAW RESOURCE CENTER, *The American Declaration on the Rights of Indigenous Peoples Background Materials and Strategies for Implementation*, 1 (2017), [https://indianlaw.org/sites/default/files/ADRIP%20Booklet%20\(web%20version\).pdf](https://indianlaw.org/sites/default/files/ADRIP%20Booklet%20(web%20version).pdf).

approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources” under Article 29(4).¹⁶ States are directed to consult with Indigenous peoples to obtain their FPIC “before adopting and implementing legislative or administrative measures that may affect them under Article 23(2) and when States “adopt measures necessary to ensure that national and international agreements and regimes provide recognition and adequate protection for the cultural heritage of indigenous peoples and intellectual property associated with that heritage.”¹⁷

The Inter-American Court of Human Rights (IACtHR) is a regional human rights tribunal with authority to determine “if a State has incurred an international responsibility for violating a right enshrined in the American Convention or other relevant human rights treaties in the Inter-American System” and to supervise States’ compliance with sentences handed down by the Court.¹⁸ The 2007 case of *Saramaka People v. Suriname* is known as the first binding international decision recognizing Indigenous peoples’ right to consultation.¹⁹ The IACtHR held in favor of the Saramaka People, a Tribal community in the upper Suriname River region, on the grounds that Suriname violated Article 32 of UNDRIP when it did not consult with affected communities or obtain their FPIC prior to granting mining and logging concessions to companies in Saramaka territory.²⁰ In the 2012 landmark case *Sarayaku v. Ecuador*, the IACtHR held in favor of the Sarayaku People, an Indigenous group of the southern Ecuadorean Amazon, after finding that Ecuador violated its obligation under ILO Convention No. 169 to consult with the Sarayaku people before approving oil extraction projects that would adversely affect the natural and cultural resources in Sarayaku territory.²¹

The African Charter on Human and Peoples’ Rights established the African Commission on Human and Peoples’ Rights (ACHPR), a quasi-judicial body responsible for promoting and

¹⁶ American Declaration, *supra* note 14, at art. 29(4); *see also* art. 20 (instructing states to consult with Indigenous peoples to ensure the right to assemble, which includes access and use of “sacred and ceremonial sites and areas”).

¹⁷ American Declaration, *supra* note 14, at art. 23(2), 28(3).

¹⁸ INTER-AMERICAN COURT OF HUMAN RIGHTS, *ABC of the Inter-American Court of Human Rights: What, How, When and Why of the Inter-American Court of Human Rights*, at 10 (2019), https://www.corteidh.or.cr/sitios/libros/todos/docs/ABCCorteIDH_2019_eng.pdf.

¹⁹ *Confirming Rights: Inter-American Court Rulings*, CULTURAL SURVIVAL <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/confirming-rights-inter-american-court-ruling-marks-key> (last visited May 29, 2024); *see Saramaka, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, (Nov. 28, 2007)*.

²⁰ *Id.* at 40 (The court also relied on Suriname’s legal and constitutional framework in reaching its decision).

²¹ *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, (June 27, 2012)* (The I/A Court affirmed that the right to consultation is also fully recognized at the domestic level, in Ecuador’s Constitution and provisions of several laws).

protecting human and peoples' rights.²² The ACHPR established a Working Group on Indigenous Populations/Communities (WGIP) in Africa that "is responsible for seeking and receiving information from individuals, governmental and non-governmental organizations and institutions, and other stakeholders concerning cases or situations that involve the human rights of indigenous peoples."²³ A report released by the Working Group cited a study reviewing the effect of logging operations on two Indigenous groups, the Bagyeli and Baka, concluding that "during the planning and preparation, consultations with the local communities, particularly the Bagyeli, were culturally inappropriate and inadequate and that they had not been informed of the implications of the project for their future."²⁴ In Namibia, the report found that consultation with the Himba people regarding the planned construction of a hydroelectric dam has been "very limited and there has been little political will to listen to their protests and to enter into a dialogue with the Himba on their perceptions of development, the consequences of the dam construction on their way of life and the kind of future they would like to see for themselves."²⁵ In 2018, Commissioner Soyata Maiga, Chairperson of both the ACHPR and the WGIP, made an urgent appeal to the President of the State of Eritrea regarding the forced evictions of the Afar and Kunama peoples from their ancestral lands that occurred without prior consultation "as a result of a United Arab Emirates military base construction and expansion project in and around the port city of Assab of the Southern Red Sea Region."²⁶ Though the base has begun to be dismantled by the UAE government, to this day the Afar and Kunama have not received compensation nor been restored to their traditional territory.²⁷

Country Snapshots

What follows is a brief survey of States' treatment of prior consultation and FPIC in many of the various geopolitical regions. The sample was chosen to illustrate the range of approaches countries have taken, including States with particularly strong or particularly weak protections, those which have been the site of influential international case law, or some combination thereof. This sample is by no means exhaustive of States' approaches to

²² AFRICAN COMM'N ON HUM. AND PEOPLES' RIGHTS, *Mandate of the Commission*, <https://achpr.au.int/en/about/mandate> (last visited May 29, 2024).

²³ INTERNATIONAL JUSTICE RESOURCE CENTER, *Working Group on Indigenous Populations / Communities in Africa*, <https://ijrcenter.org/regional/african/working-group-on-indigenous-populations-communities-in-africa/> (last visited May 29, 2024).

²⁴ AFRICAN COMM'N ON HUM. AND PEOPLES' RIGHTS, *Report of The African Commission's Working Group of Experts on Indigenous Populations/Communities*, at 28 (2005), https://www.iwgia.org/images/publications/African_Commission_book.pdf.

²⁵ *Id.* at 29.

²⁶ AFRICAN COMM'N ON HUM. & PEOPLES' RIGHTS, *Inter-Session Activity Report of Commissioner Soyata Maiga* (Nov. 13, 2018), https://www.achpr.org/public/Document/file/English/comm_maiga_63_act_report_wgip_eng.pdf.

²⁷ ERITREAN AFAR NATIONAL CONGRESS, *Decolonizing the Afar in Eritrea*, 5 (2023), <https://www.togoruba.org/togoruba1964/mainTogorubamap/mainMap/headingMap/2023/0406AO23-01AE.pdf>.

consultation or FPIC rights and leaves out some important decisions by State or international tribunals. The goal is to illustrate the complexity and conflict that often surrounds the implementation of consultation and the process of seeking and obtaining FPIC from Indigenous communities or the failure of States to do so.

United States

The United States initially voted against UNDRIP but later issued a Statement of Support of the Declaration in 2010.²⁸ The Statement of Support is qualified, as it declares that UNDRIP is “not legally binding or a statement of current international law” but nonetheless maintains “moral and political force.”²⁹ Despite this qualification, the United States expressed its aspiration to implement the human rights principles of UNDRIP “within the structure of the U.S. Constitution, laws, and international obligations.”³⁰ The United States has not ratified ILO Convention No. 169 and has not recognized the jurisdiction of the IACtHR.³¹ However, the federal government did obtain FPIC in the consent agreements reached by Indigenous peoples and the U.S. Forest Service and U.S. National Park Service regarding the management of sacred sites on public lands at Medicine Wheel and Devils Tower National Monuments.³² An overview of the domestic Indian law framework for Tribal consultation in the United States can be found in this report’s review of Federal Consultation.

²⁸ U.S. DEPT OF STATE, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous People* (Jan. 12, 2011), <https://2009-2017.state.gov/s/srgia/154553.htm>.

²⁹ *Id.*

³⁰ *Id.*

³¹ ILO, *Ratifications of C169*

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314, (last visited Feb. 3, 2022) [hereinafter *Ratifications of C169*]; IACtHR, *What is the I/A Court H.R.?*, https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en (last visited May 30, 2024) (indicating jurisdiction covering Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay); see also IACHR, *Report On Admissibility Navajo Communities Of Crownpoint And Church Rock United States Of America* (Mar. 28, 2021), <http://www.oas.org/en/iachr/decisions/2021/USAD654-11EN.pdf>. The Eastern Navajo Diné Against Uranium Mining filed a petition to the IACHR (Commission) in 2011 alleging “multiple violations of the American Declaration because of a license granted by the United States Nuclear Regulatory Commission to Hydro Resources, Inc. to conduct uranium mining in the Navajo communities of Crownpoint and Church Rock, located in Northwestern New Mexico.” In March 2021, the Commission determined the report was admissible. The Commission stated in its Admissibility Report that “the State must put in place special and differentiated mechanisms for the effective consultation of the indigenous peoples affected in accordance with their own traditions and decision-making methods, at the early stages of a development or investment plan.” As a result, the Commission concluded that “it is competent to review whether the administrative remedies available to the petitioners in the present case were in line with Inter-American standard.”

³² Carpenter, *supra* note 2, at 88.

Canada

Canada originally voted against UNDRIP but reversed its opinion and officially endorsed it in 2016.³³ Canada has not ratified ILO Convention No. 169.³⁴ Although Canada is not a signatory to the American Convention, the Inter-American system considers Canada—and all OAS member states— as bound to the American Declaration.³⁵ The duty to consult is not explicit in the Canadian constitution or legislation.³⁶ However, the duty is a constitutional requirement grounded in the common law principle of the “Honour of the Crown,” the “Crown’s assumption of sovereignty over lands and resources formerly held by Indigenous peoples” and is enshrined in section 35 of the *Constitution Act, 1982*.³⁷ Domestic jurisprudence from the Supreme Court of Canada has developed the doctrine of the duty to consult with First Nations, Inuit, and Métis people in three major cases: *Haida Nation v. British Columbia*, *Taku River First Nation v. British Columbia*, and *Mikisew Cree First Nations v. Canada*.³⁸ These decisions confirm that the duty to consult and, where appropriate, accommodate Aboriginal interests “exists whenever there is knowledge of the potential existence of an Aboriginal right or title.”³⁹ However, the “duty to consult and, where appropriate, accommodate does not dictate a particular outcome and the Crown is not held to a level of perfection in fulfilling its duty.”⁴⁰ The federal government, federal departments and agencies, and all Canadian provinces and territories have developed policies or guidelines applying the duty to consult.⁴¹ In June 2021, the UNDRIP Act (Bill C-15) received Royal Assent and became law.⁴² The Act “provides a road map for the Government of Canada to work in consultation and cooperation with First Nations, Inuit

³³ INDIGENOUS FOUNDATIONS, *UN Declaration on the Rights of Indigenous Peoples* https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/ (last visited Feb. 3, 2022);

³⁴ Ratifications of C169, *supra* note 31.

³⁵ Ward, *supra* note 3, at 71

³⁶ Isabelle Brideau, *The Duty to Consult Indigenous Peoples* (2019), https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201917E.

³⁷ *Id.*

³⁸ Ward, *supra* note 3, at 71

³⁹ *Id.*

⁴⁰ Isabelle Brideau, *supra* note 35.

⁴¹ Isabelle Brideau, *supra* note 35.

⁴² HOUSE OF COMMONS OF CANADA, Bill C-15 (May 25, 2021); *see also* GOVERNMENT OF CANADA, *Government of Canada advances implementation of the United Nations Declaration on the Rights of Indigenous Peoples Act* (Dec. 10, 2021), <https://www.canada.ca/en/department-justice/news/2021/12/government-of-canada-advances-implementation-of-the-united-nations-declaration-on-the-rights-of-indigenous-peoples-act.html>.

and the Métis Nation on the development of an action plan, including measures to ensure federal laws are consistent with the Declaration.”⁴³

Ecuador

Ecuador voted in favor of UNDRIP and has ratified ILO Convention No. 169.⁴⁴ The Constitution of the Republic of Ecuador in Article 57(7) guarantees Indigenous communities, peoples and nations the right to “free prior informed consultation” for plans on their lands that could have an environmental or cultural effect on them.⁴⁵ Decree 1247, passed in 2012, provides that Indigenous people only have to partake in the consultation process, not provide their consent.⁴⁶ In 2020, legislators prepared a draft bill on the free, prior, and informed consultation standard (not the FPIC standard of UNDRIP) but did not consult with Indigenous peoples in preparing the draft.⁴⁷ As of 2022, it appears this bill is still being discussed in the National Assembly.⁴⁸ In the 2018 case of *Cofán*, the Provincial Court in Ecuador’s Sucumbíos province held in favor of the Cofán Indigenous people, finding that the community’s right to free, prior, and informed consultation had been violated by government authorities before major mining operations were approved and underway in their territory.⁴⁹ In the 2019 case *Waorani*, the Pastaza Provincial Court voided the Ecuadorian government’s consultation process with the Waorani people concerning the government’s plan to extract oil in their territory on the grounds that the consultation contained numerous structural flaws, was performed in bad faith, and disregarded Waorani’s traditional governance and decision-making practices.⁵⁰ In 2021, Ecuador’s Constitutional Court selected these two cases as the bases to determine whether Ecuador’s free, prior, and informed consultation process satisfies Constitutional requirements and

⁴³ *Id.*

⁴⁴ Ratifications of C169, *supra* note 31.

⁴⁵ Const. of the Republic of Ecuador, art. 57(7); *see also* Art. 57(17) Consultation must also be conducted prior to the adoption of legislation that may affect their collective rights

⁴⁶ *Ecuador’s Consultation Process for Indigenous Lands Comes Under the Microscope*, MONGABAY (Nov. 4, 2021), <https://news.mongabay.com/2021/11/ecuadors-consultation-process-for-indigenous-lands-comes-under-the-microscope/>.

⁴⁷ *Manufacturing Consent: Ecuador to Draft New Bill on the Consultation of Indigenous Peoples, Without Consulting Them*, AMAZONWATCH (Nov. 18, 2020), <https://amazonwatch.org/news/2020/1118-manufacturing-consent-ecuador-to-draft-new-fpic-bill-without-indigenous-consultation>.

⁴⁸ *Declaration from Ecuador’s Indigenous Movement*, AMAZON FRONTLINES (Nov. 19, 2020), <https://www.amazonfrontlines.org/chronicles/ecuador-indigenous-movement-free-prior-informed-consent-declaration/>.

⁴⁹ *Ecuador’s Indigenous Cofán Hail Court-Ordered End to Mining On Their Land*, MONGABAY (Feb. 11, 2019), <https://news.mongabay.com/2019/02/ecuadors-indigenous-cofan-hail-court-ordered-end-to-mining-on-their-land/>.

⁵⁰ *Waorani People Win Landmark Legal Victory Against Ecuadorian Government*, AMAZON FRONTLINES (April 26, 2019), <https://www.amazonfrontlines.org/chronicles/waorani-victory/>.

will issue a ruling establishing new consultation standards. As of February 2022, Ecuador's Constitutional Court set a new legal precedent requiring that the outcome of all consultation processes must result in consent from Indigenous peoples before a project may move forward.⁵¹ In November 2023, the Court ordered the National Assembly to pass a bill codifying the FPIC standard. That bill, the text of which complies with the mandates of ILO Convention No. 169, was introduced to the National Assembly for consideration on May 8, 2024, though full approval is not expected until late this year or early 2025.⁵²

Colombia

Colombia expressed support for UNDRIP in 2009⁵³ and has ratified ILO Convention No. 169.⁵⁴ Article 7 of Colombia's 1991 Constitution "recognizes and protects the ethnic and cultural diversity of the Colombian nation," while Article 8 creates an obligation that the State "protect the cultural and natural assets of the nation."⁵⁵ Taken together, the 1991 Constitution and the ratification of Convention No. 169 create a binding right of prior consultation for matters affecting Indigenous people in Colombia.⁵⁶ However, the duty to consult is not always conducted properly and sometimes carried out under pressure.⁵⁷ In 2008, the Colombian Constitutional Court ruled the nation's Forest Law unconstitutional for lack of prior consultation with affected Indigenous communities, thereby recognizing the right of consultation to extend to the development of legislation potentially impacting Indigenous lands.⁵⁸ In 2011, the Court found that Indigenous Peoples' right to FPIC was violated when a representative of a utility company developing electric transmission lines entered Indigenous territories to take measurements, stating that development projects

⁵¹ *Indigenous Rights Victories at Ecuador's High Court Deal Blow to Government's Plans to Expand Oil and Mining*, AMAZON WATCH (Feb. 15, 2022), <https://amazonwatch.org/news/2022/0215-indigenous-rights-victories-at-ecuadors-high-court-deal-blow-to-governments-plans-to-expand-oil-and-mining>.

⁵² *Prior Consultation Bill Raises Hopes in Ecuador*, BNAMERICAS (May 11, 2024), <https://www.bnamericas.com/en/features/prior-consultation-bill-raises-hopes-in-ecuador>.

⁵³ Briefing Notes, *Colombia's Support for U.N. Declaration on Indigenous People Welcomed*, UNHCR (Apr. 24, 2009), <https://www.unhcr.org/news/briefing-notes/colombias-support-un-declaration-indigenous-people-welcomed>.

⁵⁴ Ratifications of C169, *supra* note 31.

⁵⁵ Colom. Const. arts. 7, 8.

⁵⁶ César Rodríguez Garavito & Carlos Andrés Baquero Díaz, *The Right to Free, Prior, and Informed Consultation in Colombia: Advances and Setbacks*, OHCHR – EMRIP (2018), <https://www.ohchr.org/sites/default/files/Documents/Issues/IPeoples/EMRIP/FPIC/GaravitoAndDiaz.pdf>.

⁵⁷ U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, *Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights in Colombia*, ¶ 95, U.N. Doc. A/HRC/19/21/Add.3 (Jan. 31, 2012).

⁵⁸ AIDA, *Victory: Constitutional Court Defends Right to Prior Consultation*, <https://aida-americas.org/en/victory-constitutional-court-defends-right-prior-consultation> (last visited May 28, 2024).

“cannot be imposed when such projects are developed in Indigenous Peoples’ territories.”⁵⁹ In 2023, the Court again held that the Yukpa Peoples’ right to FPIC was violated when mining projects were carried out in their traditional territory without prior consultation and consent.⁶⁰

Australia

Australia formally issued its support for UNDRIP in 2009 after having initially voted against it and has not ratified ILO Convention No. 169.⁶¹ There is “no comprehensive national legislation or agreement that frames Indigenous–government relations” in Australia.⁶² The Native Title Act of 1993 identifies consultation as a procedural right when proposed management plans or public works affect native title claimants.⁶³ Land and cultural heritage legislation and associated consultation obligations vary across state or territory jurisdictions.⁶⁴ For example, in 2023, Western Australia finalized guidelines to support the Aboriginal Cultural Heritage Act of 2021, which requires prior consultation with Aboriginal people for any land use permits that may impact their cultural heritage.⁶⁵ In New South Wales, consultation is a part of the impact assessment required for the issuance of Aboriginal cultural heritage impact permits, which are designed to minimize the impact of land use on Aboriginal places and objects.⁶⁶ In 2022, the United Nations Human Rights Committee (HRCComm) responded to a petition presented by a group of Torres Strait Islanders alleging human rights violations by the Australian government for climate change related impacts to their cultural and traditional way of life.⁶⁷ While the decision is primarily

⁵⁹ *Colombian Court Confirms Indigenous Peoples’ Right to Free, Prior, and Informed Consent*, CULTURAL SURVIVAL (May 10, 2011), <https://www.culturalsurvival.org/news/colombian-court-confirms-indigenous-peoples-right-free-prior-and-informed-consent>.

⁶⁰ *Colombia’s Constitutional Court Upholds Yukpa Peoples’ Rights*, U. OF AMSTERDAM (Nov. 9, 2023), <https://www.uva.nl/en/shared-content/faculteiten/en/faculteit-der-rechtsgeleerdheid/news/2023/11/ruling-columbia-constitutional-court-in-favour-of-yukpa-peoples.html>.

⁶¹ Ratifications of C169, *supra* note 31.

⁶² Janet Hunt, *Engaging with Indigenous Australia*, CLOSING THE GAP CLEARINGHOUSE 1, 21 (Oct. 4, 2013).

⁶³ EMRC, *Regional Aboriginal Consultation Guidelines*, 8 (2013), https://www.emrc.org.au/Profiles/emrc/Assets/ClientData/Documents/Page_Content/Environmental_Services/Swan_Helena/Regional-Aboriginal-Consultation-Guidelines.pdf.

⁶⁴ Hunt, *supra* note 61, at 21.

⁶⁵ OFF. OF ABORIGINAL AFF. MINISTER DR. TONY BUTI, *Guidelines Released for New Aboriginal Cultural Heritage Law*, GOV’T OF W. AUSTRAL. (Apr. 6, 2023), <https://www.wa.gov.au/government/media-statements/McGowan-Labor-Government/Guidelines-released-for-new-Aboriginal-cultural-heritage-laws-20230406>.

⁶⁶ DEP’T OF ENV’T, CLIMATE CHANGE AND WATER, *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010*, N.S.W. GOV’T (Apr. 2010), <https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Aboriginal-cultural-heritage/aboriginal-cultural-heritage-consultation-requirements-for-proponents-2010-090781.pdf>.

⁶⁷ Human Rights Committee ‘Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019’ UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) (Daniel Billy Decision).

significant for its effect on human rights duties as related to climate change, in their response, the HRCComm ordered as a remedy that the Australian government engage in consultation with the Torres Strait Islanders to determine their needs in adapting to sea level rise.⁶⁸

Norway

Norway voted in favor of UNDRIP and was the first country to ratify ILO Convention No. 169.⁶⁹ Norway's Constitution obligates State authorities to enable the Sámi to develop its "language, culture, and way of life."⁷⁰ The primary consultation tool for the Sámi in Norway is the Consultation Agreement of 2005, which formalized the right of the Sámi peoples to participate in consultations and decision-making processes.⁷¹ Chapter 4 of Norway's "Sámi Act" requires consultation when the issue or measure directly affects the Sámi in a manner different from the rest of society.⁷² Still, as Norway begins to develop green energy projects in and around Sámi territory, FPIC duties are sometimes not carried out or enforced.⁷³ A proposed amendment to the Sámi Act in Norway, the Bill on Consultations, is slated to impose additional consultation duties not limited to matters concerning land or natural resources, but to all issues that directly affect Sámi interests.

Sweden

Sweden voted in favor of UNDRIP but did not ratify ILO Convention No. 169. Sweden's Constitution recognizes the right of Sámi to practice reindeer husbandry and their right to develop a cultural and social life.⁷⁴ The Swedish Parliament voted in January 2022 to adopt the Sámi Consultation Law and an amendment to that law "requiring that the Swedish government, government agencies, and municipalities consult with the Sámi Parliament or other Sámi representatives on issues of special significance to the Sámi people."⁷⁵ The law

⁶⁸ *Id.* at 17; see also Fiona McGaughey, Amy Maguire, & Sasha Purcell, *Torres Strait Islanders Leading The Charge on the Human Rights Implications of Climate Change: Daniel Billy Et Al V Australia*, 51(2) U. OF W. AUSTL. L. REV. 88 (2023).

⁶⁹ Ratifications of C169, *supra* note 31.

⁷⁰ Norway Const. art. 108.

⁷¹ Øyvind Ravna, *The Duty to Consult the Sámi in Norwegian Law*, 11 ARCTIC REV. ON L. AND POL. 233 (2020).

⁷² Act of 12 June 1987 No. 56 concerning the Sameting (the Sámi parliament) and other Sámi legal matters (the Sámi Act) §§ 4-1 – 4-10 (amended 2021).

⁷³ Joseph Lee, *Why an Essential Part of Indigenous Rights and International Law is Rarely Enforced*, GRIST (Apr. 27, 2022), <https://grist.org/global-indigenous-affairs-desk/fpic-is-essential-indigenous-rights-what-is-it-why-isnt-it-followed/>.

⁷⁴ Sweden Const. art. 17, 2.

⁷⁵ LIBRARY OF CONGRESS, *Sweden: Swedish Parliament Adopts Sámi Parliament Consultation Order* (2022), <https://www.loc.gov/item/global-legal-monitor/2022-02-03/sweden-swedish-parliament-adopts-sami-parliament-consultation-order/>.

does not require that the government and the Sámi reach consensus at the end of the consultation.⁷⁶

Democratic Republic of the Congo

The Democratic Republic of the Congo (DRC) voted in favor of UNDRIP but has not ratified ILO Convention No. 169.⁷⁷ In 2022, the law on the Promotion and Protection of the Rights of the Indigenous Pygmy Peoples was signed into law.⁷⁸ Among other things, the law provides for consultation with and FPIC from Congo Pygmy peoples for development considerations in their territories.⁷⁹ The law comes after decades of displacement resulting from natural resource extraction, development, and land conservation, including the creation of Virunga National Park, often with either limited or no prior consultation.⁸⁰ There is concern among Indigenous people that the new law, like prior laws that had encouraged consultation, will not be enforced by the Congolese justice system.⁸¹

Kenya

The Kenyan government did not vote in favor of UNDRIP and has not ratified ILO Convention No. 169.⁸² However, in 2017, the African Court on Human and Peoples Rights (ACHPR) ruled in favor of the Ogiek people following their displacement by the Kenyan Forest Service arising out of a land conservation project in the Mau Forest in 2009.⁸³ The ruling required the Kenyan government to consult the Ogiek to create collective land title and ensure use and enjoyment of their lands.⁸⁴ That order was not followed by the Kenyan government and, in 2022, the ACHPR again ruled for the Ogiek.⁸⁵ The 2022 ruling reiterated

⁷⁶ *Id.*

⁷⁷ Ratifications of C169, *supra* note 31.

⁷⁸ Patrick Saidi Hemedi, *After 14 years of advocacy, the DRC president finally signs new Indigenous peoples law (commentary)*, MONGABAY (Nov. 16, 2022), <https://news.mongabay.com/2022/11/after-14-years-of-advocacy-the-drc-president-signs-new-indigenous-peoples-law-commentary/>.

⁷⁹ *New law adopted in DR. Congo to promote and protect Indigenous peoples' rights*, RAINFOREST FOUNDATION NORWAY (last visited May 28, 2024), <https://www.regnskog.no/en/news/ny-urfolkslov-er-en-stor-og-viktig-seier-for-urfolk-i-dr-kongo>.

⁸⁰ Hemedi, *supra* note 77.

⁸¹ IWGIA, COUNTRY TECHNICAL NOTES ON INDIGENOUS PEOPLES' ISSUES: DEMOCRATIC REPUBLIC OF THE CONGO, 5 (Mar. 2022).

⁸² Mali Ole Kaunga, *The Indigenous World 2023: Kenya*, IWGIA (Mar. 24, 2023), [https://www.iwgia.org/en/kenya/5054-iw-2023-kenya.html#:~:text=Kenya%20has%20ratified%20the%20International,Indigenous%20Peoples%20\(UNDRIP\)%20or%20ILO](https://www.iwgia.org/en/kenya/5054-iw-2023-kenya.html#:~:text=Kenya%20has%20ratified%20the%20International,Indigenous%20Peoples%20(UNDRIP)%20or%20ILO).

⁸³ Eunice Nsikak Olembo, *One Step Closer: Indigenous Peoples' Rights in the DRC*, MINORITY RIGHTS GROUP (Aug. 2, 2022), <https://minorityrights.org/one-step-closer-indigenous-peoples-rights-in-the-drc/>.

⁸⁴ *Id.*

⁸⁵ *Ogiek win another landmark victory in African Court*, MINORITY RIGHTS GROUP (Jun. 23, 2022), <https://minorityrights.org/ogiek-win-another-landmark-victory-in-african-court/>.

the land title consultation requirement and added an additional consultation requirement for all matters concerning development, investment, or conservation on their lands.⁸⁶ While the consultation and title orders have yet to be fully implemented by the Kenyan government, the ACHPR rulings are considered important precedent for land and consultation rights for Indigenous people throughout Africa.⁸⁷

Nepal

Nepal voted in favor of UNDRIP and is a signatory to ILO Convention No. 169.⁸⁸ At the national level, the Local Self Government Act 2055 BS states consultations must be carried out with Adivasi Janajati and local peoples for development activities.⁸⁹ However, a study conducted by several Nepali organizations found that almost all infrastructure development projects in Nepal are carried out without obtaining FPIC, in violation of national and international legal standards.⁹⁰ Moreover, the study found that as many as 174 laws and bills must be replaced or amended as they are not in line with UNDRIP and ILO Convention No. 169.⁹¹ In 2021, the European Investment Bank (EIB) pledged to resolve issues in its implementation of a power plant project after it received a complaint from Nepali civil society groups regarding EIB's failure to consult with local communities.⁹²

Philippines

The Philippines voted in favor of UNDRIP but has not ratified ILO Convention No. 169.⁹³ Further, the Indigenous Peoples' Rights Act of 1997 codified the right to consultation and FPIC for actions affecting culturally relevant places or objects, as well as those affecting Indigenous laws, traditions, and customs.⁹⁴ Passed prior to the international adoption of UNDRIP, the Act is considered foundational to Indigenous rights, even providing a clear definition of FPIC:

⁸⁶ *Id.*

⁸⁷ Salome Muiruri, *Eviction of the Ogiek People Despite Winning a Repatriation Case Against the Government of Kenya*, NATURAL JUSTICE (Nov. 3, 2023), <https://naturaljustice.org/eviction-of-the-ogiek-people-despite-winning-a-repatriation-case-against-the-government-of-kenya/>.

⁸⁸ Ratifications of C169, *supra* note 31.

⁸⁹ Cultural Survival, *Joint Submission on the Violations of Indigenous Peoples' Rights in Nepal*, 6 (July 2020).

⁹⁰ *Id.* at 5.

⁹¹ *Id.* at 4.

⁹² Rina Chandran, *Rare win for Nepal indigenous groups as EIB admits 'gaps' in hydropower project*, REUTERS (Apr. 30, 2021), <https://www.reuters.com/article/us-nepal-landrights-electricity/rare-win-for-nepal-indigenous-groups-as-eib-admits-gaps-in-hydropower-project-idUSKBN2CH1OR>.

⁹³ *The Indigenous World 2023: Philippines*, IWGIA (Mar. 29, 2023), <https://www.iwgia.org/en/philippines/5132-iw-2023-philippines.html#:~:text=The%20Philippines%20voted%20in%20favour,yet%20ratified%20ILO%20Convention%20169.>

⁹⁴ Indigenous Peoples' Rights Act, Republic Act No. 8371 §§ 7(b), 16, 17, 32, 33(a) (1997).

“[T]he consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.⁹⁵

Even with such strong recognition and protection of Indigenous peoples, FPIC processes are often complicated by the country’s attempts to develop hydroelectric energy projects⁹⁶ and extractive industries.⁹⁷ The FPIC process is the responsibility of a government agency, the National Commission on Indigenous Peoples (NCIP), that is supposed to work in conjunction with other agencies, such as the Department of Energy, to obtain FPIC before the approval of any project and even before individual phases of a given project are carried out.⁹⁸ However, the NCIP often does not conduct consultation until a given project has been effectively approved.⁹⁹ Post-colonial States, including the Philippines, operate from a presumption of sovereign ownership of natural resources and treat Indigenous land recognition as ownership over possessory rights, or a right to occupy and use the land, rather than private ownership of the land and resources themselves.¹⁰⁰ The diminution of Indigenous peoples’ FPIC rights amidst the State’s desire to develop natural resources projects is at the heart of conflicts over the denial of Indigenous prior consultation around the globe.¹⁰¹

⁹⁵ *Id.* § 3(g).

⁹⁶ Armi Beatriz E. Bayot, *Free, Prior, and Informed Consent in the Philippines: A Fourth World Critique*, in HUMAN RIGHTS IN THE EXTRACTIVE INDUSTRIES 281, 295-98 (Isabel Feichtner, et al eds., 2019).

⁹⁷ Maileenit A. Peñalba, *Indigenous Peoples Versus the State: FPIC and Resource Extraction in the Cordillera Region, Philippines*, 14 PUB. POLY 83, 85-87 (2016).

⁹⁸ Bayot, *supra* note 95, at 294-95.

⁹⁹ *Id.* at 295-99.

¹⁰⁰ *Id.* at 301-02.

¹⁰¹ *Id.* at 303-04.