

# Sovereignty as Trusteeship and Indigenous Peoples

*Evan Fox-Decent and Ian Dahlman\**

*We explore two special challenges indigenous peoples pose to the idea of sovereigns as trustees for humanity. The first challenge is rooted in a colonial history during which a trusteeship model of sovereignty served as an enabler of paternalistic colonial policies. The challenge is to show that the trusteeship model is not irreparably colonial in nature. The second challenge, which emerges from the first, is to specify the scope and nature of indigenous peoples' sovereignty within the trusteeship model. Whereas the interaction between states and foreign nationals is the locus of cosmopolitan law, the relationship between states and indigenous peoples is distinctive. In the ordinary cosmopolitan case, foreign nationals do not purport to possess legal authority. Indigenous peoples often do make such a claim, pitting their claim to authority against the state's. We discuss how international law has attempted to come to grips with indigenous sovereignty by requiring states to include indigenous peoples in decision-making processes that affect their historical lands and rights. A crucial fault line in the jurisprudence, however, separates a duty to consult indigenous peoples from a duty to acquire their free, prior and informed consent (FPIC). The latter but not the former recognizes that indigenous peoples possess a veto over state projects on their lands, in effect recognizing in them a limited co-legislative power. We focus on recent jurisprudence from the Inter-American Court of*

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\* Associate Professor of Law, Faculty of Law, McGill University and Clerk to Justice Louis LeBel of the Supreme Court of Canada, respectively. We thank for comments and suggestions Eyal Benvenisti, Evan Criddle, Hanoch Dagan, Andrew Gold, Sébastien Jodoin-Pilon, Jacob Levy and participants at the conference Sovereignty as Trusteeship for Humanity — Historical Antecedents and Their Impact on International Law held at the Buchmann Faculty of Law, Tel Aviv, Israel, June 16-17, 2014. We owe special thanks as well to the editors, whose detailed and substantive suggestions were truly helpful. Financial support for this Article was provided by the Social Science and Humanities Research Council of Canada.

*Human Rights, and consider whether either the duty to consult or FPIC are enough to dispel the shadow of the trusteeship model's colonial past. We suggest that they are a move in the right direction, and that implicitly they represent international law's recognition that states are no longer the sole bearers of sovereignty at international law. In limited circumstances, international law recognizes indigenous peoples as sovereign actors.*

## INTRODUCTION

Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It would be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience. They may be more likely to go to Heaven yet at the same time likelier to make a Hell of earth. This very kindness stings with intolerable insult. To be "cured" against one's will and cured of states which we may not regard as disease is to be put on a level of those who have not yet reached the age of reason or those who never will; to be classed with infants, imbeciles, and domestic animals.<sup>1</sup>

One need not have any sympathy for C.S. Lewis's theological apologetics to appreciate the various dangers posed by "omnipotent moral busybodies." If such persons hold public power and believe they are morally entitled to exercise it over the objections of the people subject to it, they are likely to cause those individuals great harm. Morally sanguine about their prescriptions, the busybodies may indeed "torment us without end." A deeper and more significant problem, however, is that subjection to any busybody is wrongful because it constitutes an ongoing "intolerable insult." The subject is "classed with infants, imbeciles, and domestic animals" because implicitly she is deemed incapable of governing herself. And so the idea that one person may gain authority over another by purporting to serve the latter person's interests is rightly condemned as paternalistic, even if governance by the alleged authority would in fact serve the putative subject's interests.

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1 C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 RES JUDICATAE 224, 228 (1953).

This presents a puzzle for trustee or fiduciary<sup>2</sup> conceptions of public authority: if the state holds sovereignty in trusteeship for its peoples and humanity at large, and the state's mandate as trustee is (in part) to act with due regard for the interests of its people and foreign nationals, how does the fiduciary state avoid the pratfall of becoming a paternalistic and "omnipotent moral busybody"? In other words, can we specify the state's role as trustee in a way that insulates it from the charge of paternalism? This is an especially pressing challenge when one considers, as we suggest below, that the state's position as trustee arises in part from the private legal subject's incapacity to exercise public powers.<sup>3</sup>

To explore this puzzle, we focus on a particularly hard case for fiduciary conceptions of sovereignty: the case of indigenous peoples who live within sovereign states. Indigenous peoples pose a hard case for two main reasons. First, as we discuss in Part I, European powers deployed an ethnocentrically busybody version of the trusteeship model to justify colonial expansion and domination of indigenous peoples.<sup>4</sup> This dark and lengthy history raises the question whether the trusteeship model can in principle take a non-paternalistic form. Moreover, even if paternalism is not a necessary implication of the fiduciary approach, there remains the further normative question whether it is worth adopting a model that appears so susceptible to abuse.

The second reason why indigenous peoples present a hard case has to do with the nature of their claims. The predominant claims of indigenous peoples are grounded in their historical occupation of certain lands, rights connected to indigenous uses of land (e.g., rights to hunt and fish), treaties with Europeans, and their own political and legal forms of self-government. These claims are communal or collective in character. But more important still, they comprise a claim to autonomy: i.e., a claim to a collective entitlement to govern their people and territory autonomously. Consequently, it is not obvious that a trusteeship model premised on human rights and democratic participation can respond adequately to the sub-state but collective demand of autonomy of indigenous peoples.<sup>5</sup> Whereas it is intuitively plausible to

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2 We use "trustee" and "fiduciary" interchangeably: both denote a power that is held in trust for others.

3 See Evan J. Criddle, *Reclaiming the Grotian Theory of Humanitarian Intervention*, 16 THEORETICAL INQUIRIES L. 473 (2015) (warning of the danger of paternalism that haunts trusteeship accounts of sovereignty); Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 THEORETICAL INQUIRIES L. 447 (2015) (same).

4 For discussion of this colonial history, see Fitzmaurice, *supra* note 3.

5 See generally Eyal Benvenisti, *Sovereigns as Trustees for Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013) (affirming human rights and democracy as bases for viewing sovereigns as

imagine that international law, post-World War II, might concern itself with the human rights and democratic access of citizens and noncitizens alike, individuals and sub-state groups do not ordinarily claim territorial land rights, treaty rights and sovereign powers of their own. Indigenous peoples do make these claims. To the extent that they seek to retain or reclaim their right to self-government, their claim to possess public authority over the members of their communities and their territory is pitted against the state's.

In Part II we discuss how international law has attempted to come to grips with indigenous peoples' claims to autonomy by requiring states to include indigenous peoples in decision-making processes that affect their historical lands and rights. A crucial fault line in the positive law and jurisprudence separates a duty to consult indigenous peoples from a duty to acquire their free, prior and informed consent (FPIC). The latter but not the former recognizes in indigenous peoples an entitlement to veto state projects on their lands, in effect recognizing in them a limited co-legislative power. We focus on recent jurisprudence from the Inter-American Court of Human Rights (IACHR).

In Part III we elaborate a pluralist account of the sovereigns-as-trustees-of-humanity model, arguing that such an account must look within as well as outside states to accommodate the special claims and status of indigenous peoples. We claim that this pluralist rendering of the trusteeship theory is presupposed by the IACHR jurisprudence. Importantly, the IACHR jurisprudence suggests that the trusteeship model must recognize that some non-state actors — indigenous peoples — are cognizable to international law as sovereign actors. Under this approach, indigenous peoples do not acquire a claim to statehood. Rather, they enjoy a form of sub-state autonomy that yields a measure of the independence that comes with sovereignty. Sub-state but sovereign indigenous peoples may thus come to enjoy, as Martti Koskenniemi puts it when discussing sovereignty, “the thrill of having one's

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trustees for humanity). Of course, if one views indigenous claims as human rights claims — nothing Benvenisti says about human rights would block such a move — then a trusteeship model premised on human rights and democracy could accommodate indigenous claims. But because human rights are conventionally viewed as emanating from the moral status individuals possess by virtue of their shared humanity, and because they are usually rights asserted by individuals or groups against a state whose authority is taken for granted, our point is simply that some work would have to be done to show that indigenous collective claims to sub-state autonomy are also human rights claims. For a defense of the conventional view of human rights, see John Tasioulas, *Human Rights, Legitimacy, and International Law*, 58 AM. J. INT'L L. 1 (2013). For the distinctiveness of indigenous claims, see PATRICK MACKLEM, *INDIGENOUS DIFFERENCE AND THE CONSTITUTION OF CANADA* (2001).

life in one's own hands."<sup>6</sup> With the pluralist model in place, we suggest that the IACHR regime can help overcome the moral-busybody challenge as well as the objection that the fiduciary approach lends itself to abuse.

## I. TRUSTEESHIP, SOVEREIGNTY AND OPPRESSION

Accounts of European colonialism inevitably recount the use and abuse of the concept of trusteeship by colonial powers, typically traced back to the writings of Francisco de Vitoria.<sup>7</sup> For Vitoria, while indigenous peoples were the true owners of the land, it was necessary that European powers assume authority over the new world for indigenous benefit, as a sort of trustee of sovereignty.<sup>8</sup> Indigenous peoples were "sufficiently rational" to possess original rights, but they were "unfit to found or administer a lawful State up to the standard required by human and civil claims."<sup>9</sup> Thus began a well-documented tradition of using a civilization-based claim of indigenous incapacity to justify domination under the guise of trusteeship.

Vitoria was somewhat ambivalent about the relationship he conceptualized: "I dare not affirm it at all, nor do I entirely condemn it."<sup>10</sup> Yet he never explained his trepidation. Arguably, Vitoria was hesitant because he recognized that his theory lacked coherence and could generate undesired consequences. Undergirding the colonial use and abuse of trusteeship was a contradiction in its treatment of indigenous peoples. On the one hand, indigenous peoples were conceived as having no sovereignty, inhabiting *terra nullius*, and as such had no claim to standing or consideration under international law, allowing colonial claims to "new" or "discovered" territory. On the other hand, in practice indigenous peoples were treated as though they had sovereignty, or at least as though they had a moral claim to it: treaties were sought and signed, implicitly recognizing a form of original sovereignty that lay with indigenous peoples. Thus, indigenous sovereignty was at once both affirmed and denied. Antony Anghie has argued that it was the European encounter

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6 Martti Koskenniemi, *What Use for Sovereignty Today?*, 1 *ASIAN J. INT'L L.* 61, 70 (2011).

7 FRANCISCO DE VITORIA, *DE INDES ET DE IVRE BELLI REFLECTIONES* (James Brown Scott ed., John Pawley Bate trans., 1917) (1532).

8 See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 18 (2d ed. 2004); see also *id.* at 31-34 (discussing the widespread European commitment to trusteeship over indigenous peoples in the nineteenth and early twentieth centuries, and its "civilizing" mission).

9 VITORIA, *supra* note 7, at 161.

10 *Id.* at 160.

with indigenous peoples that produced the concept of sovereignty,<sup>11</sup> but even in that case the concept was forged only so it could be at once recognized and denied with respect to indigenous nations. To this day, international law remains plagued by this formative contradiction as it struggles to recognize and accommodate the status of indigenous peoples, indigenous treaties, and indigenous rights.

Under the Westphalian conception of state sovereignty in international law, states possess exclusive and absolute dominion over a territory and its people. James Tully has labelled the result of this conception of sovereignty “the Empire of Uniformity,” whereby a drive towards absolute and centralized power produced “monologic” relations — that is, an undifferentiated relation of dominion over aboriginal peoples, justified as an inherent dimension of European state sovereignty.<sup>12</sup> P.G. McHugh, however, in his magisterial history of English commonwealth colonialism, suggests that it was only by the mid-to late-nineteenth century that Tully’s “Empire of Uniformity” accurately captured “the misery-ridden experience of aboriginal peoples in the North American and Australasian jurisdictions.”<sup>13</sup> By this point, indigenous peoples were entirely subsumed within the state, and subject to a “non-justiciable trust.”<sup>14</sup> Indigenous peoples were denied what we now refer to as aboriginal standing or aboriginal rights because the relationship between them and the Crown was viewed as a function of the Crown’s prerogative.<sup>15</sup> Their status served to negate any indigenous legal capacity, swallowed by a positivist vision of Crown sovereignty.<sup>16</sup>

It is important to recognize that the “Empire of Uniformity” form of sovereignty did not emerge fully formed, but was rather the result of shifting doctrines and practices which, McHugh stresses, lacked any consistent application in the early nineteenth century.<sup>17</sup> The inconsistency of Crown policy toward indigenous peoples was epitomized by the tension between the recommendations of an 1837 Select Committee on Aboriginals and actual

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11 See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 29 (2005).

12 See JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995).

13 P.G. MCHUGH, *ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS AND SELF DETERMINATION* 129 n.20 (2004) (implying in a footnote that he is giving historical location to what Tully merely described as a “powerful tendency”).

14 *Id.* at 191.

15 *Id.*

16 *Id.* at 213.

17 *Id.*

Crown practice. The Committee recommended that Britain no longer conclude treaties with tribes under British sovereignty, so as to avoid the claim that indigenous polities possessed a measure of sovereignty.<sup>18</sup> The Committee believed that “proper recognition of the rights of aboriginal peoples came through the Crown guardianship of its aboriginal subjects rather than the ‘decorous veil’ of a pretended, retained tribal sovereignty,” a sovereignty the Committee claimed was unsustainable under common law doctrine.<sup>19</sup> McHugh notes, however, that the report came too late for many colonies, which had been concluding treaties for years, and in practice representatives of the Crown continued to make treaties, driven by a need to obtain aboriginal land for resources rather than any ideological project.<sup>20</sup> The sum was a massive inconsistency: in British practice, indigenous people were seen as capable of relinquishing sovereignty and land, but without the legal status requisite for such a cession.<sup>21</sup> It was only by the end of the nineteenth century that the Westphalian conception of state sovereignty would implicitly oust indigenous sovereignty, in effect denying the previous two centuries’ practice that recognized tacitly the sovereign capacity of indigenous groups.<sup>22</sup>

The simultaneous recognition and denial of indigenous sovereignty is emblematic of what Koskenniemi identifies as the “exclusion-inclusion” discourse of international law.<sup>23</sup> For Koskenniemi, treaty practices of the nineteenth century — or in poignant terms for this Article, the seeking of “native consent in written form”<sup>24</sup> — epitomized the double play of colonialism. Treaties were an important part of justifying an empire: “[n]ative consent given in a treaty cession seemed to constitute an irreproachable moral-legal basis for European title and did away with the suspicion that Europeans were merely following in the footsteps of the fifteenth- and sixteenth-century empires.”<sup>25</sup> Nonetheless, for the treaties to be valid implied both indigenous

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18 *Id.* at 133.

19 *Id.* at 134.

20 *Id.* at 126.

21 *Id.* at 132-33.

22 *Id.* at 213. A sceptic might suggest that there is no inconsistency here, that sovereignty was merely surrendered in exchange for Crown protection. One of us has argued elsewhere that such an account is unconvincing. A surrender of sovereignty was unnecessary for acceptance of British protection, and any such deal would have been unconscionable and void. See EVAN-FOX DECENT, *SOVEREIGNTY’S PROMISE: THE STATE AS FIDUCIARY* 65-66 (2011).

23 MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 130 (2002).

24 *Id.* at 137.

25 *Id.* at 138.

possession of sovereignty and standing for indigenous peoples, which would subsequently be denied under orthodox conceptions of international law. From the beginning, indigenous peoples were inside and outside international law, with and without sovereignty, and in possession of land that had been viewed as *terra nullius* but still required cession by treaty.

Animating this nineteenth-century evolution of sovereignty, McHugh claims, was a justification of the relationship between the Crown and indigenous peoples as one of trusteeship or guardianship. McHugh explains how Enlightenment thinking — which saw history as progress and humanity at various points on a spectrum guided by a universal law of development (“monogenism”) — combined with a liberty-extending vision of imperialism to define Britain’s relationship with non-Christian peoples.<sup>26</sup> Equally important was the liberal belief “that human nature was intrinsically the same everywhere, and that it could be totally and completely transformed, if not by revelation . . . then by the workings of law, education, and free trade.”<sup>27</sup> Civilization became the catch-all discourse, albeit inconsistently deployed, to sum up these beliefs and practices; a standard whereby aboriginal culture fell short but which colonialism could help cultivate, thereby justifying imperial rule. As Anghie puts it, in the nineteenth-century “the acquisition of sovereignty was the acquisition of European civilization,” which meant that for “the non-European world, sovereignty was the complete negation of power, authority and authenticity.”<sup>28</sup> Indigenous peoples were seen through familiar tropes as either barbarians or noble savages, untouched by the enlightening or corrupting power of civilization. These tropes were subsequently blended with Social Darwinist beliefs that rose to popularity in the 1860s and which affirmed that survival was the prize for the fittest culture. Within Britain’s intellectual culture at the time, civilization “came to describe a state into which aboriginal culture would be prodded and shepherded,”<sup>29</sup> producing the assimilationist practices that would violently define indigenous life within an “Empire of Uniformity.”

Koskenniemi writes that the nineteenth-century colonial discourse of civilization equally presents a case of “exclusion-inclusion” regarding indigenous sovereignty. Sovereignty, understood as both an indicator and a gift of civilization, was to be judged by European standards. In the presence of indigenous difference, civilization as a measure of sovereignty worked as a paradoxical justification of colonialism due to its malleability and Eurocentrism:

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26 McHUGH, *supra* note 13, at 121-22.

27 *Id.* at 125.

28 ANGHIE, *supra* note 11, at 104.

29 McHUGH, *supra* note 13, at 126.



[I]f there was no external standard for civilization, then everything depended on what Europeans approved. What Europeans approved, again, depended on the degree to which aspirant communities were ready to play by European rules. But the more eagerly the non-Europeans wished to prove they played by European rules, the more suspect they became . . . . In order to attain equality, the non-European community must accept Europe as its master — but to accept a master was proof that one was not equal.<sup>30</sup>

Koskenniemi's history reveals a colonialism that both denied and extended sovereignty at the same time, through a conception of civilization that assured European domination under an imperial rule cloaked in trusteeship.

Alternative accounts, such as the one provided by Ronald Niezen, suggest these contradictions only existed so long as they were necessary to solidify colonial power. "Only as the balance of power shifted," he writes, "in favour of immigrant peoples with a growing settler population, increased military power, and the decimation of indigenous populations through diseases of European origin was the status of indigenous peoples as nations reappraised and legally diluted."<sup>31</sup> While the dynamics of power are undeniable, what such an account misses is that sovereignty's indigenous contradiction was more than a convenient power placeholder; it became the foundation and continuing *modus operandi* of the international legal order *vis-à-vis* indigenous peoples. Far from being "a one-shot affair," Patrick Macklem stresses that international law "is an ongoing process of exclusion and inclusion to the extent that it continues to subsume indigenous populations under the sovereign power of States not of their making."<sup>32</sup> On Macklem's view, international law is predominantly a legal system that vests sovereignty in states.<sup>33</sup> Its starting point allowed indigenous sovereignty only insofar as it could be forfeited, and the dual inclusion-exclusion discourse enabled the creation of an international legal order that is with us to this day.

The question now, then, is whether international law, as a system that distributes sovereignty to some actors and not others, is amenable to reconceptualization from the point of view of indigenous peoples. The immense challenge in restructuring the international legal order so as to include indigenous peoples has led some theorists to suggest sovereignty is conceptually irredeemable.

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30 KOSKENNIEMI, *supra* note 23, at 135-36.

31 RONALD NIEZEN, THE ORIGINS OF INDIGENISM: HUMAN RIGHTS AND THE POLITICS OF IDENTITY 29 (2003).

32 Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177, 186 (2008).

33 *Id.* at 182.

For Karen Shaw, the liberal conception of sovereignty operates pre-politically, as a set of shared ontological and epistemological conditions that become the foundation of the exercise of politics.<sup>34</sup> As a result, indigenous peoples are rendered external or other in the production of sovereignty in international law: “the violence of [sovereignty’s] production is rendered necessary and inevitable, rather than open to scrutiny and contestable.”<sup>35</sup> In other words, sovereignty is a precondition that sets limits on the political and results in an “othering” of indigeneity. Any project of reform that fails to take the pre-political status of sovereignty seriously, she writes, is guilty of “reinscribing the problem in [its] efforts to find solutions.”<sup>36</sup> From this perspective, the structure of international law is necessarily incompatible with plurality and will inevitably marginalize indigeneity in its maintenance and distribution of sovereignty.

Macklem, however, suggests just the opposite: it is the structure of international law, and its foundational denial of indigenous sovereignty, that justifies and gives standing to indigenous people, particularly in the form of indigenous rights. In this regard, indigenous rights emerge in order to

mitigate some of the adverse consequences of how the international legal order continues to validate what were morally suspect colonization projects by imperial powers . . . whose claims of sovereign power possess legal validity because of an international legal refusal to recognize these peoples and their ancestors as sovereign actors.<sup>37</sup>

What is fascinating in Macklem’s conception, then, is that the ongoing colonial machinations at the base of international law are what now drive international legal recognition of aboriginal standing and rights. In this sense,

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34 KAREN SHAW, *INDIGENEITY AND POLITICAL THEORY: SOVEREIGNTY AND THE LIMITS OF THE POLITICAL* 8-9 (2008). Shaw draws particular attention to Thomas Hobbes, whose blueprint for sovereignty in *Leviathan*, she claims, necessarily begins with “an entire — quite specific — attitude towards time, history, meaning” and constructs a knowing subject against the figure of the savage. *Id.* at 32-37. While Hobbes at times expressed the ethnocentric views of his day, Shaw misinterprets him badly when she casts him as an advocate of a pre-political view of sovereignty. For Hobbes, the state of nature is pre-political, but sovereignty is an artifice and always human-made. One of us has disputed Shaw’s pre-political and authoritarian reading of Hobbes. See Evan Fox-Decent, *Hobbes’s Relational Theory: Beneath Power and Consent*, in *HOBBS AND THE LAW* 118 (David Dyzenhaus & Tom Poole eds., 2012).

35 SHAW, *supra* note 34, at 203.

36 *Id.* at 156.

37 Macklem, *supra* note 32, at 179.

international law's contradiction with regard to indigenous peoples — the aforementioned “ongoing process of exclusion and inclusion”<sup>38</sup> — justifies an internal correction because “the sovereign power of the States in which they are located is grounded in international law's refusal to recognize their ancestors as sovereign legal actors.”<sup>39</sup> Whereas for Shaw the concept of sovereignty denies meaningful recognition of indigenous rights and sovereignty *ab initio*, Macklem suggests that international law's system of sovereignty itself explains contemporary recognition of indigenous claims.

In 2007, James Anaya outlined four major effects indigenous peoples have had on modern international law, an influence that supports Macklem's position and suggests an ongoing process of correction within international law. The first way indigenous peoples have shaped international law, Anaya writes, is by pushing it past the individual-state dichotomy and toward recognition of collective rights,<sup>40</sup> while the second is a general weakening of an absolutist doctrine of state sovereignty.<sup>41</sup> The third effect of indigenous peoples on international law is contestation of the assumed connection between self-determination and statehood, thus undermining “the premise of the state as the highest and most liberating form of human association.”<sup>42</sup> The final effect is a breakdown of the classical understanding of the subjects of international law, since a true plurality of sub-state and autonomy-seeking actors must now be considered.<sup>43</sup> Each development challenges, to some degree, the exclusion of indigenous sovereignty from international law.

We have argued that, as a general matter, colonial powers recognized indigenous sovereignty when it suited their interests to do so, and denied it otherwise. International law enabled this inclusion-exclusion approach to indigenous peoples by supplying the framework under which European states could seek to justify colonialism by purporting to place indigenous peoples under a civilizing trusteeship, allegedly for their own good. In the next Part, we begin with a brief overview of the development of modern international law on indigenous peoples. We then discuss the development under international law of indigenous peoples' right to participate in public decision-making. We pay particular attention to IACHR jurisprudence that imposes on states a duty to consult and, in some cases, an FPIC duty to obtain

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38 *Id.* at 186.

39 *Id.* at 209.

40 S. James Anaya, *Indigenous Law and Its Contribution to Global Pluralism*, 6 *INDIGENOUS L.J.* 3, 6-7 (2007).

41 *Id.* at 8.

42 *Id.* at 9.

43 *Id.* at 10.

indigenous consent to intended state-sponsored projects. As we shall see, the IACHR jurisprudence implicitly affirms an ideal of constitutional pluralism. To that extent, it holds the promise of letting trusteeship in international law break with its colonial and paternalist past.

## II. INDIGENOUS PARTICIPATION AS INDIGENOUS SOVEREIGNTY

### A. The Rise of Indigenous Rights

At the Berlin Conference on Africa in 1884, European powers divided up Africa for colonization while committing themselves to “watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being. . . .”<sup>44</sup> Similarly, the members of the League of Nations later undertook “to secure just treatment of the native inhabitants of territories under their control.”<sup>45</sup> Under the League’s mandate system, which applied to territories annexed to or colonized by Germany and the Ottoman Empire before World War I, mandatories pledged to provide “tutelage” of local inhabitants “not yet able to stand by themselves” in accordance with “the principle that the well-being and development of such peoples form a sacred trust of civilization. . . .”<sup>46</sup> Around the same time, during the Interwar period, the International Labour Organization (ILO) began to extend its supervision of working conditions to the colonies.<sup>47</sup>

It was not until 1957, however, that the ILO adopted the Indigenous and Tribal Populations Convention (Convention 107),<sup>48</sup> which for the first time extended international law to indigenous peoples living not in colonies but independent states. Drafted in the shadow of the Universal Declaration of Human Rights,<sup>49</sup> Convention 107 enshrined a significant array of rights protective of indigenous

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44 General Act of the Conference of Berlin Concerning the Congo art. 6 (Feb. 26, 1885), *reprinted in* 2 E. HERTSLET, *THE MAP OF AFRICA BY TREATY* 468, 473 (3d ed. 1908).

45 League of Nations Covenant art. 23, para. b.

46 *Id.* at art. 22.

47 See LUIS RODRÍGUEZ-PIÑERO, *INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919-1989)* (2005) (providing a detailed account of the ILO’s interventions and initiatives regarding indigenous peoples).

48 International Labour Organization Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247 [hereinafter ILO No. 107].

49 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

peoples — e.g., rights to traditional territory,<sup>50</sup> nondiscrimination in political and civic life<sup>51</sup> and employment,<sup>52</sup> social security,<sup>53</sup> health services,<sup>54</sup> and education.<sup>55</sup> Nonetheless, these rights were all subsumed within an overarching policy of integration that considered the suffering of indigenous peoples to stem from a failure to integrate them into the liberal settler state. The Preamble of Convention 107 affirms that a lack of integration of indigenous peoples explains their disadvantaged position, and calls for “their progressive integration into their respective national communities.”<sup>56</sup> Implicit throughout is an erasure of indigenous sovereignty and any entitlement to sub-state autonomy. In other words, Convention 107 preserves and even entrenches more deeply the paternalistic approach.

As with the commitments undertaken at the Berlin Conference of 1884 and later on through the League of Nations’ mandate system, the rights protected under Convention 107 emerge from a deep-seated view that the central problem afflicting indigenous peoples is that they are distinctively indigenous. Plainly, Convention 107 was drafted under the still-prevalent influence of colonial misconceptions about the inferiority of indigenous peoples. While the measures used to bring about integration were not to include “force or coercion”<sup>57</sup> — Convention 107 marks a shift in policy from forcible assimilation to non-coercive integration — the Convention nevertheless sought the “progressive integration” of indigenous peoples into Western society and with it the extinguishment of indigenous peoples *qua* peoples. To this extent, the Convention upheld the assumption of the mandate system that aboriginal individuals were in need of “tutelage,” and likewise would have appeared to many of its intended beneficiaries as the alien constitutional regime of an intermeddling moral busybody.

Convention 107 did contain a forerunner of the duty to consult. Under Article 5, state parties were to “seek the collaboration of [indigenous] populations and of their representatives.”<sup>58</sup> But the context of this collaboration was limited to the state’s application of “the provisions of this Convention relating to the

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50 ILO No. 107, *supra* note 48, art. 11.

51 *Id.* art. 2.

52 *Id.* art. 15.

53 *Id.* art. 19.

54 *Id.* art. 20.

55 *Id.* arts. 21-25.

56 *Id.* pmb1.

57 *Id.* art. 2(4); *see also id.* art. 4 (addressing the harms that can befall groups and individuals “when they undergo social and economic change”).

58 *Id.* art. 5(a).

protection and integration of the populations concerned.”<sup>59</sup> In other words, the scope of indigenous collaboration was limited to the assistance it could provide to liberal rights protection and the dissolution of indigenous peoples as distinctive entities.

In 1989, Convention 107 was replaced by the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169).<sup>60</sup> While many of the same substantive rights affirmed in Convention 107 are retrenched in Convention 169, the latter makes no reference to an overarching policy of integration. Moreover, while Convention 107 stipulated that indigenous peoples “shall be *allowed* to retain their own customs and institutions where these are not incompatible with the national legal system or the objective of integration programmes,”<sup>61</sup> Convention 169 affirms that indigenous peoples “shall have the *right* to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights.”<sup>62</sup> Convention 169 also anticipates the establishment of procedures to resolve conflicts between indigenous customary law and national law or international human rights.<sup>63</sup> These provisions have led many scholars to suggest that Convention 169’s signal achievement is its recognition of legal pluralism within multinational and pluriethnic states.<sup>64</sup>

## **B. Between Consultation and Consent**

Implicit to intrastate legal pluralism is an idea of constitutional pluralism under which sovereign powers related to lawmaking, adjudication and administration are distributed within a single state across separate entities that have primary jurisdiction over certain territories and persons. Plausibly, under this constitutional model, indigenous peoples would have primary jurisdiction over the lands and aboriginal inhabitants within their territory. Tensions arise, however, when states seek to utilize indigenous lands for national purposes in ways that will harm indigenous communities. States, for example, may wish to develop hydro projects or grant concessions for

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59 *Id.* art. 5.

60 International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO No. 169].

61 ILO No. 107, *supra* note 48, art. 7(2) (emphasis added).

62 ILO No. 169, *supra* note 60, art. 8(2) (emphasis added).

63 *Id.*

64 *See, e.g., ANAYA, supra* note 8, at 58-59.

the extraction of natural resources. These forms of state action may infringe indigenous rights to land or indigenous rights to use certain lands for traditional purposes, such as religious ceremonies, hunting or fishing.

Crucial for present purposes is the way invasive state action tests both the constitutional pluralist model and the idea that sovereignty is held in trust for humanity. Constitutional pluralism is tested because state action over indigenous peoples and their lands brings to the fore the issue of whether state or indigenous authorities have ultimate decision-making power with respect to such matters. The limits of the trusteeship model are likewise tested: can the trusteeship model entrust sovereign powers to joint but conflicting public entities within the same state? And if it can, how are conflicts between state and indigenous legal authorities to be resolved? At the limit, the question is whether international law can go deeply intra-national and meet the demands of constitutional pluralism that arise from the presence of indigenous peoples within sovereign states. The challenge is not to pierce the veil of sovereignty, but to reimagine sovereignty's structure and foundations.

Convention 169 addresses the problem of constitutional pluralism, in part, by entrenching a much more robust duty to consult than appeared in Convention 107. Article 7(1) affirms that indigenous peoples are entitled to participate in public policy- and decision-making that affects them directly.<sup>65</sup> More specifically still, Article 6(1) declares that states must "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly."<sup>66</sup>

In drafting Convention 169, a major stumbling block concerned whether indigenous people would have a veto over invasive state action. State parties roundly condemned this proposal as an unwarranted violation of their sovereignty, while indigenous representatives insisted on an FPIC duty and its implicit veto.<sup>67</sup> In the result, the drafters settled on the following compromise that fell short of a full FPIC obligation, but nonetheless identified FPIC as the "objective" of the duty to consult: "The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures."<sup>68</sup>

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65 ILO No. 169, *supra* note 60, art. 7(1).

66 *Id.* art. 6(1).

67 See Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677, 690-91 (1990) (discussing the dispute).

68 ILO No. 169, *supra* note 60, art. 6(2).

In 2007, the U.N. General Assembly adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>69</sup> Whereas Convention 169 is silent on the issue of self-determination and indeed undercuts such claims by stipulating that the term “*peoples*” in the Convention is not to be read as having any implications under international law,<sup>70</sup> UNDRIP declares forthrightly that “[i]ndigenous peoples have the right to self-determination.”<sup>71</sup> Similarly, UNDRIP recognizes in indigenous peoples “the right to autonomy or self-government,”<sup>72</sup> as well as “the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.”<sup>73</sup> UNDRIP protects a wide range of indigenous cultural and religious practices, and places states under an unqualified FPIC duty in relation to any action that might compel a community’s relocation.<sup>74</sup> Furthermore, the general duty to consult from UNDRIP is stronger and closer to an FPIC duty than the cognate duty from Convention 169:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>75</sup>

This is not an FPIC duty, strictly speaking, since the requirement that states consult “*in order to obtain*” indigenous consent leaves open the possibility that a state may engage in a good-faith consultation, fail to obtain consent, and then proceed with its project having consulted in good faith. Although UNDRIP is nonbinding, it and Convention 169 formed part of the international legal context within which the IACHR recently adjudicated two important cases

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69 United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295, 46 I.L.M. 1013 (Sept. 13, 2007) [hereinafter UNDRIP]. 143 countries voted for the Declaration, four voted against, eleven abstained, and thirty-four were absent from the vote. Australia, New Zealand, Canada and the United States voted against.

70 ILO No. 169, *supra* note 60, art. 1(3) (“[T]he term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”).

71 UNDRIP, *supra* note 69, art. 3.

72 *Id.* art. 4.

73 *Id.* art. 5.

74 *Id.* arts. 8, 9, 10, 11, 12, 13, 15, 24, 25, 34.

75 *Id.* art. 32(2).



involving the duty to consult: *Saramaka People v. Suriname*<sup>76</sup> and *Kichwa People of Sarayaku v. Ecuador*.<sup>77</sup>

### C. Consultation and FPIC at the IACHR<sup>78</sup>

The Saramaka are a Maroon people of African descent. Their ancestors were taken forcibly to Suriname as slaves during European colonization in the seventeenth century. They fought and won freedom from slavery in the eighteenth century, establishing themselves as autonomous communities in the rainforest of the Upper Suriname River region. The Court found that they organized themselves in matrilineal clans, had a communal system of property holding, maintained a strong spiritual connection to their lands, and regulated themselves (at least partially) using their own norms and cultural traditions. Thus they were considered a tribal community, and as such entitled to rely on special measures of protection the Court had established in its prior decisions

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76 *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007). For commentary, see Lisl Brunner, *The Rise of Peoples' Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights*, 7 CHINESE J. INT'L L. 699 (2008); James Harrison, *International Law — Significant Environmental Cases 2007-08*, 20 J. ENVTL. L. 475 (2008); and Marcos Orellana, *Saramaka People v. Suriname (Case Note)*, 102 AM. J. INT'L L. 841 (2008). The Court provided an “interpretation judgment” in 2008 to clarify certain findings in its original 2007 judgment. See *Saramaka People v. Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185 (Aug. 12, 2008).

77 *Kichwa People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012). For commentary, see Lisl Brunner & Karla Quintana, *The Duty to Consult in the Inter-American System: Legal Standards After Sarayaku*, AM. SOC'Y INT'L L. INSIGHTS, Nov. 28, 2012, at 35; Upsana Khatri, *Indigenous Peoples' Right to Free, Prior and Informed Consent in the Context of State-Sponsored Development: The New Standard Set in Sarayaku v. Ecuador and Its Potential to Delegitimize the Belo Monte Dam*, 29 AM. U. INT'L L. REV. 165 (2013); and Carol Verbeek, Note, *Free, Prior, Informed Consent: The Key to Self-Determination: An Analysis of The Kichwa People of Sarayaku v. Ecuador*, 37 AM. INDIAN L. REV. 263 (2012-2013).

78 The IACHR's mandate is to adjudicate claims where States Parties are alleged to have violated the American Convention on Human Rights, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (Nov. 22, 1969) [hereinafter American Convention]. Beginning in 2001, the IACHR began to recognize the rights of indigenous peoples to their ancestral lands.

on indigenous and tribal land rights. In *The Moiwana Community v. Suriname*,<sup>79</sup> in particular, the Court had found that another Maroon community in Suriname was a tribal community to which special measures of protection applied.

*Saramaka People* arose from Suriname's failure to recognize and secure the Saramakas' rights to traditional lands and resources, and its violation of those rights through concessions to mining and logging companies. The key articles of the American Convention on which the Saramaka relied were Articles 1, 2 and 21. Article 1 commits the Convention's signatories to respecting the rights and freedoms it enshrines.<sup>80</sup> Article 2 aims to ensure that the commitment under Article 1 has domestic effect by requiring states to adopt any legislative or other measures as may be necessary.<sup>81</sup> Finally, Article 21 establishes a right to property subject to lawful restrictions that serve the public interest and which are accompanied by "just compensation."<sup>82</sup>

The Court held that Article 21 protects the communal property of indigenous communities.<sup>83</sup> This expansive interpretation of Article 21, the Court said, is "based upon the special relationship that members of indigenous and tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the physical and cultural survival of such peoples."<sup>84</sup> The Court found that Suriname was under an obligation to adopt an appropriate legislative framework to give domestic effect to the Saramakas' communal property right, and a further duty to delimit and demarcate this property in consultation with the Saramakas and neighboring peoples. The Court declared Suriname in breach of both duties.<sup>85</sup>

These findings more or less reaffirmed and applied the Court's prior case law. The Court's subsequent conclusions with respect to natural resource rights, however, were largely novel and in a good sense revolutionary. In two prior cases, *Yakye Axa* and *Sawhoyamaya*, the Court had held that members of indigenous and tribal communities have the right to ownership of natural resources traditionally used within their territories, because without such

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79 *The Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005).

80 American Convention, *supra* note 78, art. 1(1).

81 *Id.* art. 2.

82 *Id.* art. 21.

83 *Saramaka People*, (ser. C) No. 172, ¶ 89 (quoting *The Indigenous Community Yakye Axa v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 143 (June 17, 2005)).

84 *Id.* ¶ 90.

85 *Id.* ¶ 96.

ownership their physical and cultural survival would be imperiled.<sup>86</sup> But those cases did not confront the issue of commercial exploitation of natural resources, nor the issue of subsoil rights.

In *Saramaka People*, the Inter-American Commission and the Saramakas' representatives alleged that concessions to forestry and mining companies, unless granted after full and effective consultation with the Saramakas, violated the community's right to natural resources lying on and within the land. Suriname countered that all land ownership, including all natural resources, vests in the State, and thus the State may grant at its discretion mining and logging concessions within Saramaka territory. Suriname also argued, in the alternative, that if the Court found that the Saramakas had some entitlement to resources, that this entitlement should be limited to the tribe's subsistence requirements (e.g., agriculture, hunting and fishing).<sup>87</sup>

The Court acknowledged that mining and logging operations could have unintended deleterious consequences with respect to the Saramakas' traditional use of resources, but noted that Article 21 provides that national law may restrict property rights for public purposes so long as the restriction respects proportionality.<sup>88</sup> Additionally, the Court held that the State could restrict the Saramakas' use and enjoyment of ancestral lands only if the restriction "does not deny their survival as a tribal people."<sup>89</sup> From this principle of physical and cultural survival, the Court adduced three concrete obligations owed by the State to the Saramakas whenever a concession over natural resources within their territory is under contemplation. First, the Saramakas must be ensured effective participation within any development, investment, exploration or extraction plan. Second, the Saramakas must receive a reasonable benefit from any such plan. Third, no concession may be granted until an independent environmental and social impact assessment has been conducted.<sup>90</sup>

In elaborating the content of "effective participation" within development or investment plans, the Court said that at a minimum this implies a duty to consult with the community "at the early stages . . . not only when the need arises to obtain approval from the community."<sup>91</sup> The State must also ensure

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86 *Yakye Axa*, (ser. C) No. 125, ¶ 137; *The Indigenous Community Sawhoyamaya v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 118 (Mar. 29, 2006).

87 *Saramaka People*, (ser. C) No. 172, ¶¶ 118-125.

88 *Id.* ¶ 127. The Court held that restrictions on property must be "a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society." *Id.* ¶¶ 144-145.

89 *Id.* ¶ 128.

90 *Id.* ¶¶ 129-140.

91 *Id.* ¶ 133.

that the community is aware of environmental and health risks. All this is consistent with the duties to consult found in Convention 169 and UNDRIP.

The Court broke new ground, however, when it turned its attention to the requirements of “effective participation” where “large-scale” development or investment projects are involved that would have a major impact within Saramaka territory. In these cases, the Court held that “the State has a duty, not only to consult the Saramakas, but also *to obtain their free, prior, and informed consent, according to their customs and traditions.*”<sup>92</sup> The Court, in other words, plainly affirmed an unequivocal FPIC duty. The obligation of the state in these circumstances is not simply to consult “in order to obtain” indigenous consent (UNDRIP) or with such consent as its “objective” (Convention 169). The FPIC duty imposed by the Court is qualitatively different in nature than the duty to consult because it alone gives indigenous peoples a veto over large-scale state action within their territory. In support of the FPIC duty, the Court cited a report by the U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People.<sup>93</sup> The Special Rapporteur found that large-scale projects can have devastating effects related to “loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.”<sup>94</sup> In sum, where the physical and cultural survival of an indigenous people is threatened by a large-scale project, the Court imposes an FPIC duty to resolve the question of “Who decides?” in favor of indigenous peoples.<sup>95</sup>

In *Sarayaku*, the Court had to rule on the legality of Ecuador’s grant of a permit to a private oil company to carry out exploration and exploitation activities in Sarayaku territory in the 1990s without previously consulting the Sarayaku or obtaining their consent. The Kichwa People of Sarayaku

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92 *Id.* ¶ 134 (emphasis added).

93 *Id.* ¶ 135 (citing Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, submitted in accordance with Commission Resolution 2001/65, 59th Sess., U.N. Doc. E/CN.4/2003/90, at 2 (24/02/2003) (by Rodolfo Stavenhagen)).

94 *Id.*

95 There is a helpful analogy to the FPIC duty in U.S. corporate law. In certain settings, classes of shares are entitled to vote separately on decisions that will have a material adverse effect on their interests, and their vote may be decisive, even if the class constitutes a minority position in the corporation. Del. General Corp. Law art. 242(b)(2). We thank Andrew Gold for pointing out this analogy to us.

inhabit a remote tropical forest area of the Amazonian region of Ecuador. Numbering roughly 1200, they have traditional lawmaking and executive institutions, and live according to ancestral customs and traditions, subsisting on collective farming, hunting, fishing and gathering.<sup>96</sup> In 1992, Ecuador awarded territory to indigenous peoples in which the Sarayaku territory composed 135,000 hectares.<sup>97</sup> In 1998, Ecuador ratified Convention 169, and a month later adopted its 1998 Constitution which recognizes the collective rights of indigenous peoples.<sup>98</sup>

In 1996, however, Ecuador had granted a private oil company a permit to explore and exploit hydrocarbons in an area encompassing sixty-five percent of the Sarayaku territory.<sup>99</sup> The contractor assumed obligations to prepare an Environmental Impact Assessment (EIA) and an Environmental Management Plan aimed at preserving the ecological integrity of the region, but these were never put into practice.<sup>100</sup> Instead, the contractor offered inducements to various individuals within the Sarayaku community to win their support so as to obtain the consent of the community as a whole.<sup>101</sup> On June 25, 2000, the Sarayaku held a General Assembly at which, in the presence of the contractor, it decided to reject the company's offer of sixty-thousand dollars total and jobs for 500 men of the community.<sup>102</sup> In 2001, the contractor hired a team of anthropologists and sociologists that attempted to divide the community through a campaign of defamation waged against various leaders and local organizations.<sup>103</sup> In 2002, the government approved the contractor's EIA and Environmental Management Plan over the objections of the Sarayaku. The contractor engaged in seismic exploration using explosives, with increasing conflicts between the Sarayaku, the military and the contractor's security personnel. The Sarayaku declared an "emergency" in November 2002, ceasing their daily economic, educative and administrative activity for four to six months. The Court found that the oil company destroyed one site of special significance for the spiritual life of the Sarayaku, and also "laid down seismic lines, set up seven heliports, destroyed caves, water sources and underground rivers needed to provide drinking water for the community; and cut down trees

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96 *Sarayaku*, (ser. C) No. 245, ¶¶ 52-57.

97 *Id.* ¶ 61.

98 *Id.* ¶ 71.

99 *Id.* ¶ 65.

100 *Id.* ¶¶ 67-69.

101 *Id.* ¶¶ 73-75.

102 *Id.* ¶ 74.

103 *Id.* ¶ 75.

and plants of great environmental and cultural value, and used for subsistence food by the Sarayaku.”<sup>104</sup>

Citing Convention 169, UNDRIP and *Saramaka People*, the Court affirmed that the right to consultation is “one of the fundamental guarantees to ensure the participation of indigenous peoples and communities in decisions regarding measures that affect their rights,”<sup>105</sup> and characterized the obligation as a “general principle of international law.”<sup>106</sup> Although the Court did not discuss the FPIC duty of *Saramaka People* explicitly, it referred to the paragraph that contained it at numerous junctures.<sup>107</sup> Given the numerous adversarial measures the state and the contractor had taken against the Sarayaku, and the lack of any meaningful consultation, the Court did not need to rely on an FPIC duty to hold Ecuador liable — a robust duty to consult was more than adequate. Significantly, however, various aspects of the Court’s articulation of the duty to consult in *Sarayaku* arguably presuppose or admit something very close to an FPIC obligation. Consultation must take place in the early stages and “not only when it is necessary to obtain the community’s approval, if appropriate.”<sup>108</sup> The Court also held that the duty to consult includes a duty to disclose the potential risks and benefits of a project.<sup>109</sup> The justification of this duty is cast in terms of allowing the members of the indigenous community to make an informed decision whether or not to approve the project.<sup>110</sup> This duty to disclose would have no purpose if a community’s subsequent negative decision had no legal effect.

We turn now to the question whether this beefed-up duty to consult and an FPIC duty of limited scope can save a trusteeship model of sovereignty from its alleged susceptibility to abuse and the charge of busybody paternalism. But to address these concerns, we first need to bring into view the *plural* fiduciary structure of sovereignty suggested by the constitutional pluralism that underwrites the IACHR’s duty-to-consult jurisprudence.

### III. IMPLICATIONS OF CONSTITUTIONAL PLURALISM

The plural and fiduciary conception of sovereignty builds on the idea that states hold sovereignty in trust for humanity. The implication of this thought

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104 *Id.* ¶ 105.

105 *Id.* ¶ 160.

106 *Id.* ¶ 164.

107 *Id.* notes 178, 236, 242.

108 *Id.* ¶ 177.

109 *Id.*

110 *Id.*

is that states must take account of the interests of foreign stakeholders when they adopt policies that have spillover or negative externality effects.<sup>111</sup> States are entitled to favor their nationals because they are entrusted by international law to secure political and legal order on their behalf within the territory under their jurisdiction, but states cannot adopt an attitude of indifference to foreign nationals who stand to be wronged by their policies. On this view, states can treat their nationals as a predominant but not exclusive moral concern.<sup>112</sup> While the members of indigenous peoples are citizens and not foreign nationals, the pluralist account of sovereigns as trustees nonetheless must extend the trusteeship model in two directions so as to explain the special status and claims of indigenous peoples under international law.

First, the pluralist account borrows from the path-breaking work of Will Kymlicka, treating indigenous peoples as a special case on the grounds that no one can reasonably be asked to forsake the legal and political institutions that are thickly constitutive of their distinctive culture and sense of place in the world.<sup>113</sup> Busybody policies of assimilation and integration are wrongful precisely because they foist this unreasonable demand on indigenous peoples and their members. The special status of indigenous peoples is reinforced by their thick attachment to ancestral lands, an attachment on which their cultural survival is often said to depend.<sup>114</sup> Whereas the sovereigns-as-trustees model suggests that foreign stakeholders have fewer and weaker claims against states than citizens, in the indigenous case, just the opposite is true: the sovereigns-as-trustees model, applied in a manner that is sensitive to indigenous difference, suggests that indigenous peoples and their members have wider and stronger claims against the state than non-indigenous citizens.

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111 Benvenisti, *supra* note 5, at 8 (characterizing this approach as a rejection of monism in favor of “other-regarding dualism”). As will become clear, our defense of constitutional pluralism pushes “other-regarding dualism” into new pluralistic territory.

112 A rich literature on cosmopolitanism has developed around this idea. *See, e.g.*, Kok-Chor Tan, *The Demands of Justice and National Allegiance*, in *THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* 164 (G. Brock & H. Brighouse eds., 2005).

113 *See* WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

114 *See, e.g.*, *Saramaka People*, (ser. C) No. 172, ¶ 90. A “thick” attachment is an attachment partially constitutive of a person or group’s identity; the person or group cannot forego the attachment without suffering a grave sense of loss, such as one experiences with the passing of a loved one or an injury that ends one’s career. These considerations reveal that the pluralist model applies to indigenous peoples where there is no (or an attenuated) history of colonialism, such as the Samis in Scandinavia, as well as to the majority who have endured colonialism.

Indigenous claims are *wider* because they encompass, for example, the duty to consult and a limited FPIC duty, as well as ancestral claims to land and resources that non-indigenous citizens do not possess. Indigenous claims are *stronger* because they proceed from a claim to share sovereign authority with the state so as to constrain its lawmaking power. This is what the duty to consult and the FPIC duty are all about. While non-indigenous citizens may benefit from entrenched constitutional norms that restrict lawmaking, ordinarily there is no duty on the state to consult its non-indigenous citizens *before* enacting legislation, much less a duty to obtain their consent.

The second and more radical way in which the pluralist account extends the fiduciary model is by taking seriously the intrinsic, intrastate sovereign authority of the legal and political institutions of indigenous peoples. The FPIC duty in relation to large-scale projects is difficult to explain without reference to international law's recognition of indigenous peoples' sovereignty over their lands and themselves.<sup>115</sup> As noted already, an FPIC duty confers a veto on indigenous peoples. This in effect gives them co-legislative power with respect to large-scale projects within their territories, which is precisely why state parties resisted incorporating a general FPIC duty in Convention 169 and UNDRIP. To explain this development in international law, the sovereigns-as-trustees model must admit that states are not the only sovereign actors cognizable to international law. Just as the post-World War II human rights movement expanded the subjects of international law to include individuals as bearers of human rights, the modern indigenous movement expands the class of sovereign persons at international law to include indigenous peoples. This is the second direction in which the pluralist account of sovereignty pushes the trusteeship model. Whereas the first direction regulates the vertical relations between the state and indigenous peoples, this second direction establishes a

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115 This is not to deny, of course, that the positive source of the obligation is the American Convention on Human Rights, and that the IACHR at many junctures, relying on a large interpretation of property under Article 21, points to social, cultural and economic human rights to justify the FPIC duty. Still, it is significant that the Court has not found a duty to consult or obtain consent where property rights of non-indigenous persons are infringed. Moreover, the legal right-bearer in the indigenous case is not the usual bearer of human rights — the individual — but rather the community. In our view, a plausible and normatively attractive way to account for the Court's recognition of the FPIC duty in the indigenous case is to see it as an attempt to overcome the paternalistic inclusion/exclusion logic of prior trusteeship models through a limited recognition of indigenous sovereignty. It may well be that a capacious and context-sensitive understanding of human rights can incorporate — or even require — recognition of indigenous sovereignty, but we cannot explore this possibility here.



horizontal relationship between states and indigenous peoples, albeit one of limited scope. Its regulation falls properly within the province of international law, understood literally to denote the law that regulates relations between separate nations, even if those nations happen to occupy the same state.

This is the intrastate model of constitutional pluralism presupposed by the IACHR's imposition of an FPIC duty in cases of large-scale projects within indigenous territory. The model is constitutional in the ordinary sense that it bears on the lawmaking authority of the state. But it is also constitutional in the sense that it articulates an ideal of constitutionalism appropriate to the legal order of a state in which indigenous and non-indigenous peoples alike have a legitimate claim to autonomous lawmaking authority. At the core of this ideal is the thought that peoples as well as individuals are moral equals, and thus, in principle, they are all entitled to their own forms of lawmaking.

With this model of constitutional pluralism in view, we can now make sense of the way in which the Court in *Sarayaku* developed various pieces of the duty to consult. The Court explained that, in order for affected peoples to make an informed decision as to whether or not to approve any given project, the duty to consult must both occur early and inform indigenous peoples of the project's risks and benefits. In other words, having found an explicit FPIC duty of limited scope in *Saramaka People*, the Court in *Sarayaku* should be interpreted as having seized on the model of constitutional pluralism implicit to that FPIC duty and having woven an FPIC duty into the fabric of the wider duty to consult. But even if this interpretation of *Sarayaku* presses too far, it remains significant that the state-indigenous vertical relationship is regulated not only by a duty to consult, but by a further duty borne by the state to justify its action in compliance with a strict principle of proportionality that takes seriously the material requirements for the cultural survival of indigenous peoples. This international legal duty, and its supervision by the IACHR, helps ensure that decisions taken by the state that set back indigenous interests must still be defensible to them. This is a far cry from the Westphalian conception of sovereignty under which states could legislate at will within their territory. Properly understood, robust duties to consult and justify speak to the idea that the state is a trustee *vis-à-vis* indigenous peoples, and that their special vulnerability to state action brings with it special, international obligations. Let us consider now some of the ways this regime can address the worry that trusteeship invariably leads to paternalism.

Three features of the IACHR regime mitigate this concern. The most prominent is the explicit FPIC duty from *Saramaka People*, since this duty effectively distributes to indigenous peoples a limited sovereign power to co-legislate with respect to large-scale projects in their territories. The same is true regarding the constitutional pluralist reading of the duty to consult

set out in *Sarayaku*. Where an FPIC duty explicitly or implicitly lies, there is a sharing of state sovereignty rather than subjection to it. Second, where the duty to consult does not bring with it an FPIC duty, there still remains the state's duty to justify its actions in a way that satisfies the requirements of proportionality. Last, the question whether consent has been given or whether (non-FPIC) consultation and subsequent justification is adequate is ultimately reviewable by an independent, international body; namely, the IACHR. The possibility of independent review supplies impartial conditions of justice that allow the state and indigenous peoples to confront one another as international legal equals. This is not to say that international law treats indigenous sovereignty in the same way it treats state sovereignty — states plainly remain the primary legal actors in international law — but rather that when the state is brought into an international adjudicative forum by an indigenous people, both parties are treated as equals before the law.

These same considerations also belie the suggestion that the pluralist trusteeship model lends itself too readily to abuse. Were the model one that states with compliant courts could apply themselves, without the possibility of external review, this would indeed be a deep concern: such states would wield unilateral power over indigenous peoples and dominate them. Admittedly, the duty to consult and justify cedes greater authority to the state than it would retain were FPIC the clear norm across the board. If nothing else, FPIC empowers indigenous peoples to charge higher lease fees for the use of their lands, and similarly empowers them to impose more strict conditions related to environmental protection, labor and health standards, and other concerns. Nonetheless, the success of peoples such as the Saramaka and the Sarayaku suggests that even the enforcement of a robust duty to consult that falls short of FPIC can supply effective protection in a way that acknowledges their special claim to intrastate autonomy.

## CONCLUSION

Ultimately, by understanding the development of the duty to consult and FPIC in international law as an implicit recognition of indigenous sovereignty, we see the limits of Macklem's assertion that "international indigenous rights vest in indigenous people because international law vests sovereignty in States."<sup>116</sup> There is equal limitation in James Anaya's lauding the IACHR decisions before 2005 as solely an expression of a realist human rights approach to international law, "both pragmatic and ethical," denying the presence of any

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116 Macklem, *supra* note 32, at 203.

thread of sovereignty recognition within the evolution.<sup>117</sup> Properly construed, these more recent developments are a realist evolution in a sovereignty-based approach to international law, espousing a pragmatic and ethical sensibility that a fiduciary theory of the state is able to absorb but which a Westphalian conception cannot. They represent an expansion and reconfiguring of international law, not a correction internal to its founding injustices.

In our opinion, to suggest that these new developments either hinge upon “the normative grounds of the Sovereign power of the States in which [indigenous peoples] are located” (Macklem<sup>118</sup>) or are operating only as an interpretation of human rights (Anaya<sup>119</sup>) serves to reenact, in a way, Koskenniemi’s “exclusion-inclusion” discourse. It permits indigenous peoples into international law only to exclude them from sovereignty, and buries them in states under the power of potential busybodies. The duty to consult and FPIC are tangible steps towards a pluralist fiduciary theory of sovereignty, one that discerns and ousts the paternalistic abuses of past fiduciary conceptions. These duties should be received and celebrated as such.

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117 S. James Anaya, *Divergent Discourses About International Law, Indigenous Peoples, and Rights over Land and Resources: Towards a Realist Trend*, 16 COLO. J. INT’L ENVTL. L. & POL’Y 237, 258 (2005). It should be noted that Anaya wrote this piece before the *Saramaka People* and *Sarayaku* cases.

118 Macklem, *supra* note 32, at 209.

119 Anaya, *supra* note 117, at 256.

