## Having a Say

Indigenous Peoples, International Law and Free, Prior and Informed Consent

Proefschrift ter verkrijging van de graad van doctor aan Tilburg University op gezag van de rector magnificus, prof. dr. Ph. Eijlander, in het openbaar te verdedigen ten overstaan van een door het college voor promoties aangewezen commissie in de aula van de Universiteit op vrijdag 27 juni 2014 om 14.15 uur

door

Sebastiaan Johannes Rombouts

geboren op 30 mei 1981 te Goes

#### Having a Say

Indigenous Peoples, International Law and Free, Prior and Informed Consent

S.J. Rombouts

ISBN: 978-94-6240-134-1

Publisher: ₩olf Legal Publishers (WLP) Postbus 313 5060 AH Oisterwijk E-Mail: info@wolfpublishers.nl www.wolfpublishers.com

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission of the publisher. Whilst the authors, editors and publisher have tried to ensure the accuracy of this publication, the publisher, authors and editors cannot accept responsibility for any errors, omissions, misstatements, or mistakes and accept no responsibility for the use of the information presented in this work.

# CONTENTS

Acknowledgements			
Abbrevia	tions	VII	
I. Introduction			
I.1	Indigenous Peoples and Free, Prior and Informed Consent	10	
I.2	Indigenous Peoples, International Law, and Human Rights	12	
1.3	A Short Introduction to the Legal Status of FPIC	20	
I.4	Structure and Approach	24	
II. Princi	ples	31	
П.1	Self-Determination	31	
II.1.1	Introduction	31	
II.1.2	Development of the Idea of Self-Determination of Peoples	34	
II.1.2,1	Self-Determination and its Vocabulary	35	
II.1.2.2	Westphalia and the French Revolution	38	
II.2.2.3	The Vienna Congress and Liberal Nationalism	41	
II,2.2.3	Lenin, Wilson, and the League of Nations	44	
II.1.3	The Law of Self-Determination	47	
II.1.3.1	The Period after the Second World War	47	
∏.1.4	Beyond the State: Self-Determination for Indigenous Peoples	52	
II.1.4.1	Self-Determination for Indigenous Peoples during the		
	Post-Decolonization and Post Cold-War period	53	
II.1.4.2	Interpretations of Indigenous Peoples' Right to Self-		
	Determination	55	
II.2	Self-Determination through Control over Land and Resources	65	
$\Pi.2.1$	Indigenous Peoples' Special Relation to their Lands	66	
II.2.2	Sovereignty over Natural Resources	68	
П.3	Conclusion: Self-Determination for Indigenous Peoples:		
	Autonomy, Participation and Control over Lands and Resources	71	
III. Proce	edures	75	
III.1	Introduction: Participatory Norms for Indigenous Peoples	76	
Щ.2	Effective Participation	79	
III.2.1	Effective Participation for Minorities and Indigenous Peoples	79	
III.2.2	Participatory Provisions and FPIC in the UN Declaration	84	
III,2.3	The United Nations System: The Right to Effective		
	Participation as a General Framework	88	
III.2.4	Participation: James Tully and the Preconditions for Peaceful		
	Intercultural Dialogue	95	
III.2.4.1	Liberal Constitutionalism in Multi-Nation States	97	
III.2.4.2	Three Principles for Intercultural Negotiations	106	
III.2.4.3	Conclusions: Dialogue and Diversity in Multi-Nation States	109	

#### TABLE OF CONTENTS

П.3	Free, Prior and Informed Consent	112
III.3.1	Free: Discursive Coutrol and Non-Domination	116
III.3.1.1	Personal Freedom and Consent: Discursive Control	117
III.3.1.2	Political Freedom and Self-Determination: Non-Domination	129
III.3.2	Prior: Ex Ante Contestation and Ex Post Revision	140
III.3.3	Information and Communication	141
III.3.3.1	Informed Consent in Bioethics: Development, Scope and	
	Justifications	145
III.3.3.2	Informing as Communicative Action	153
III.3.3.3	Informed Consent: Justification, Role and Function	157
Ш.3.3.4	Informed Consent Processes: Standards for Successful	
	Communicative Transactions	161
III.3.3.5	Conclusions: Informed Cousent in Bioethics and FPIC for	
	Indigenous Peoples	164
III.3.4	FPIC: Participation, Representation and Consent	167
III.3.4.1	Participation and Representation	168
III.3.4.2	FPIC: External and Internal Representation	170
III.3.4.3	Difficulties with Representation and Obtaining Consent	172
III.3.4.3.1	Isolation	173
III.3.4.3.2	Internal Participation	177
III.3.4.3.3	Overlap	179
III.3.4.4	Conclusions	183
III.4	Conclusions: Effective Participation and FPIC for Indigenous	
	Peoples: Dialogue, Communication, and Consent in Multi-	
	Nation States	185
IV. Platfo	rms	195
IV.1	The International Diffusion of FPIC standards	195
IV.1.1	Mapping and Tracing FPIC in International Law	195
IV.1.1.1	FPIC: Diffusion in International Law and Institutions	196
IV.1.1.2	Traces of FPIC in International Law	197
IV.1.1.3	The Cobo Study	197
IV.1.1.4	The International Labour Organisation	198
IV.1.1.5	The Human Rights Committee on Cousent	199
IV.1.1.6	The Committee on the Elimination of Racial Discrimination	200
IV.1.1.7	The Committee on Economic, Social and Cultural Rights	203
IV.1.1.8	Responsibilities of Transnational Corporations	204
IV.1.1.9	The Rotterdam Convention	205
IV.1.1.10	The Policy of the European Union	205
IV.1.1.11	The OAS Human Rights System	206
IV.1.1.12	The Draft American Declaration on the Rights of	
	Indigenous Peoples	208
IV.1.1.13	The African Commission on Human and Peoples' Rights	209
IV.1.1.14	The World Bank System and the Extractive Industries	
	Review	210
IV.1.1,15	The International Finance Corporation: Performance	
	Standard 7	212
IV.1.1.16	The Convention on Biological Diversity	213

#### TABLE OF CONTENTS

IV.1.2	A Closer Look at the United Nations System of Indigenous	
	Peoples' Protection	214
IV.1.2.1	The Permanent Forum on Indigenous Issues	214
IV.1.2.2	The Expert Mechanism on the Rights of Indigenous Peoples	215
IV.1.2.3	The Special Rapporteur on the Rights of Indigenous Peoples	216
IV.1.3	Conclusion: the Widespread Diffusion of FPIC Requirements	217
	•	
V. Practice	es	219
V.1	Case Law: Legal and Semi-Legal Decisions	219
V.1.1	Introduction: Regional Protection of Indigenous Peoples'	
	Rights and the Inter-American Human Rights System	219
V.1.2	FPIC and Self-Determination in the Inter-American Human	
	Rights System	220
V.1.2.1	The OAS and Human Rights	222
V.1.2.2	The OAS and Indigenous Peoples	224
V.1.2.3	Self-determination, Land Rights and Participation in the	
	Inter-American System	230
V.1.2.3.1	Awas Tingni v. Nicaragua	230
V.1.2.3.2	Decisions from the Commission: The Dann Sisters and	
	Maya Communities in Belize	235
V.1.2.3.3	Subsequent Cases of the Court: Moiwana, Yakye Axa	
	and Sawhoyamaxa	243
V.1.2.4	The Key Decision: An In-depth Investigation of Saramaka	
	People v. Suriname	252
V.1.2.4.1	Suriname: Maroon and Indigenous Communities	253
V.1.2.4.2	Contemporary Problems and Land Protection in	
	Surinamese Law	254
V.1.2.4.3	Controversy over Land and Resource Rights before	
	the Inter-American Court of Human Rights: Saramaka	
	People v. Suriname	257
V.1.2.4.4	Implementation of FPIC and International Judgments	
	in Suriname	269
V.1.2.5	Legal Developments in the Aftermath of Saramaka People	
	v. Suriname	281
V.1.2.5.1	Suriname: CERD and the Inter-American Commission	281
V.1.2.5.2	The OAS Region and the Inter-American Court:	
	Xákmok Kásek and Sarayaku	285
V.1.2.6	Influence of the Inter-American System Outside the OAS Area	296
V.1.2.6.1	Judicial Interpretation and Approach	297
V.1.2.6.2	Regional Diffusion of the Inter-American Approach:	
	The African Commission on Human and Peoples'	
	Rights in Endorois v. Kenya	301
V.1,3	Conclusions and Recapitulation: The OAS System,	
	International law and FPIC	309
V.2	Practices and Implementation of FPIC in Voluntary	
	Environmental Protection Schemes	318
V.2.1	Integrating Impact Assessments: The Akwé: Kon Guidelines	322
V.2.2	FPIC in the UN-REDD Programme	331

### TABLE OF CONTENTS

V.2.3	The Forest Stewardship Council Guidelines on FPIC	346
V.2.4	Other Voluntary Standards ,	360
V.2.5	Case: The Orang Asli of Peninsular Malaysia: Sustainable	
	Timber Certification and FPIC	370
V.2.5.1	Introduction	370
V.2.5.2	The Orang Asli of Peninsular Malaysia	370
V.2.5.3	Malaysian Legal Framework and Judicial Decisions	372
V.2.5.4	Sustainable Logging and the Orang Asli	381
V.2.5.5	MTCC and TPAC: Concerns about Safeguarding Orang	
	Asli Rights	381
V.2.5.6	FPIC in the MTCS case: Standards versus Reality	385
V.2.5.7	Conclusions and Lessons from the "Orang Asli Case"	389
V.2.6	Conclusion: Progressive Implementation of FPIC in	
	Voluntary Schemes	391
VI. Conclusions		397
VI.1	Explaining FPIC	397
VI.1.1	Principles: Self-Determination and Rights to Lands and	
	Resources	398
VI.1.2	Procedures: Effective Participation and Free, Prior and	
	Informed Consent	399
VI.1.3	Platforms: International Diffusion of FPIC Norms	408
VI.1.4	Practices: Legal Status, Case Law, and Guidance on	
	Implementation	409
VI.2	FPIC: Limitations and Future Development	415
Bibliography		419
Curriculum Vitae		437