Recent developments in Inter-American standards on the delegation of the state duty to consult indigenous peoples

Is it possible to frame direct international human rights obligations for businesses at the IAHRS?

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Title: Sviluppi recenti negli standard interamericani sulla delega del dovere statale di consultare i popoli indigeni

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1. *Introduction* – Two of the most rapidly developing issues in International Law in recent years are the responsibilities of corporations to respect human rights, and the right of indigenous peoples to give or withhold free, prior, and informed consent for the use of their lands and resources (FPIC). In addition, both issues have points of intersection, namely in the extractive industry sector, where corporations impact indigenous peoples' rights whenever they carry out their activities on the latter's ancestral lands. In such context, the Inter-American Human Rights System (IAHRS) has dealt with both issues, and the purpose of this short piece is to analyse some recent developments.

For that matter, this article will address specifically the state's delegation of the duty to consult to private corporations on recent pronouncements of both the Inter-American Commission on Human Rights (IACHR or the Commission) and the Inter-American Court of Human Rights (IACtHR or the Court). Said delegation concerns the assignment of a state responsibility to another actor — the potential transfer in whole or part of a legal responsibility from one party to another — and the resulting duty or responsibility obtained or acquired by the latter.

A secondary aim of this piece is to determine whether such delegation is permitted under the IAHRS, and in such case, to explain how and under what conditions this delegation could or should be done. The author's thesis is that if this kind of delegation is accepted at the IAHRS, it could result in direct responsibility of corporations recognized under Inter-American law, regardless of whether they are subject to direct responsibility under other international law schemes — such as the United Nations Guiding Principles on Business and Human Rights (or UNGPs) or the UN Global Compact.

As will be explained, the newly born responsibility under this avenue cannot be of the same nature as the state responsibility, since state responsibility cannot be avoided and will not disappear. But the fact that states retain a duty would not

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mean that private parties cannot have any international responsibility under Inter-American law.

2. *The (non)delegation to businesses of the state duty to consult in the IAHRS* – To begin with some background, it should be said that neither the IACHR nor the IACtHR have traditionally favoured direct responsibilities for corporations in FPIC cases. This course of action appears to have essentially prohibited the delegation of consultation to private entities. The Commission expressly rejected this possibility in a 2009 thematic report, based not on Inter-American standards but on language from the UN Special Rapporteur on the rights of indigenous peoples:

> Carrying out consultation procedures is a responsibility of the State, and not of other parties, such as the company seeking the concession or investment contract. In many of the countries that form part of the Inter-American system, the State responsibility to conduct prior consultation has been transferred to private companies, generating a *de facto* privatization of the State's responsibility. The resulting negotiation processes with local communities then often fail to take into consideration a human rights framework, because corporate actors are, as a matter of definition, profit-seeking entities that are therefore not impartial. Consultation with indigenous peoples is a duty of States, which must be complied with by the competent public authorities (IACHR, *Indigenous and Tribal People's Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System* (2009), OEA/Ser.L/V/II. Doc. 56/09, para 291).

The Commission's reference was to the then UN Special Rapporteur on the rights of indigenous peoples James Anaya's 2009 Report, in which he stated:

> In accordance with well-grounded principles of international law, the duty of the State to protect the human rights of indigenous peoples, including its duty to consult with the indigenous peoples concerned before carrying out activities that affect them, is not one that can be avoided through delegation to a private company or other entity (UNHRC, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people* (2009), James Anaya, UN Doc. A/HRC/12/34, para 54).

Those "well-grounded principles" only prohibit the avoidance of the state responsibility by delegation, i.e., the total transfer of the duty (or "*de facto* privatization", in the IACHR terms) without the state retaining any responsibility. In other words, international law does not permit states to "wash their hands" of the duty. Long-established principles of international law require that the state ensures the protection of human rights including against infringement by private parties, and no form of delegation could ever imply that the state's duty disappears. In fact, in the same report Anaya clarifies that such delegations do not absolve the state of ultimate responsibility (UN Doc. A/HRC/12/34, para 55). While not ruling out the possibility, he warns that the handing on of a state's human rights obligations to a private company "may not be desirable, and can even be problematic" (*ibídem*).

Although Anaya expressed similar concerns in his 2011 annual Report (UNHRC, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories*, UN Doc. A/HRC/18/35, para 63, 2011), in an Addendum he made reference to a country in which he observed that consultations had been delegated *de facto* to the enterprises responsible for the execution of certain projects, and the matter of concern was not the delegation itself but the fact that it was done "without due supervision of the State" (Addendum: *Observations on the situation of the rights of the indigenous people of*

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Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories ,UN Doc. A/HRC/18/35/Add.3, 2011, para 36).

The above stance is consistent with the positions sustained by the Committee of Experts on the Application of Conventions and Recommendations of the ILO (CEACR). When interpreting ILO Convention 169 in a case concerning Ecuador, the CEACR accepted that the oil companies in charge of exploration and exploitation activities could carry out consultations (CEACR, Observation, adopted 2002, published 91st ILC session, 2003). The Committee found that the consultation was incomplete because only some groups of the Shuar people were consulted and there were representation problems, but not because the consultation was carried out by the contractors (Gómez LE, Boulin Victoria IA, de Casas CI, *"Las industrias extractivas frente al Sistema Interamericano de Derechos Humanos"*, RADEHM 8:71-106, 2016, p. 99).

The position of the IACHR and the UN Special Rapporteur may be understandable given the date in which those reports were issued. Anaya's 2009 Report, quoted by the IACHR, still considered that "in strict legal terms" international law did not impose direct responsibility on companies to respect human rights, and that it was merely "ill-advised for companies to ignore relevant international norms for practical reasons" (*UN Doc. A/HRC/12/34, para 56*). The adoption, subsequently, of the UNGPs in 2011 could have altered the understanding of this issue in the IAHRS.

This doctrine of a general prohibition against the transfer of responsibility with respect to the duty to consult was adopted by the Court more than three years later in the *Sarayaku* case:

> It should be emphasized that the obligation to consult is the responsibility of the state; therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties, much less delegating it to the very company that is interested in exploiting the resources in the territory of the community that must be consulted (IACtHR, *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27, June 2012, (Merits and reparations) Series C No. 245, para 187).

Nevertheless, in this case the Court adopted the IACHR's position with nuances, for it left the door open for a possible delegation. In fact, it discussed the issue explicitly because the state had alleged that some actions of "socialization and contact" conducted by the oil company were to be considered as forms of consultation (IACtHR, *Sarayaku v. Ecuador*, para 188). Therefore, the Court considered that in the hypothetical case in which "such a consultation process could be delegated to private third parties" the state would have to indicate the measures it had taken to observe, supervise, monitor, or participate in the process and thereby safeguard the rights of the people concerned (*Sarayaku*, para 189).

The Court went on to analyse whether the company's actions complied with the relevant consultation standards applicable to the state (*Sarayaku*, paras 194, 198, 203, 211). The Court concluded that "the search for an 'understanding' with the Sarayaku People, undertaken by the [company] itself, could not be considered a consultation carried out in good faith, inasmuch as it did not involve a genuine dialogue as part of a participatory process aimed at reaching an agreement" (*Sarayaku*, para 200).

One can only speculate as to what the Court would have found if the corporation had in fact complied with the relevant standards. Certain parts of the ruling are encouraging for those who believe that the tribunal should develop the concept of direct corporate responsibility. Employing its traditional state-centred approach, the Court affirmed that:

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> [T]he State not only partially and inappropriately delegated its obligation to consult to a private company, thereby failing to comply with the above-mentioned principle of good faith and its obligation to guarantee the Sarayaku People's right to participation, but it also discouraged a climate of respect among the indigenous communities of the area by promoting the execution of an oil exploration contract (*Sarayaku*, para 199).

Thus, a hint that an "appropriate delegation" might be possible remains.

The Court has not been called upon again to analyse corporate activity against the consultation standards usually applied to states. However, parts of the *Kaliña and Lokono* case could be interpreted as indirectly confirming the possibility of delegating consultation. In this case, an environmental impact assessment (EIA) was carried out by a private entity subcontracted by the mining company (IACtHR, *Kaliña and Lokono v. Suriname*, para 215).

It should be noted that the Court had never imposed an express ban on the "privatization" of EIAs, and therefore the analogy may not be instructive. However, the IACHR, did prohibit the privatization of EIAs in its 2009 thematic report (*Indigenous and Tribal People's Rights over their Ancestral Lands*, para 252). And since the Court has affirmed the interrelation of EIAs with the duty to ensure the effective participation of indigenous peoples, and emphasized the state's obligation to supervise these assessments, this leads to the possible interpretation that delegating the consultation duty is possible on the condition that it is properly monitored by state agencies (*Kaliña* , paras 216, 222).

At this point, it is important to note that in James Anaya's final Report as UN Special Rapporteur his position on delegation appeared to have shifted:

> The Special Rapporteur has observed that in many instances companies negotiate directly with indigenous peoples about proposed extractive activities that may affect them, with States in effect delegating to companies the execution of the State's duty to consult with indigenous peoples prior to authorizing the extractive activities. By virtue of their right to self-determination, indigenous peoples are free to enter into negotiations directly with companies if they so wish. Indeed, direct negotiations between companies and indigenous peoples may be the most efficient and desirable way of arriving at agreed-upon arrangements for extraction of natural resources within indigenous territories that are fully respectful of indigenous peoples' rights, and they may provide indigenous peoples [with] opportunities to pursue their own development priorities (UNHRC, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples* (2013) UN Doc. A/HRC/24/41, para 61).

The new approach could be certainly rooted in what the Court had already clarified in its second ruling in the *Saramaka* case, when it held that:

> By declaring that the consultation must take place "in conformity with their customs and tradition", the Court recognized that it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process ordered by the Tribunal (IACtHR, Case of the *Saramaka People v. Suriname*, Judgment of 12 August 2008 (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs), Series C No. 185, para 18).

Accordingly, it is also the indigenous people and not the IACHR or the IACtHR, who must decide whether the state, or a private party, is a suitable party to the consultation process.

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Unfortunately, even though this path seemed tentatively taken by the Court, in very recent cases we can still find references and quotes of Anaya's 2009 Report, despite his position changed in 2013. For example, in the IACtHR's *Case of the indigenous communities of the Lhaka Honhat (Our Land) Association v. Argentina* (Judgment of 26 February 2020, Merits, reparations and costs, Series C No. 400, fn 161).

The Reports of Anaya's successor as UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, contain no indication that the delegation of the responsibility to consult is or should be forbidden (UNHRC, *Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz: Rights of indigenous peoples* (2020) UN Doc. A/HRC/45/34. See specially, chapter IV *"Consultation and consent: experiences and recommendations"*; and UN Doc. A/HRC/45/34.Add.3 *"Regional consultation on the rights of indigenous peoples in Asia"*). However, it is unclear why also the Commission still refers to the abandoned position in this regard (See IACHR, *Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II. Doc. 43/15 (31 December 2015), fn 817; and IACHR, *Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities*, OEA/Ser.L/V/II. Doc. 47/15 (31 December 2015), fn 266).

In conclusion, the most recent developments are not very encouraging, since both the IACHR and the IACtHR keep preventing corporate actors of assuming new obligations, by prohibiting state's to delegate on them (part of) their owns.

3. *A proposal* – This piece claims that a limited delegation to private actors of the state duty to consult seems the most realistic and appealing approach, provided that the state retains that duty under appropriate care and diligence (See a similar position in Lehr AK, Smith GA (2010) *Implementing a corporate free, prior, and informed consent policy: Benefits and challenges*. Foley Hoag eBook, Boston, p. 12). The core essence of the duty should remain with the state (its continuing and non-delegable duty to protect), and proper implementation by both the state and the corporate obligations should be complementary.

Therefore, in a context in which private corporations could carry out consultations directly with indigenous peoples, they must abide by all the international standards applicable to the rights of those people regarding consultation. This observance means that the standards applicable to corporations would be almost identical to those applicable to states, taking into account the differences that result from the state being the ultimate bearer of the duty to ensure rights. In Anaya's words:

> In accordance with the responsibility of business enterprises to respect human rights, direct negotiations between companies and indigenous peoples must meet essentially the same international standards governing State consultations with indigenous peoples, including — but not limited to — those having to do with timing, information gathering and sharing about impacts and potential benefits, and indigenous participation. Further, while companies must themselves exercise due diligence to ensure such compliance, the State remains ultimately responsible for any inadequacy in the consultation or negotiation procedures and therefore should employ measures to oversee and evaluate the procedures and their outcomes, and especially to mitigate against power imbalances between the companies and the indigenous peoples with which they negotiate (UNHRC, *Report of the Special Rapporteur*, James Anaya (2013) UN Doc. A/HRC/24/41, para 62).

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Thus, international law would be imposing direct responsibilities on corporations. In the Inter-American system, however, there are still some barriers or obstacles to these ideas.

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