

The South Africa High Court *Baleni* judgment: towards an indigenous right to consent?

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ABSTRACT: In the *Baleni* judgment the High Court of South Africa declared that the Umgungundlovu community has a right to consent before the exploitation of mineral resources in their traditional lands. This decision represents one of the few cases where a domestic court refers to a right to consent of an indigenous community under both domestic and international law. The article aims to explore the compatibility of the Court's findings with the current international law standard on permanent sovereignty over natural resources and on indigenous peoples' right to free, prior and informed consent to explore whether it is possible to conceive an indigenous right to consent, as a veto power, before the exploitation of natural resources on their lands. In doing so, the case discussion focuses on the possible impact of such judgment on the jurisprudence of the African Court and Commission on Human and Peoples' Rights. Furthermore, the article outlines how the findings of the Court may contribute to strengthening the concept of an indigenous right to free, prior and informed consent.

TITRE ET RÉSUMÉ EN FRANCAIS:

L'arrêt *Baleni* de la Haute Cour d'Afrique du Sud: vers un droit des peuples autochtones au consentement?

RÉSUMÉ: Dans l'arrêt *Baleni*, la Haute cour d'Afrique du Sud a déclaré que la communauté Umgungundlovu jouit du droit de consentement préalablement à l'exploitation des ressources minérales sur ses terres traditionnelles. Cette décision représente l'un des rares cas où un tribunal national fait référence à un droit au consentement des populations autochtones en vertu du droit national et international. Ce commentaire vise à examiner l'adéquation de la décision de la Haute cour avec le principe de souveraineté permanente sur les ressources naturelles consacré en droit international et le droit des populations autochtones au consentement préalable, libre et éclairé. Ce commentaire questionne, en outre, la possible existence d'un droit de consentement des populations autochtones, comme un droit de veto, avant toute exploitation des ressources naturelles sur leurs terres. Ce faisant, ce commentaire d'arrêt se concentre sur l'impact possible d'un tel arrêt sur la jurisprudence de la Cour et de la Commission africaine des droits de l'homme et des peuples. En outre, il met en exergue la manière dont les conclusions de la Cour peuvent contribuer au renforcement du concept d'un droit autochtone au consentement libre, préalable et éclairé.

KEY WORDS: right to free, prior and informed consent, indigenous peoples, Umgungundlovu community, African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, natural resources

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1 INTRODUCTION

The exploitation of natural resources in lands traditionally occupied by indigenous peoples poses several questions on the relationship between the right of states to permanent sovereignty over the natural resources and the right to free, prior and informed consent (FPIC) enjoyed by those communities under international law. This tension is particularly relevant in projects involving the exploration and exploitation of subsoil resources such as oils and minerals located within indigenous lands, which may have a significant impact on the peoples living in such areas.

In the *Baleni* judgment the High Court of South Africa, considering both domestic and international law, declared that the Umgungundlovu community has a right to consent before the exploitation of mineral resources in their traditional lands. This represents one of the few cases where an indigenous community is conceived as the holder of a right to consent, and not to consultations, under both domestic and international law. The reference of the High Court to international law implies some relevant questions, including the compatibility of the Court's findings with the current international legal content of permanent sovereignty over natural resources and with the indigenous right to FPIC. Furthermore, another significant issue is represented by the possible implications of this judgment for the African Human Rights system and for the exploitation of natural resources in the African continent.

The article is divided into five sections. While Section 2 provides a description of the main facts of the dispute, Section 3 illustrates the findings of the High Court. In Section 4, the article outlines the compatibility of the judgment with current international law on permanent sovereignty over natural resources and on FPIC, including in the African Human rights system. Finally, Section 5 outlines the possible impact of the judgment on the connotation of the right to FPIC in the African Human rights system and on the successive development of international law in this field.

2 MAIN FACTS

The judgment refers to a dispute before the High Court of South Africa between the Umgungundlovu community, headed by Duduzile Baleni

and part of the Amadiba traditional authority, and the Australian mining company Transworld Energy and Mineral Resources (TEM).¹ The applicants occupy since generations the area of Umgungundlovu, and their informal rights over such land are indisputably held under the Interim Protection of Informal Land Rights Act (IPILRA)² and customary law.³ TEM applied for mining rights for titanium ores and other heavy materials in an area of 2859 hectares near a coastland area. Precisely, TEM aimed to conduct various mining activities and installation of plants on some 900 hectares within that zone, while the rest of the area would have been interested in power lines, access roads, services and accommodation of employees.⁴ The proposed mining area is populated by a significant number of the applicants and their families, while others live in close proximity.⁵ The area has particular spiritual significance for the community since it includes traditional family graves who have a fundamental value for their cultural rights. Furthermore, the disputed area is traditionally used, owned and occupied by the Umgungundlovu community, having thus also a peculiar importance for the life and subsistence of the community, including for food and water resources and also for potential tourist related activities.⁶ In order to prevent the intrusion of strangers and protect this sacred area, decisions on land application by subjects not part of the community are traditionally adopted with a higher degree of consensus than a mere majority method.⁷

The impact of the proposed mining activities on the Umgungundlovu traditional land and of its natural resources would have included possible social, economic and environmental consequences, as well as physical displacement of the community

- 1 Duduzile Baleni headed also the Umgungundlovu iNkosana Council, a customary institution of the community.
- 2 Interim Protection of Informal Land Rights Act 31 of 1996 (the 'IPILRA'). In general, O Ülgen 'Developing the doctrine of Aboriginal title in South Africa: source and content' (2002) 46(2) *Journal of African Law* 131-154; on the *Baleni* case and on South African domestic law on land rights, also Y Meyer '*Baleni v Minister of Mineral Resources: paving the way for formal protection of informal land rights*' (2020) 23 *Potchefstroom Electronic Law Journal* 23; HJ Kloppers & GJ Pienaar 'The historical context of land reform in South Africa and early policies' (2014) 17 *Potchefstroom Electronic Law Journal* 677-706; J Dugard 'Unpacking section 25: what, if any, are the legal barriers to transformative land reform?' (2019) 9 *Constitutional Court Review* 136-160; AJ van der Walt 'Land reform in South Africa since 1990 – an overview' (1995) 10 *South African Public Law* 1-30.
- 3 *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018) (*Baleni* case), para 3.
- 4 *Baleni* (n 3) paras 4-5.
- 5 Already in 2008, the government granted mining rights to Mineral Resources Company, the holding company of TEM. The project was initially supported by the chief of the community, but some of its members did not support it. Since 9 June 2017 a moratorium of 18 months decided by the Minister of Mineral Resources suspended mining activities.
- 6 *Baleni* (n 3) paras 8-9, 11-13. In general, Bradley Frolick, 'The Granting of Mining Rights Over Cultural (Heritage) Land in South Africa and Canada – A Comparative Analysis' (3 July 2020).
- 7 *Baleni* (n 3) para 10.

members and the destruction of their way of life. For such reasons, the community opposed the TEM project.⁸ The applicants underlined that, considering the potential consequences of the project, the support of the mining activities would require a higher degree of consensus and a prior detailed and accurate information about the possible consequences of the projects, including guarantee of sufficient compensation for any harm and loss suffered.⁹ Furthermore, the applicants noted how they were not involved in the procedures which led to grant mining rights to TEM and that the Australian company did not make any proposal to mitigate the impact of the mining activities.¹⁰ According to the applicants, IPILRA Section 2(1) required a prior free and informed consent before the community would have been deprived of its lands for mining activities.

By contrast, both TEM and government parties claimed that the Mineral and Petroleum Resources Development Act (MPRDA)¹¹ did not grant the applicants a right to consent but a more limited right to be consulted before the concession of mining rights by the Government to the mining company.¹² Nevertheless, the applicants affirmed that, considering both domestic and international law, a traditional community cannot be compared to common-law owners and that the vulnerability of the community and its peculiar relationship with the land implied higher degree of protection and hence their consent before the realisation of the project.¹³

3 FINDINGS OF THE COURT

In its findings the High Court of South Africa first highlighted how the interpretation of relevant domestic legislation shall consider existing international law, as prescribed by sections 39(1)(b) and 233 of the South African Constitution.¹⁴

According to section 3 of the MPRDA, the state is the custodian of all mineral and petroleum resources on behalf of the people of South Africa, thus having the exclusive right on the exploitation of those natural resources.¹⁵ In doing so, the provision is consistent with the

8 *Baleni* (n 3) para 14.

9 *Baleni* (n 3) para 15.

10 *Baleni* (n 3) para 18.

11 Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

12 *Baleni* (n 3) paras 25-26.

13 As above para 27.

14 According to art 39(1)(b), domestic courts shall consider international law when interpreting the Bill of Rights. On the other hand, art 233 states that South African courts must prefer 'any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

15 As part of such custodian role, according to sec 3(2)(a), the state 'grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right'.

aims of the Act stated in section 2, which explicitly include to ‘recognize the internationally accepted right of the state to exercise sovereignty over all the mineral and petroleum resources within the Republic’.¹⁶ The MPRDA, in its section 23(1) recognises to the South African Minister for Natural Resources the right to grant mineral rights in case law requirements are met, not mentioning a right to consent but the duty to consult the communities involved. In such context, the Preamble of the MPRDA states the need to promote local, rural and social development of communities interested in mining activities.¹⁷

By contrast, a right to consent is declared in the IPILRA, a legal instrument specifically conceived to protect insecure tenure, including certain rights to and interests in land, due to the lack of formal recognition of customary title. Article 2(1) of the IPILRA states indeed that the holders of informal rights to land, such as an indigenous community, have a right to consent before the deprivation of their land or rights in land and that this land may be deprived only in accordance with customs and usage of those communities.

First, the Court found that the Umgungundlovu community falls within the notion of ‘the group of persons whose rights to land are derived from shared rules determining access to land held in common by such group’ of Section 1 of the IPILRA and also within the concept of ‘community’ stated in Section 1 of the MPRDA.¹⁸ Mentioning the judgment of the Constitutional Court of South Africa in *Bengwenyama Minerals*, the High Court underlined the differences between ‘consent’, which includes an agreement with the involved communities, and ‘consultations’, which refers to a process of consensus that does not necessarily involve an agreement.¹⁹ As stated in *Bengwenyama Minerals*, while one of the purposes of consultation is to identify whether an accommodation between the applicant for prospecting rights and the landowner is possible, the MPRDA does not impose

16 The provision states also that the goals of the Act include to ‘(b) give effect to the principle of the State’s custodianship of the nation’s mineral and petroleum resources; (c) promote equitable access to the nation’s mineral and petroleum resources to all the people of South Africa’.

17 *Baleni* (n 3) para 43. This principle mirrors the findings of the South African Constitutional Court in *Maledu: Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 2 SA (CC) (*Maledu* case), para 5; also Section 104 of the Act, which gives preference in the consideration of applications for prospecting rights to, *inter alia*, communities who wish to prospect on communal land

18 *Baleni* (n 3) para 54. In the MPRDA, communities are defined as ‘a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community’.

19 *Baleni* (n 3) para 76, mentioning *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011(2) SA 113 (CC), paras 62-68.

agreement for granting the prospecting right but requires engaging consultation in good faith to attempt to reach such agreement.²⁰

According to the High Court the IPILRA and MPRDA may operate together, with the IPILRA granting special protection to customary informal rights compared to the rights stated under the MPRDA for common law owners. Indeed, the protection of community land rights is also among the principles of the MPRDA and is not in contrast with the latter instrument. In this context, the IPILRA provides additional obligations upon the South African Minister to seek the consent of the involved community rather than to mere consulting it as provided by the MPRDA.²¹

The Court declared that this interpretation of a right to consent of the applicant is not only consistent with the Constitutional Court jurisprudence in *Maledu*²² but also with international law, which would require that communities have a right 'to grant or refuse' their FPIC before mining developments that will have a significant impact on them.²³ The Court underlined also that while the right to FPIC is not stated in the African Charter, according to the jurisprudence of the African Commission and of the African Court on Human and People's Rights 'no decision may be made' about people's land' without the FPIC of the people concerned.²⁴

The terminology adopted by the High Court in applying those international instruments describes the right to FPIC as a veto, even if the judgment does not explicitly define the consequences of a lack of consent, which is an essential aspect to outline the content of such right. The Court found that TEM 'it obliged to obtain the full and informed consent' of the community.²⁵ To conclude, the Court declared that when the land is held on a communal basis, communities shall be able to take a decision according to their customary law on whether they consent or not to a proposal to dispose of their land rights.²⁶

20 *Bengwenyama Minerals* (n 19) para 65. At para 67, the Constitutional Court declares that 'The consultation process required by section 16(4)(b) of the Act thus requires that the applicant must: (a) inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the Regional Manager concerned; (b) inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land; (c) consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and (d) submit the result of the consultation process to the Regional Manager within 30 days of receiving notification to consult'.

21 *Baleni* (n 3) para 76.

22 *Baleni* (n 3) para 77, citing *Maledu* (n 18), paras 68, 95-97, stating that the two instruments should be interpreted and read harmoniously.

23 *Baleni* (n 3) paras 79-81; also, see para 4.2.

24 *Baleni* (n 3) para 82.

25 *Baleni* (n 3) para 84(2).

26 *Baleni* (n 3) para 83.

4 CONSISTENCY WITH INTERNATIONAL LAW AND THE AFRICAN HUMAN RIGHTS SYSTEM

The findings of the South African High Court in *Baleni* raise certain questions on the compatibility of the indigenous peoples' right to FPIC before the realisation of projects on their traditional lands with states' permanent sovereignty over natural resources.

4.1 Permanent sovereignty over natural resources

South African legislation and findings of the Court with reference to the role of the state in the exploitation of natural resources are consistent with existing international law. As previously mentioned, the South African state is the custodian of the mineral resources in South Africa on behalf of its peoples and that the act respects the principle of permanent sovereignty over natural resources is clearly stated in sections 2 and 3 of the MPRDA and confirmed by the jurisprudence of the South African Constitutional Court.²⁷

Indeed, and as stated by the ICJ, a state's permanent sovereignty over the natural resources within its territory represents a 'principle of customary international law'.²⁸ As declared by UNGA Resolution 1803 (XVII) and successive UNGA seminal resolutions, states have the exclusive right on the exploitation, management, utilisation and

27 *Bengwenyama Minerals* (n 20) paras 31, 40; Constitutional Court of South Africa, *Agri South Africa v Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013), para 71: 'The State is the custodian of all our mineral and petroleum resources on behalf of the people of South Africa'. It is worth mentioning that the Constitutional Court of South Africa found that communal ownership encompasses the indigenous right to exploit natural resources, in the surface and in the subsoil, not challenging however the permanent sovereignty that states have over such mineral resources: *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003), paras 60-64; *Baleni* (n 3) para 43 and *Maledu* (n 17) para 5, underlining the importance mining for national economy.

28 *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005) (19 December 2005), para 244; in general, N Schrijver *Permanent sovereignty over natural resources: balancing rights and duties* (1997); S Hobe 'Evolution of the principle on permanent sovereignty over natural resources' in M Bungenberg & S Hobe (eds) *Permanent sovereignty over natural resources* (2015); M S Rajan *Sovereignty over natural resources* (1978); K Hussain & SR Chowdhury *Permanent sovereignty over natural resources in international law, principle and practice* (1984); D Cambou 'Permanent sovereignty over natural resources (PSNR)' in C Binder and others (eds) *Elgar encyclopedia of human rights* (2022); A Mensi *Indigenous peoples, natural resources and permanent sovereignty* (2022); V Barrall 'Sovereignty over natural resources: environmental challenges and sustainable development' in E Morgera & K Kulovesi (eds) *Research handbook on international law and natural resources* (2016); F Visser 'The principle of permanent sovereignty over natural resources and the nationalization of foreign interests' (1988) 21(1) *The Comparative and*

conservation of natural resources within their territory.²⁹ This includes resources in the subsoil, with the parallel duty to exploit those resources for the benefit of their people. The right to permanent sovereignty includes the inalienable right of the states to fully and freely regulate and supervise the activities of transnational corporations, which includes the right of states to grant concessions to those companies.³⁰ That states have the exclusive and ultimate authority on the exploitation of natural resources within their territory is reflected not only by international treaty law³¹ and jurisprudence³² but also in the regional legal instruments and jurisprudence in the African

International Law Journal of Southern Africa 76-91; YT Chekera & VO Nmehielle 'The international law principle of permanent sovereignty over natural resources as an instrument for development: the case of Zimbabwean diamonds' (2013) 6 *African Journal of Legal Studies* 69-101; J Baloro 'Some international legal problems arising from the definition and application of the concept of permanent sovereignty over wealth and natural resources of States' (1987) 20(3) *Comparative and International Law Journal of Southern Africa* 335-352; R Pereira 'Permanent sovereignty over natural resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law' (2013) 14 *Melbourne Journal of International Law* 451; SP Ng'ambi 'Permanent sovereignty over natural resources and the sanctity of contracts', from the angle of *Lucrum Cessans*' (2015) 12(2) *Loyola University Chicago International Law Review* 153-172.

29 UNGA Res 3201 (S-VI) containing the 'Declaration on the Establishment of a New International Economic Order' (NIEO Declaration) (1 May 1974), art 4(e); UNGA Res 3281 (XXIX) containing the 'Charter of Economic Rights and Duties of States' (12 December 1974), arts 2(1); UNGA Res 36/103 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States' (9 December 1981), Preamble and Annex, art 1(b); UNGA Res 2542 (XXIV) 'Declaration on Social Progress and Development' (11 December 1969), art 3(d). It is relevant to note that according to South African Constitution Article 232, customary international law is law within the state unless it is inconsistent with the South African Constitution or acts of the Parliament.

30 As above.

31 Energy Charter Treaty (ECT) 2080 UNTS 100 (17 December 1994) (entered into force 16 April 1998), arts 1(10)(a)-(b), 18; United Nations Convention on the Law of the Sea 1833 UNTS 3 (Montego Bay, 10 December 1982) (entered into force 16 November 1994), art 193; United Nations Framework Convention on Climate Change (UNFCCC) 1771 UNTS 107, (opened for signature 9 May 1992) (entered into force 21 March 1994), Preamble; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1954 UNTS 3 (14 October 1994) (entered into force 26 December 1996), Preamble; Cf GATT article XX(g) which allows parties to adopt or enforce measures related to the conservation of exhaustible natural resources: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994) ('GATT Agreement' or 'GATT 1994'), art XX(g); Agreement Establishing the International Bauxite Association 1021 UNTS 176 (8 March 1974) (entered into force 29 July 1975), Preamble; Agreement Establishing the Association of Iron Ore Exporting Countries 987 UNTS 356 (3 April 1975) (entered into force 12 October 1975).

32 Panel Reports, *China – measures related to the exportation of various raw materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R (adopted 5 July 2011), paras 7.380 and 7.387 panel reports, *China – measures related to the exportation of rare Earths, Tungsten and Molybdenum*, WT/DS431/R, WT/DS432/R, WT/DS433/R (adopted 26 March 2014), para 7.270; *Libyan Am. Oil Co. (LIAMCO) v Gov't of Libya Arab Republic* 20 ILM 1 (1981), 53, 29-30, para 206; also, *Ad-Hoc-Award, Kuwait v The American Independent Oil Company (AMINOIL)*, 21 ILM 976 (1982) (*Kuwait v Aminoil*) para 143.

continent. Precisely, the permanent sovereignty of states over their natural resources has been declared by the African Commission in *FLEC v Angola*, which found that according to article 21 of the Banjul Charter, states have the right to supervise the disposal of natural resources in the general interest of the state and its communities,³³ and is affirmed also in regional treaty law.³⁴

Therefore, the MPRDA is consistent with customary international law, conferring the authority to the South African Minister for Natural Resources to grant mineral rights, with a parallel duty to consult the communities involved and to guarantee a 21-day prior notice before the start of the activities, as provided by section 5(A)(c) of the MPRDA. On the other hand, the IPILRA refers to a right to consent of communities' holders of informal rights to land before the deprivation of their rights. The IPILRA, which like any South African law shall be interpreted considering international law, does not say anything on the authority of the state to grant concessions for the exploitation of those resources, which is declared by section 3 of MPRDA and part of customary international law. By contrast, the instrument provides a stronger legal framework for the protection of communities' traditional rights, which is coherent with the MPRDA principles on the need to protect those communities.

However, since the High Court interpreted those provisions as conferring a right to consent, in the sense of a veto power, it is necessary to consider this judgment also in the light of existing international law on FPIC mentioned by the Court to fully analyse the content of such right.

4.2 Right to FPIC in international law

While the Court declared that the community has a right to consent under domestic law, as interpreted in accordance with international law, some open questions remain on the current content of FPIC and on the possible implications of such findings for international and African human rights law.³⁵

33 *FLEC v Angola* (Communication No 328/06) [2013] ACHPR 10 (5 November 2013), paras 128-132.

34 OAU, Revised African Convention on the Conservation of Nature and Natural Resources (the 'Maputo Convention') (7 March 2017) (entered into force 10 July 2016), Preamble. Cf OAU, African Convention on the Conservation of Nature and Natural Resources (the 'Algiers Convention') (15 September 1968) (entered into force 16 June 1969), Article XVI(1)(b). Also, Southern African Development Community (SADC) Protocol on Forestry (3 October 2002) (entered into force 16 April 2010), art 4(2).

35 In general, M Satterthwaite & D Hurwitz 'The right of indigenous peoples to meaningful consent in extractive industry projects' (2005) 22 *Arizona Journal of International and Comparative Law*; T Ward 'The right to free, prior, and informed consent: indigenous peoples' participation rights within international law' (2011) 10 *Northwestern Journal International Human Rights* 54;

As anticipated in the previous paragraphs, while the MPRDA provides a duty to consult common law owners, the IPILRA states the right to consent of the community concerned.³⁶ In interpreting those instruments, the High Court mentions the UN Committee on the Elimination of Racial Discrimination (CERD) General Recommendation No 23,³⁷ UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 21³⁸ and the UN Human Rights Committee (HRC) views in *Poma Poma v Peru*³⁹ to state that international law would accord a right to consent to those communities.

On the one hand, the Court is correct in mentioning how General Recommendation No 23 referred to a general duty to obtain the informed consent of indigenous peoples before any decision relating to their rights and interests;⁴⁰ the same approach is confirmed in the monitoring activity, where the Committee affirms that mere consultations are not consistent with General Recommendation No 23, declaring that states shall 'obtain' the FPIC people concerned.⁴¹ However, on other occasions the CERD Committee does not refer to a

EM McCulloch 'Free, prior, and informed consent: a struggling international principle' (2021) 44 *Public Land & Resources Law Review*; M Storey 'States' rights to development of natural resources versus indigenous people's rights: resource corporations and free, prior and informed consent' in J Gomez & R Ramcharan (eds) *Business and human rights in Asia* (2021); L Cotula 'Reconsidering sovereignty, ownership and consent in natural resource contracts: from concepts to practice' in M Bungenberg and others (eds) *European Yearbook of International Economic Law* (2018); J Razzaque 'A stock-taking of FPIC standards in international environmental law' in S Turner and others (eds) *Environmental rights: the development of standards* (2019).

36 *Baleni* (n 3) para 3.

37 As above para 79, citing CERD, General Recommendation 23 Indigenous Peoples UN Doc CERD/C/51/misc13/Rev4 (18 August 1997), paras 3-5.

38 *Baleni* (n 3) para 80, citing CESCR, General Comment No 21: Right of everyone to take part in cultural life article 15(1) (a) UN Doc E/C.12/GC/21 (21 December 2009), para 36.

39 As above, para 81, citing *Angela Poma Poma v Peru*, Comm No 1475/2006 (27 March 2009), HRC Communication No 1457/2006, para 7.6.

40 CERD, General Comment 23 (n 37) para 4(d).

41 CERD, Concluding Observations: Ecuador UN Doc CERD/C/62/CO/2 (21 March 2003), para 16, with reference to the exploitation of subsoil resources of indigenous traditional lands; Australia UN Doc CERD/C/AUS/CO/14 (14 April 2005), paras 11, 16; Guatemala UN Doc CERD/C/GTM/CO/11 (15 May 2006), para 19; India UN Doc CERD/GTM/CO/19 (5 May 2007), para 19; cf early warning and urgent action procedure, Decision 1(67) Suriname UN Doc CERD/C/DEC/SUR/4 (1 November 2005), para 4, urging state parties to 'strive to reach agreements with the peoples concerned, as far as possible, before awarding any concessions'; also, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 (Fifty ninth session) UN Doc E/CN.4/2003/90 (21 January 2003), para 66.

right to consent but to meaningful consultations.⁴² Therefore, the CERD Committee findings, which are not binding under international law, but which shall be considered for the interpretation of the International Convention on Elimination of Racial Discrimination (ICERD), in certain occasions seems to posit a right to consent to the peoples involved but this conceptualisation is not constant.

By contrast, that those communities have a right to consent as a veto power is less evident in the other instruments cited by the Court. As a matter of fact, the findings of the CDESCR Committee in General Comment 21 cited by the Court refer to communal lands, territories and resources inhabited or used without their free and informed consent, thus referring to previous deprivation of lands rather than explicitly stating a right of consent of indigenous peoples before the realisation of future projects. Furthermore, the General Comment refers to the principle that states 'should' obtain indigenous FPIC, which is a weak terminology to conceive an obligation to obtain such consent.⁴³

Even in *Poma Poma v Peru* the reference to FPIC shall be read in accordance with the statement that 'the participation in the decision-making process shall be effective' and not limited to mere consultations.⁴⁴ In doing so, the HRC refers to consultations that shall not be 'mere' but effective to seek the community FPIC.⁴⁵ This conceptualisation of the right to FPIC as meaningful consultation and participation has been confirmed also in other occasions by the HRC.⁴⁶

Therefore, while it is true that mere consultations do not correspond to the current international legal standard on indigenous rights, it seems the right to FPIC, as stated in the instruments and cited by the High Court, requires meaningful consultations. Considering the above mentioned statements of the UN Committees, meaningful consultations, in this case, should be conducted with the aim to reach a consensual agreement of the concerned communities, rather than implying a veto power that would challenge the ultimate authority that

42 Eg CERD, Ågren et al v Sweden, CERD Communication 54/2013 (18 December 2020), paras 6.5-6.7; also, CERD, Concluding Observations: Suriname UN Doc CERD/SUR/CO12 (13 March 2009), para 14; Ecuador UN Doc CERD/C/ECU/CO/20-22 (24 October 2012), para 17; New Zealand UN Doc CERD/C/NZL/CO/18-19 (17 April 2013), para 18; Bolivia UN Doc CERD/C/BOL/CO/17-20 (8 April 2011), para 20; Chile UN Doc CERD/C/CHL/CO/15-18 (7 September 2009), paras 21-23; Cameroon UN Doc CERD/C/CMR/CO/15-18 (30 March 2010), para 18.

43 CDESCR, General Comment 21 (n 38) paras 37, 55(e); also, A Barratt & A Afadameh-Adeyemi 'Indigenous peoples and the right to culture: the potential significance for African indigenous communities of the committee on economic, social and cultural rights' General Comment 21' (2011) 11(2) *African Human Rights Law Journal* 560-587.

44 *Poma Poma v Peru* (n 39) para 7.6.

45 As above.

46 Eg General Comment 23: Article 27 (Rights of Minorities) UN Doc CCPR/C/21/Rev1/Add5 (8 April 1994), para 3.2; *Ilmari Lämsman et al v Finland*, HRC Communication 511/1992, paras 9.5-9.6.

states have as part of their permanent sovereignty over natural resources.⁴⁷

Such interpretation of the right to FPIC under international law is in line also with other international instruments not mentioned by the Court. First, the Court does not refer to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which is not legally binding but which represents the most recent international legal instrument on indigenous rights. Article 32(2) of the Declaration affirms that states shall ‘consult’ and cooperate in good faith with the indigenous peoples through their own representative institutions ‘in order to obtain’ indigenous free and informed consent prior to the approval of projects affecting their lands, territories and resources, including mineral resources. This right shall be considered in accordance with UNDRIP article 3, which echoing articles 1(1) of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), states that indigenous peoples have a right to internal self-determination, as a form to autonomy to be exercised within the context of existing states, and that they freely determine their political status and freely pursue their own economic, social and cultural development.⁴⁸

47 Also, ILO, Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No 169), made under article 24 of the ILO Constitution by the Central Unitary Workers’ Union (CUT) (2001), paras 89-90.

48 In general, M L  m *At the edge of the state: indigenous peoples and self determination* (2021); C Doyle & J Gilbert ‘Indigenous peoples and globalization: from “development aggression” to “self-determined development”’ in European Academy Bozen/Bolzano (eds) *European Yearbook of Minority Issues* (2011) 219-262, at 245-256; F Lenzerini ‘Implementation of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples’ (2019) 23(1-2) *The International Journal of Human Rights* 51-62; C Charters ‘Indigenous peoples’ rights to lands, territories, and resources in the UNDRIP: articles 10, 25, 26, and 27’ in J Hohmann & M Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples. a commentary* (2018); F Lenzerini ‘Declaration on the rights of indigenous peoples (UNDRIP)’ in C Binder and others (eds) *Elgar encyclopedia of human rights* (2022); M Scheinin & M   hr  n ‘The UNDRIP’s relationship to existing international law’ in J Hohmann & M Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples: a commentary* (2018); S Wiessner ‘Indigenous self-determination, culture, and land’ in E Pulitano (ed) *Indigenous rights in the age of the UN Declaration* (2012); article 1(2) of the Covenants declares a people’s right, including indigenous peoples, to dispose of its natural wealth and resources as part of their right to self-determination; also, J Gilbert ‘The right to freely dispose of natural resources: utopia or forgotten right’ (2013) 31(3) *Netherlands Quarterly of Human Rights* 314-341; B Kingsbury ‘Competing structures of indigenous peoples’ claims’ in P Alston (ed) *Peoples’ rights* (2001) 96-97; M Scheinin ‘Indigenous peoples’ rights under the international covenant on civil and political rights’ in J Castellino & N Walsch (eds) *International law and indigenous peoples* (2004) 3-11.

The text of article 32 is different from original draft article 30, which mentioned the right of indigenous peoples that states shall 'obtain' their FPIC,⁴⁹ but also from articles 10, 29(2) and 30(1) of the Declaration, which respectively provide a right to consent in case of relocation of indigenous peoples, of storage or disposal of hazardous materials and of military activities. Therefore, the text of the UNDRIP suggests that today under international law states have a duty to consult indigenous peoples 'in order to obtain' their FPIC, in the sense that consultation shall be meaningful and with the objective to reach an agreement with the communities concerned.⁵⁰

In international treaty law, according to article 15(2) of the 1989 ILO Convention No 169, and acknowledging that South Africa is not Party of the Convention which may however be regarded as an evidence of current international law in this field, states have the duty to consult indigenous peoples before granting exploration or exploitation of natural resources owned by the state, including the ones in the subsoil, but pertaining to indigenous lands.⁵¹

In international jurisprudence, in a case concerning the territory of Western Sahara, the Court of Justice of the European Union (CJEU) outlined how the FPIC of indigenous peoples is different from the right to consent enjoyed by other non-independent peoples.⁵² This

- 49 UN Doc E/CN.4/Sub.2/1994/2/Add.1 (1994). F Gómez Isa 'The UNDRIP: an increasingly robust legal parameter' (2019) 23(1-2) *The International Journal of Human Rights* 7-21.
- 50 That indigenous peoples do not have a right to consent is confirmed also by recent regional legal instruments, such as the American Declaration on Indigenous Rights (ADRIP) art XXIX and art 36 of the proposed Nordic Saami Convention. In general, R Healey 'From individual to collective consent: the case of indigenous peoples and UNDRIP' (2019) 27(2) *International Journal on Minority and Group Rights* 251-269; M Barelli 'Free, prior, and informed consent in the UNDRIP: articles 10, 19, 29(2), and 32(2)' in J Hohmann & M Weller (ed) *The UN Declaration on the Rights of Indigenous Peoples. a commentary* (2018).
- 51 The ILO CEACR Committee highlighted the importance to ensure the consultations in good faith of indigenous and tribal peoples before any mining, oil, or gas exploitation occur in their traditional lands: Observation (CEACR) adopted 2019, published 109th ILC session (2021) Indigenous and Tribal Peoples Convention, 1989 (No 169) Bolivia (Plurinational State of) (Ratification: 1991); also, Report of the Committee set up to examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No 169), made under article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF) (2009), paras 44, 49; Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) (2001), paras 89-90. Also, C Courtis 'Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples' (2011) 18(4) *International Journal on Minority and Group Rights* 433-460. It is worth mentioning that the Constitutional Court of South Africa found that communal ownership encompasses the indigenous right to exploit natural resources, in the surface and in the subsoil, not challenging however the permanent sovereignty that states have over such mineral resources: *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003), paras 60-64.
- 52 *Front populaire pour la libération de la Saguia el-Hamra et du Rio de Oro (Front Polisario) v Council of the European Union* (General Court, 29 September 2021) (Case T-279/19), paras 368-370, 391.

interpretation of the right to FPIC under present international law has been confirmed, for example, also in international investment arbitration. As stated in the ICSID arbitration *Bear Creek Mining Corporation v Peru*, current relevant international legal instruments are coherent in affirming that consultations have to be made with the goal to obtain the community consent.⁵³ The right to consultation in order to obtain the indigenous FPIC, has been applied with respect to development projects on natural resources by different regional judiciary bodies and domestic jurisprudence.⁵⁴

4.3 A right to consent as a peoples' right

Under international law only certain categories of non-independent peoples are the bearers of a collective right to permanent sovereignty over the natural resources of their territories and to consent before the exploitation of such resources. Those peoples are today represented by peoples of non-self-governing territories⁵⁵ and peoples under subjugation, domination and exploitation such as the Palestinian

53 ICSID Arbitration *Bear Creek Mining Corporation v Republic of Perú Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/2 (30 November 2017), para 406.

54 Eg *Saramaka People v Suriname*, Interpretation of the judgment on preliminary objections, merits, reparations and costs, IACHR Series C No 185, IHRL 3058, [2008] IACHR (12 August 2008), para 129-137, mentioning how the level of consultation depends on the nature of the right at issues and that the duty to consult indigenous peoples requires their FPIC in case of large-scale projects; *Sawhoyamaxa Indigenous Cmty v Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (Ser C) Mo 146 (29 March 2006), para 223; *Maya Indigenous Communities of the Toledo District v Belize*, Case 12.053, Inter-American Commission on Human Rights, Report No 40/04 (Merits Decision of 12 October 2004), paras 153-154. Also, B Frolick *The granting of mining rights over cultural (heritage) land in South Africa and Canada – a comparative analysis* (2020); EC Olivares Alanís 'Indigenous peoples' rights and the extractive industry: jurisprudence from the Inter-American system of human rights' (2013) 5 *Goettingen Journal of International Law* 187. Among domestic jurisprudence, the Supreme Court of Canada in *Haida Nation* and *Taku River* declared the duty of states to 'consult and accommodate' aboriginal peoples before exploiting resources in their traditional lands: *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73 (18 November 2004), paras 35, 76; also, *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* 2004 SCC 74 (18 November 2004), para 42; *Delgamuukw v British Columbia* 3 SRC 1010 (1997), para 168; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] SCC 69, [2005] 3 SCR 388, para 34; Constitutional Court of Colombia, *Judgment C 169/01 of 14 February 2001*, para 2.3.

55 *Front populaire pour la libération de la Saguia el-Hamra et du Rio de Oro (Front Polisario) v Council of the European Union* (n 53), paras 368-370, 391; UNGA Res 3201 (S-VI) (n 1), art 4 (f), (h); UNGA Res 33/40 'Activities of foreign economic and other interests which are impeding the implementation of the declaration on the granting of independence to colonial countries and peoples in Southern Rhodesia and Namibia and in all other territories under colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in southern Africa' (13 December 1978), para 20; UNGA Res 71/103 'Economic and other activities which affect the interests of the peoples of the non-Self-governing territories' (23 December 2016), paras 8-9; Decree No 1 for

people.⁵⁶ Such categories of peoples have, as part of their right to external self-determination, a right to statehood and to a territory, which has a status separate from the one of the administering power.⁵⁷ This right is not enjoyed by indigenous peoples as part of their right to internal self-determination. Indeed, in international law only peoples of non-self-governing territories and peoples under subjugation, domination and exploitation have a right to consent before the exploitation of the natural resources within their territories, including the right that the exploitation of those resources is conducted exclusively for their own benefit.

Therefore, while a domestic law may provide a right to consent to indigenous people, the same assumption cannot be made with reference to present international law. International law does not refer

the Protection of the Natural Resources of Namibia, enacted by the Council on 27 September 1974 and approved by the UNGA in its resolution 3295 (XXIX) of 13 December 1974, Preamble; UNGA Res 33/182-A 'Situation in Namibia resulting from the illegal occupation of the territory by South Africa' (21 December 1978), Preamble, para 7; UNGA Res 33/182-C 'Programme of work of the United Nations Council for Namibia' (21 December 1978), Preamble, para 5; UNGA Res 44/84 'Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Namibia and in all other Territories under colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in southern Africa' (11 December 1989), Preamble, para 1; UNGA Res 2226 (XXI) 'Question of the trust territory of Nauru' (20 December 1966), Preamble, para 3; UNGA Res 33/34 'Question of the United States Virgin Islands' (13 December 1978), para 6; UNGA Res 33/32 'Question of American Samoa' (13 December 1978), para 9; UNGA Res 33/33 'Question of Guam' (13 December 1978), para 8; UNGA Res 33/30 'Question of the New Hebrides' (13 December 1978), para 8.

- 56 UNGA Res 3005 (XXVII) 'Report of the Special Committee to investigate Israeli practices affecting the human rights of the population of the occupied territories' (15 December 1972), para 4; UNGA Res 3175 (XXVIII) 'Permanent sovereignty over natural resources in the occupied Arab territories' (17 December 1973); UNGA Res 3336 (XXIX) 'Permanent sovereignty over national resources in the occupied Arab territories' (17 December 1974), para 1; UNGA Res 31/186 'Permanent sovereignty over national resources in the occupied Arab territories' (21 December 1976), para 1; UNGA Res 32/161 (19 December 1977), para 3; UNGA Res 75/236 'Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources' (21 December 2020), paras 1ff. In general, P Alston 'Peoples' rights: their rise and fall' in P Alston (ed) *Peoples' rights* (2001) 286; N Schrijver *Permanent sovereignty over natural resources in territories under occupation or foreign administration' in sovereignty over natural resources: balancing rights and duties* (1997) 143-168.
- 57 UNGA Res 2625 (XXV) 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of United Nations' (24 October 1970); also, UNGA Res 1514 (XV) 'Declaration on the Granting of Independence of Colonial Countries and Peoples' (14 December 1960); ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory opinion, [2010] ICJ Rep, para 82; also, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion [1971] ICJ Rep 31, paras 52-53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion [2004] ICJ Rep 136, para 58; CERD, General Recommendation 21: Right to Self-Determination UN Doc CERD/48/Misc.7/Rev.3 (8 March 1996), para 4.

to a mere duty of consultation of indigenous peoples and requires a higher standard to ensure that those consultations are meaningful and done with the aim to obtain the consent of the people concerned. These consultations shall be effective, especially when projects may particularly affect the rights of the peoples involved. However, this does not correspond to a duty to obtain such consent and, therefore, does not entail a veto power of such populations.

4.4 The right to FPIC in the African human rights system

The High Court found that according to the jurisprudence of the African Court and Commission on Human and Peoples' Rights, no decisions may be made on people's land without their FPIC.⁵⁸ In doing so, the South African Court mentions the *Ogiek*⁵⁹ and *Endorois*⁶⁰ cases. While it is beyond any doubt that the right to FPIC has been declared in both judgments, it is less evident that such jurisprudence conceived such right as a veto power.

58 *Baleni* (n 3) para 83. In general, J Gilbert 'Indigenous peoples's human rights in Africa: the pragmatic revolution of the African Commission on Human and Peoples' Rights' (2011) 60(1) *International and Comparative Law Quarterly* 245-270; J Murphy 'Extending indigenous rights by way of the African Charter' (2012) 24 *Pace International Law Review* 158-189; F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67(1) *International & Comparative Law Quarterly* 63-98; WA Mutua 'The Banjul Charter and the African cultural fingerprint: an evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; SA Yeshanew 'Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: progress and perspectives' (2011) 11(2) *African Human Rights Law Journal* 317-340; JC Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*' (2005) 1(2) *African Journal of Legal Studies* 129-146; J Swanson 'The emergence of new rights in the African Charter' (1991) 12 *New York Law School Journal of International and Comparative Law* 307; SA Dersso 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to Peoples' Rights' (2006) 6(2) *African Human Rights Law Journal* 333-357; KN Bojosi & GM Wachira 'Protecting indigenous peoples in Africa: an analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6(2) *African Human Rights Law Journal* 382-406; GM Wachira & T Karjala 'The struggle for protection of indigenous peoples' rights in Africa' in C Lennox & D Short (eds) *Handbook of indigenous peoples' rights* (Routledge 2015); F Viljoen 'Reflections on the legal protection of indigenous peoples' rights in Africa' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010); J Gilbert & V Couillard 'International law and land rights in Africa: the shift from states' territorial possessions to indigenous peoples' ownership rights' in R Home (ed) *Essays in African land law* (2011); F Viljoen *International human rights law in Africa* (2012); CC Ngang & SD Kamga *Natural resource sovereignty and the right to development in Africa* (2021); VR Nalule *Mining and the law in Africa: exploring the social and environmental impacts* (2020).

59 *ACHPR v Kenya*, Application 6/2012 (2017) (*Ogiek* case).

60 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, ACHPR Communication No 276/2003 [2009] AHRLR 75 (*Endorois* case).

In *Ogiek*, the African Court declared that article 22 of the Charter must be read in accordance with UNDRIP article 23.⁶¹ The Court then stated that the eviction of the Ogiek peoples from their lands without effective consultations was not consistent with article 22 of the African Charter since it did not consider the impact on the Ogiek economic, social and cultural development and violated article 22 of the African Charter.⁶² In such cases, the African Court referred to ‘effective consultations’ rather than to a right to consent, thus mirroring the above-mentioned international law on indigenous FPIC. Furthermore, the Court applied article 22 of the African Charter in light of UNDRIP article 23, a provision which refers to the right of indigenous peoples to be ‘actively involved’ to determine and develop priorities and strategies necessary for their right to development, including in economic and social programmes affecting them, noting that *Ogiek* people have not been ‘consulted’. Therefore, the Court did not refer to a right to consent for the people involved but to a right to effective consultations and participation.

A stronger connotation of the right to FPIC is, however, declared in *Endorois*, where the Commission found that in certain circumstances states have the duty to consult effectively the communities involved to obtain their FPIC in case of projects that may have a major impact on their territories.⁶³ However, in the same judgment the African Commission refers to the failure to respect the obligation to ‘seek consent’ and not to obtain such consent’.⁶⁴ Even in the *Ogoni* case, the Commission did not refer to a right to consultation but to participation and prior environmental and social impact assessments before major industrial developments.⁶⁵

61 *Ogiek* (n 60) para 209; C Focarelli ‘Indigenous peoples’ rights in international law: the *Ogiek* Decision by the African Court of Human and Peoples’ Rights’ in AD Blase & V Vadi (eds) *The inherent rights of indigenous peoples in international law* (2020); OD Akinkugbe & A Majekolagbe ‘The African Court of Human and Peoples’ Rights decision in the *Ogiek* case: an appraisal’ (27 December 2018) in M Amissi Manirabona & YV Cardenas (eds) *Extractive industries and human rights in an era of global justice: new ways of resolving and preventing conflicts* (2019).

62 As above, paras 210-211.

63 *Endorois* (n 60), para 291, 290-297. Also, S Korir, A Oei & J Shepherd ‘In land we trust: the Endorois’ communication and the quest for indigenous peoples’ rights in Africa’ (2010) 57 16 *Buffalo Human Rights Law Review*; G Lynch ‘Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples’ Rights and the Endorois’ (2012) 111(442) *African Affairs* 24-45; W Wicomb & H Smith ‘Customary communities as “peoples” and their customary tenure as “culture”’: what we can do with the Endorois decision’ (2011) 11(2) *African Human Rights Law Journal* 422-446; E Ashamu ‘Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: a landmark decision from the African Commission’ (2011) 55(2) *Journal of African Law* 300-313.

64 *Endorois* (n 60), para 226.

65 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Comm No 155/96 Case No ACHPR/COMM/Ao44/1, (*Ogoni* case), para 53: ‘ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking

Those findings shall be considered in light of the findings in the above-mentioned case *Flec v Angola*. In that case, the Commission did not only find that states have the permanent sovereignty over natural resources to be exercised in the interest of their peoples.⁶⁶ Indeed, the Commission also declared the duty of the state to involve representatives in decisions concerning the management of national wealth and resources.⁶⁷ Therefore, the jurisprudence of the African Court and Commission outlines a framework where states have the exclusive authority to determine the exploitation of their natural resources within their territory, that shall be done for the interest and benefit of their peoples. Furthermore, participation and consultation rather than a right to consent seem consolidated principles in the African human rights jurisprudence.

In such a context, the state's ultimate authority over the exploitation of natural resources has never been challenged in the African human rights system, conceiving a duty to consult indigenous peoples which requires to seek their FPIC and also environmental and social impact assessments before major projects that may have important consequences on indigenous physical and cultural survival.

5 POSSIBLE IMPACT ON THE RIGHT TO FPIC IN THE AFRICAN HUMAN RIGHTS SYSTEM

The *Baleni* judgment is particularly relevant for the rights of indigenous peoples and communities with respect to natural resources in the African region.

On the one hand, the High Court of South Africa declares a right to consent of indigenous communities before the realisation of projects on their traditional lands. Therefore, according to the Court TEM would have the duty 'to obtain the full and informed consent' of the community before the realisation of the mining project, thus limiting the right of the states to freely grant concessions for the exploitation of natural resources within its territory. This right to consent affirmed by the Court, and which is formally affirmed also by the IPILRA but not in other South African domestic law, does not correspond to the current content of the right to FPIC under international law and also by the current approach of the African Court and Commission on Human Rights, which never challenged the principle of permanent sovereignty over natural resources stating a right to consent of those communities.

appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'; also, F Coomans 'The *Ogoni* case before the African Commission on Human and Peoples' Rights' (2003) 52(3) *The International and Comparative Law Quarterly* 749–760.

66 *FLEC v Angola* (n 33) paras 128-132.

67 As above para 131.

The right to FPIC in the African human rights jurisprudence is conceived, like in international law, as a right to meaningful and effective consultations before, and participation in, decisions regarding the exploitation of natural resources within indigenous lands which requires to seek a FPIC and prior environmental and social impact assessments in case of major projects. In such a sense, states shall seek the consent of the communities involved, especially when the impact of those projects may particularly affect the rights of such communities and their cultural and physical existence.

This conceptualisation does not correspond to a right to consent in the sense of a veto, which is established under current international law only as a right of peoples of non-self-governing territories and peoples under alien subjugation, domination and exploitation. Indeed, conceiving the right to FPIC as a right to consent would have relevant economic consequences for the exploitation of natural resources in Africa. As a matter of fact, the permanent sovereignty of African states over their natural resources would be limited in the sense that before granting any concessions states, and foreign investors, would be obliged not to seek but obtain the consent of indigenous communities and would not be able to exploit freely and fully their resources on their territory.

Nevertheless, the *Baleni* judgment may have possible important consequences for the evolution of international law in this field and for the African human rights system. Indeed, from the point of view of international law the judgment may represent evidence of states practice and *opinio juris* towards continuing and progressive strengthening the indigenous right to FPIC that cannot be ignored by the African Court and Commission. While the findings of the High Court do not reflect the current content of this right under international law, *Baleni* confirmed the assumption that the large exploitation of natural resources in indigenous and traditional lands shall respect higher standards compared to the ones accorded to common law owners under domestic law, considering the importance that lands and natural resources have for those communities.

Indeed, despite the judgment postulating a community's right to consent which is not part of international law, it is not irreconcilable with current international law on indigenous rights. It seems evident that while the judgment affirms a right to consent whose existence under international law has little evidence, it does not expressly challenge the principle of permanent sovereignty stating the necessity to interpret the IPILRA in accordance with the MPRDA and international law. As mentioned before, important evidence of this is that the High Court while interpreting the ILPRIA refers to additional obligations upon the South African Minister to 'seek the consent' of the involved community rather than to mere consulting it.⁶⁸ Furthermore, the Court does not outline what may happen in case this consent is not provided by the concerned community.

68 *Baleni* (n 3) para 76.

Therefore, considering both the judgment and the principle of permanent sovereignty, a possible interpretation of the judgment that would be consistent with international law would, on the one hand, maintain vested in the state the ultimate authority on the exploitation of natural resources in their territories. On the other hand, in respect of large projects it would grant to indigenous peoples a right to manifest their FPIC, based also on environmental and social impact assessments and according to their customs and traditional institutions. States would be obliged to effectively seek, in good faith, such consent and reconsider its decision in case the consent is not provided.

Furthermore, it would seem arguable that the lack of consent would require states to effectively address the observations, interests and expectations expressed by the community concerned, and to motivate effectively any decision on the continuation of the project. This would represent an evident higher degree compared to the right to consultation of common law owners and would also strengthen the current content of FPIC under international law, respecting at the same time states permanent sovereignty.

Furthermore, this strengthening of the right to FPIC would be compatible with the jurisprudence of the African Court and Commission, including the findings in *Ogoni*, which in its judgments paid particular attention to social, environmental and economic consequences of major projects on indigenous lands.

6 CONCLUSION

The *Baleni* judgment involves important aspects of the rights that states and indigenous peoples and communities have with respect to natural resources. While the permanent sovereignty of states is still one of the most important principles of international law, the continued recognition of rights to indigenous peoples with respect to natural resources may potentially challenge the exclusive authority that states enjoy today over natural resources. Indeed, as stated in *Baleni* the protection granted by international law to indigenous rights with respect to natural resources is significant compared to the level of protection of common law owners.

Today there is almost no evidence on the possibility to reconcile a right to consent, in the sense of a veto power, of indigenous peoples and communities with states permanent sovereignty over natural resources in their territories. However, the findings of the High Court, if interpreted in accordance with current international law, may contribute to the strengthening of the indigenous right to FPIC. Broadly, international law requires states to conduct meaningful and effective consultations with indigenous communities, especially in case of large projects that may have a greater impact on those communities. This obligation includes a duty to seek the indigenous FPIC that should be based also on the social and environmental impact of the project.