Free Prior Informed Consent Protocols as Instruments of Autonomy

Laying Foundations for Rights Based Engagement

enip
European Network on Indigenous Peoples

infoe

In cooperation with:

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ACRONYMS

ACONC	Association of Community Councils of Northern Cauca
AECID	Spanish Agency for International Development Cooperation
ASOMICARS	Association of Ancestral Miners of Embera Chamí in Colombia
BMZ	German Federal Ministry for Economic Cooperation and Development
CBD	Convention on Biological Diversity
ELN	Colombian (rebel) National Liberation Army
FARC-EP	Colombian Revolutionary Armed Forces of Colombia—People's Army
FPIC	Free, prior and informed consent
FUNAI	Brazilian National Indigenous Peoples Foundation
GIZ	Society for International Cooperation, Germany
GTAN-Wampis	Wampis Nation's Autonomous Territorial Government
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICMM	International Council for Mining and Metals
IHRL	International human rights law
ILO	International Labour Organisation
ISA	Brazilian Social and Environmental Institute
KI	Kitchenuhmaykoosib Inninuwug (Canadian indigenous people)
IUCN	International Union for the Conservation of Nature
NCIP	Philippines National Commission on Indigenous Peoples
MPF	Brazilian Federal Prosecutors Office
NGO	Non-Governmental Organisation
OHCHR	Office of the High Commissioner for Human Rights
REDD	Reducing Emissions from Deforestation and Forest Degradation (also REDD+)
SEMAS	Brazilian Secretary of State for the Environment and Sustainability of the State of Pará
TIX	Indigenous land of Xingu in Brazil
UN	United Nations
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

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The experiences shared at the project's Geneva FPIC Protocol Workshop, at the Office of the High Commissioner on Human Rights' Workshop on Consultation and FPIC protocols in Cartagena, Colombia, and at the Columbia Center for Sustainable Investment and Middlesex University London Roundtable on FPIC Implementation at the Ford Foundation in New York, were invaluable in helping to contextualize local realities within the broader regional and international contexts.

These insights of indigenous representatives from Latin America, Asia and Africa, as well as input from indigenous peoples' support organizations, provided the basis for analysing existing FPIC protocols and their potential future contribution to rights realization.

We offer our sincere thanks to all of these indigenous and tribal representatives and salute their struggles to realize their peoples' rights despite the enormous obstacles they face, including in some cases death threats and intimidation. We hope that this publication will in some way contribute to their struggle for genuine respect for indigenous peoples' rights. We also hope that it will contribute to the recognition indigenous peoples must have a central role in determining how their self-determination rights are to be implemented in practice, something which their FPIC Protocols seek to ensure.

Report editors,
Cathal Doyle, Andrew Whitmore and Helen Tugendhat

EXECUTIVE SUMMARY

By Cathal Doyle

International human rights law (IHRL) recognizes that indigenous peoples are equal to all other peoples and therefore vested with the right to self-determination. This right is the foundation for their collective rights, by virtue of which they are free to determine their social, economic and cultural development. The decision to give or withhold free, prior and informed consent (FPIC) is a self-determination choice about the form of social, cultural, and economic development a people wishes to pursue.

This recognition of the duty to consult in order to obtain FPIC has been hard fought for by indigenous peoples. Experience with its implementation has, however, been disappointing. The concept has largely been divorced from indigenous peoples' self-governance, territorial and cultural rights, as control over its definition and operationalization has remained predominantly in the hands of States, corporations and other third-party actors. Rather than afford protection to rights, in many cases forms of false consultation and "FPIC" have become a means to coercively or forcefully legitimize projects in indigenous peoples' territories.

A growing response of indigenous peoples has been to codify their own laws and governance rules by developing their own autonomous rights-based consultation and consent protocols and polices (henceforth FPIC protocols), defining how they are to be consulted and their FPIC sought. This report probes the strengths and potential limitations and challenges of these self-determination instruments. It does so by drawing on the concrete experiences and realities of indigenous peoples who have developed, or are in the process of developing, them. The terms "FPIC protocol" or "autonomous FPIC protocol" - among others such as regulatory or normative frameworks, policies, guidelines or manifestos - are used by indigenous peoples as shorthand to describe documents that formalize their engagement rules and procedures in relation to consultations aimed at obtaining their FPIC.

The protocols from these 20 countries are available in the project protocol database which will be made publicly accessible in a subsequent stage of the project. For further information contact the report editors.[1]

The common features addressed include: the attention protocols accord to activities with a potentially significant impact on indigenous peoples' rights; the preconditions they establish for good faith consultations; the consultation timeframes and stages they outline; the legal bases they affirm for the duty to obtain FPIC; concepts, practices and principles which the concerned indigenous peoples regard as non-negotiable, and guidance on representation and how decisions are taken.

The significant variance across FPIC protocols in terms of their focus, format, and the nature of the processes they prescribe, highlights the absence of a one size fits all approach to FPIC. It also demonstrates the important role for FPIC protocols to ensure that consultation processes address the context specific actions needed to guarantee respect for indigenous peoples' rights.

Section two consists of three case studies addressing four emblematic FPIC protocols: the protocol of Juruna in Brazil, the protocols of the Embera Chamí and of the Afro-Colombian Communities of northern Cauca in Colombia and the draft protocol of the Wampis in Peru. All four protocols have distinct features that reflect these peoples' experience and realities and the national

context within which they operate. The experience of each of these peoples offers unique insights into the development, content and potential contribution of FPIC protocols to rights realization in specific contexts.

The Juruna, one of the peoples of the Xingu river in the state of Para in Brazil, finalized their protocol in 2017 when faced with the commencement of the Belo Sun mining project in the absence of prior consultation or FPIC. A notable feature of the Juruna Protocol, arising from their negative experience with the Belo Monte Dam, is its emphasis on their role in designing participatory environmental impact assessments. In 2018, the Juruna won an important legal case in the Federal Court suspending the Belo Sun mining project and affirming the need to respect their FPIC Protocol. Its subsequent application led to an environmental approval for the Belo Sun mine being declared invalid.

The Embera Chamí people of the Resguardo Indígena Cañamomo Lomaprieta, in Caldas, Colombia developed a regulatory framework in 2012, including an FPIC protocol, governing all forms of mining in their territory in response to attempts to impose external mining concessions. The FPIC protocol has had a deterrent effect, and no company has managed to commence mining activities in the Resguardo since it was adopted. In 2016, the Colombian Constitutional Court affirmed the need to respect the Embera Chamí protocols and procedures in relation to FPIC (Case T-530/2016).

Since 2009, the Embera Chamí have worked in close cooperation with the Afro-Descendant communities of the Alto Cauca who have also developed an FPIC protocol and implemented it in the context of the Salvajina hydroelectric project. The protocol enabled the communities to negotiate the terms and conditions of impact assessments as required by a decision of the Colombian Constitutional Court. Widespread intimidation, death threats, attacks and killings of community leaders is a central challenge to the implementation of these and other FPIC protocols in Colombia.

In November 2015, the Wampis became the first indigenous peoples in Peru to declare an indigenous Autonomous Territorial Government and in doing so issued their governing Statute. One aspect of the Statute is that it establishes the requirement for consultation and FPIC in relation to externally proposed activities. A 2017 landmark court ruling affirmed the requirement for consultation and FPIC with the Wampis in relation to oil exploitation, while suspending a specific project impacting on their territory. In preparation for State initiated consultation processes, the Wampis are developing an FPIC protocol grounded on their Statute and IHRL.

These and other initial experiences with autonomous FPIC Protocols demonstrate their potential to contribute to tackling critical shortcomings in existing law and practice around consultation and consent. They have acted as tools for resistance, challenging the absence of, or flaws in, consultation processes and establishing standards and procedures with which future consultation processes must comply. Their legitimacy in this regard has been recognized by national courts as well as local, national and international oversight and administrative bodies. The autonomous development of FPIC protocols has opened spaces for reflection and dialogue among and between indigenous peoples. These spaces are generally free from the external and internal pressures that inevitably accompany consultation processes. This has allowed indigenous peoples to address how

they wish to take decisions when confronted with powerful external actors seeking to operate in their territories, and has contributed to addressing the significant power imbalances that generally occur between indigenous peoples and external actors proposing projects of economic interest to the State. It has provided them the time and freedom necessary to articulate what consultation and FPIC mean in their own terms.

Developed in specific local contexts FPIC protocols are more than the sum of their parts. As a growing number of indigenous peoples develop them, their impact is being magnified. The emergence of a body of practice in this area by indigenous peoples could establish a de-facto regulation of consultation processes and FPIC in accordance with indigenous customary law, that States, corporations and international organizations cannot ignore.

The report closes with recommendations to States, project proponents, financers and investors, and international organizations. Among these recommendations are that:

States in which indigenous peoples reside should:

- acknowledge the self-determination-based right of indigenous peoples to define their own development paths and the associated duty to obtain FPIC;
- recognize and commit to respecting FPIC protocols as a pro-active exercise of the right to self-determination and as living self-government instruments that form an integral part of the law governing State actions in relation to indigenous peoples;
- afford indigenous peoples the necessary time and space to formulate FPIC protocols, free from external pressure, and refrain from holding consultations processes while FPIC protocols are being developed; and
- recognize the consultation and FPIC, including the development of FPIC protocols, are rights that indigenous peoples are free to exercise, not obligations with which they must comply.

Home States of companies should:

- establish mandatory human rights due diligence legislation;
- ensure that international investment agreements are consistent with indigenous peoples' right to give or withhold FPIC;
- enact extraterritorial legislation to hold their companies to account for violations of indigenous peoples' rights overseas; and
- support the development of improved multilateral standards.

Financiers and investors should:

- develop policies that commit to dealing exclusively with clients who respect indigenous peoples' rights under IHRL;
- ensure that clients' due diligence processes assess potential impacts on indigenous peoples through participatory consent-based processes that respect FPIC protocols; and
- provide access to independent, transparent and credible complaint mechanisms to address allegations of violations of indigenous rights.

Project proponents should:

- respect FPIC protocols, follow their guidance and ensure that they are fully addressed as part of human rights due diligence, impact assessments, agreements and monitoring;
- develop a public policy commitment to respect international standards on indigenous peoples' rights, including the right to consultation and FPIC;
- recognize that FPIC is a process to be defined and managed by indigenous peoples; and
- acknowledge that FPIC protocols reduce long-term investment risk exposure and encourage States and other corporate actors to respect FPIC protocol implementation.

International Organizations should:

- share and examine of experiences with other indigenous peoples of FPIC protocol development and implementation;
- consider a range of topics outlined in the report as part of protocol development, including whether FPIC protocols should be used in place of, or in conjunction with, national regulation;
- collaborate nationally and internationally to amplify the collective impact of their FPIC protocols; and
- insist that as rights-based normative self-governance tools, FPIC protocols must serve as educational instruments for all actors engaging with indigenous peoples.

Indigenous peoples have shown good faith in developing FPIC protocols. States, corporations, financers and international organizations now need to show good faith by respecting them. Until this happens, and the necessary preconditions are in place for rights-based consultations to take place, FPIC protocols will continue to act as tools for resistance, education and strengthening self-governance.

INTRODUCTION: A GLOBAL OVERVIEW OF THE CONTEXT AND CONTENT OF FPIC PROTOCOLS

By Cathal Doyle

"From the outset the State starts consultation in bad faith as it issues decrees on how to consult without consultation on those decrees."

Representative of Sarayaku People, Ecuador.

"We need a concept, such as FPIC Protocols, that connects indigenous peoples, States and companies"

Representative of Embera Chami People, Colombia.

"It is important for us to have a consultation and FPIC protocol instrument that is specific to the Wajapi people. The Government is trying to make a general protocol, but that cannot work when there are 200 peoples, almost all with their own languages and ways of engaging with outsiders and taking decisions."

Representative of Wajapi People, Brazil.

"Time is determined by the moon, not by capital"

Representative of Putomayo communities, Colombia.

International human rights law (IHRL) recognizes that indigenous peoples are equal to all other peoples and therefore are vested with the right to self-determination. This right is the foundation for their collective rights, by virtue of which they are free to determine their social, economic and cultural development. The decision to give or withhold free, prior and informed consent (FPIC) is a decision about the form of social, cultural, and economic development a people wishes to pursue. The relationship between FPIC and self-determination is therefore a reciprocal one. Self-determination implies a requirement for FPIC, and the exercise of FPIC facilitates the pursuit of self-determination.

Over the past three decades, and in particular since the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, there has been a growing understanding of this relationship. There is now widespread acknowledgement among informed actors that FPIC is necessary to guarantee the realization of indigenous peoples' rights and to ensure their survival as self-determining peoples. This is reflected in a series of developments including international, regional and national judicial and quasi-judicial decisions, legislative and administrative measures, lending requirements of international finance institutions, multi-stakeholder standard setting initiatives, and in specific policies of companies,

non-governmental organisations (NGOs) and international organizations.

The International Finance Corporation's inclusion of the requirement for FPIC in its 2011 performance standards, and by extension in the policies of the Equator Banks, was a major development for the private sector. It marked a tipping point in the recognition of FPIC as a standard with which companies must comply in order to ensure respect for indigenous peoples' rights. The World Bank's inclusion of FPIC in its 2017 Environmental and Social policy was a reaffirmation of the international community's expectation that States will require and enforce FPIC whenever development projects potentially impact on indigenous peoples' rights.

This recognition of consultation and FPIC has been hard fought for by indigenous peoples. Experience with its implementation has, however, been disappointing. The concept has been divorced from indigenous peoples' self-governance, territorial and cultural rights, as control over its operationalization has remained in the hands of State and corporations. Rather than afford protection to rights, in many cases forms of false consultation and "FPIC" have become a means to forcefully legitimize projects in indigenous peoples' territories.

A response of indigenous peoples has been to develop their own autonomous rights-based consultation and consent protocols (henceforth FPIC protocols), defining how they are to be consulted and their FPIC sought. This research seeks to probe the strengths and potential limitations of these instruments based on the concrete experiences and realities of indigenous peoples who have developed, or are in the process of developing, them.

The research project, which was funded through the GIZ sector programme on 'Realising human rights in development cooperation', ran from October 2018 to April 2019. Existing FPIC protocols were consolidated into a database, and emblematic cases in Colombia, Brazil and Peru were selected for analysis. A workshop was held in November, prior to the UN Forum on Business and Human Rights, involving participation of indigenous representatives from the three case study communities, and indigenous representatives from Asia with experience of FPIC protocols. Over the course of the project, the authors participated in additional international workshops addressing FPIC protocols and conducted on-site research in the case study countries[2]. The primary target audience of the research is indigenous and tribal peoples, and the organizations that support them. This includes peoples who wish to implement FPIC protocols, those who are developing them, and those who are considering their potential utility. States, companies, investors, financial institutions, certification bodies and multi-stakeholder initiatives, as well as international and regional human rights and development bodies are all secondary targets.

The project has three primary outcomes. The first is this research document. It synthesizes insights from experiences with existing FPIC protocols and consists of three main sections. Section one provides a general overview of the context in which FPIC protocols have emerged and outlines their typical contents. It concludes with a brief introductory overview of the case study protocols. Section two consists of three case studies, each addressing specific protocols. The first two case studies address the FPIC protocols of the Juruna people in Brazil and of the Embera Chamí people and Afro Descendant communities in Colombia. The third case study addresses the Wampis nation in Peru who are currently developing their FPIC protocol. Each case study examines the background to the development of the protocol, its scope and key provisions, and the role which it has played in the concerned indigenous peoples' struggle. Section three concludes by considering the contribution of FPIC protocols to the realization of

indigenous and tribal peoples' rights and offers some recommendations to States, corporations, civil society and indigenous peoples in relation to their development and implementation.

The second outcome consists of two strands, both of which were created as subprojects and were developed to provide concrete and direct assistance to the peoples contributing their experiences with protocols. The first is the strengthening of the Embera Chamí internal regulation of ancestral mining and the development of a position on the delineation of their ancestral territory. These activities help to implement their landmark 2016 Constitutional Court ruling and are a precondition for the effective implementation of their FPIC protocol. The second strand is the development of a draft legal and political framework that forms the basis for the Wampis FPIC protocol. This contributes towards the implementation of their 2018 Court decision affirming the State duty to obtain their FPIC.

The third project outcome is a pilot database. This is a proof of concept for the consolidation and indexing of FPIC protocols according to issues and themes they commonly address. A potential second phase of the project would develop the database and could involve assisting two or more indigenous peoples who are embarking on the development, or are commencing implementation, of their FPIC protocols. It would also examine the possibility of extending the project beyond the Latin American region.

> *"From the outset the State starts consultation in bad faith as it issues decrees on how to consult without consultation on those decrees."*
>
> **Sarayaku representative**

CONTEXT

State approaches to consultation and FPIC

Good faith consultation and FPIC imply a shift in power and a change in the decision-making *modus operandi* of States and corporate actors. Current models of decision-making around resource exploitation are based almost exclusively on State and corporate timeframes, constraints and perspectives. These decision-making processes for large scale projects can take years or decades and involve significant investment. When it comes to engaging indigenous peoples, however, the focus inevitability switches to minimizing the time and costs involved. Their opinions are considered incidental, and often inconvenient, and they are expected to conform to processes that are designed without taking their rights, interests, or even existence, into consideration.

From this State and corporate centric perspective, consultations with indigenous peoples are mere procedural tasks, necessary to legitimize access to resources. They are viewed in terms of their economic implications, the key barometer of their effectiveness being how quickly they facilitate resource access. Indigenous peoples' rights are rendered invisible, their perspectives on development ignored and their autonomy dismissed; They are peoples who live subsistence lifestyles characterized as poor or backward, in need of external development for their own good. Those who attempt to assert their rights are portrayed as subversive, anti-development, and conflictive and the use of violence against them is sanctioned as a result. This is compounded by pervasive corruption in the extractive industry sector, the presence of armed groups, intimidation and killings of indigenous leaders, ineffective State institutions and deeply entrenched and long-standing structural discrimination.

Structural discrimination towards indigenous peoples is generally reflected in the way their

rights are interpreted and implemented by the State. Indigenous territories are frequently delineated in a limited and fragmented manner, inconsistent with the customary laws, practices, uses and needs of the concerned peoples. Their governance structures are, at best, afforded partial recognition and their cultural practices and worldviews are given minimal, if any, consideration in State designed processes. This limited recognition of rights is compounded by widespread ignorance of what those rights entail, and the standards and safeguards necessary to guarantee their protection. Unsurprisingly in such contexts, State designed mechanisms to implement consultation and FPIC fail to deliver on their purpose of protecting rights, as those rights are not adequately recognized from the outset. This raises the question as to why an indigenous people who is aware of their rights would ever willingly engage in such consultation processes.

States rarely, if ever, ask indigenous peoples what they need or the type of development they want. In many contexts, they are completely absent from indigenous peoples' territories until there is a corporate interest in exploiting resources they contain. At this point the State generally adopts the role of facilitating access to those resources and protecting investment rights granted to corporations[3]. Consultations are consequently a unique opportunity for indigenous peoples to raise their issues with the State. A starting point for genuine good-faith engagement would ask why indigenous peoples come to the consultation table. This involves consideration of their priorities and developmental aspirations, the extent to which their rights are recognized in law and practice, the degree to which they have they suffered, or continue to suffer, from human rights abuses, how they wish to engage with external actors and the processes through which they take decisions.

Indigenous peoples' approaches to FPIC

The State duty to consult in order to obtain FPIC emerged in the context of indigenous peoples' struggles for rights recognition. For indigenous peoples, FPIC is an assertion of their collective right to self-determination. Developing FPIC protocols is seen as an exercise of that right[4]. Indigenous peoples' right to self-determination implies that they must be free to decide how they wish to be consulted, on what they will be consulted, and how they will give or withhold their consent. It also implies that consultation processes must respect their governance structures, customary laws and decision-making processes. This means that there can be no single, one-size fits all, rights-based FPIC process and that self-determination-based models of FPIC are defined by, and operationalized under the control of, the concerned indigenous peoples.

As an assertion of autonomy, FPIC protocols reject the historical paternal approach of States which viewed indigenous peoples primarily through the lens of vulnerability and dismissed their capacity for self-governance. Jurisprudential developments in many Latin American countries reflect the transition to a self-determination-based approach, with regional and national Courts ordering consultation and FPIC in accordance with IHRL standards and jurisprudence. However, for institutional and ideological reasons, States seem incapable of implementing this jurisprudence and IHRL standards. Legislative and regulatory approaches deliberately decouple FPIC from its basis in rights, self-determined development and cultural and physical survival. This allows it to be dismissed as an unacceptable "veto power". The emergence of oppressive political regimes that are hostile to indigenous peoples' rights has compounded this issue. Across Latin America, and in other jurisdictions where consultation has been recognized, the same indigenous peoples who demanded that their right to consultation be regulated through legislation are now opposed to State initiatives to develop such legislation.

A vacuum exists between the international rights framework and the ability of States to implement it. FPIC protocols have the potential to help fill this void by grounding the international rights framework in local realities. They expose the unjust stigmatization of indigenous peoples as obstacles to development and the national interest, an image often amplified by misrepresentation of their views in the media[5]. As proactive self-government instruments aimed at realizing self-determined development, they constitute an expression of good faith on the part of indigenous peoples, formally establishing what meaningful consultations and FPIC imply for the concerned peoples and how they wish to be engaged.

Indigenous peoples have also demanded that the private sector recognize its agency and ensure that it is not complicit in the violation of their rights, including their right to give or withhold FPIC. This independent corporate responsibility to respect indigenous peoples' rights is recognized in the 2011 UN Guiding Principles on Business and Human Rights and in subsequent jurisprudence and recommendations of regional and international human rights bodies[6]. Initiatives have been taken by private sector actors to develop standards and guidance on FPIC, but many of these are inadequate from an IHRL perspective. As with State-centric approaches, they fail to cater to the diversity of indigenous peoples' decision-making process and the complex, oppressive, and at times violent, realities in which they must seek to assert their rights.

Rather than be perceived as a threat, FPIC protocols should be embraced by all actors as an opportunity to hear and respect indigenous peoples' voices and build meaningful relationships. Autonomous protocols can answer fundamental questions that national legislation and regulation cannot. These include, what consent means for a certain people, and what are the processes and structures through which it must be sought for it to be legitimate. Experience demonstrates that these protocols can serve to address deficiencies in State legislation and regulation, and in some contexts play an important role in regulating corporate interaction with indigenous peoples[7].

Subanon FPIC protocol contributions to reform of the FPIC Regulation in the Philippines

"The negative experiences of the Subanon of Mt Canatuan, and other Subanon communities, with NCIP [National Commission on Indigenous Peoples] regulated and controlled FPIC processes promoted the Subanon to assert their own conception of FPIC and their right to control its implementation. The Subanon "Manifesto" on FPIC came about after Subanon traditional leaders from different parts of Zamboanga Peninsula gathered in 2007 to protest against the NCIP 2006 FPIC Guidelines for facilitating the entry of extractive projects into their ancestral domains. This was followed in 2009 by a series of community consultations and a conference of Subanon traditional leaders [including Subanon women leaders] to consolidate the views of the different communities and to formulate FPIC guidelines that they considered to be culturally appropriate, consistent with their customary law and sensitive to their indigenous worldview and beliefs. … The result of this broad-based community consultation process was a manifesto expressing the aspirations of the Subanon people for an acceptable consent process before the introduction of development projects in the ancestral domains. … Among the conditions for the conduct of FPIC were: … participation of all affected communities in the FPIC process; respect for traditional territories

and boundaries; respect for traditional leadership and decision-making processes; performance of traditional sacred rituals; written agreements with terms and conditions; respect for decisions to reject projects and the absence of military and police forces in the community.…Pressured by demands of [the Subanon and other] indigenous peoples throughout the country, the NCIP suspended all FPIC processes in late 2011, pending the review of the 2006 FPIC guidelines and the determination of appropriate guidelines for implementation. The review process led to the issuance by the NCIP of the Revised Guidelines on FPIC and Related Processes of 2012 [the provisions of which are closely aligned with the demands of the Subanon Manifesto]."[8]

The emergence of FPIC protocols

Having struggled to obtain recognition of their consultation and consent rights, only to observe the enactment of consultation legislation or issuance of decrees that fail to protect their self-governance and territorial rights, many indigenous peoples are now questioning the desirability of such an approach. An underlying concern is that States have appropriated the interpretation of indigenous peoples' rights, and in the process are distorting them, and fundamentally restricting indigenous peoples' exercise of autonomy and self-determination.

Faced with this situation, indigenous peoples have developed a range of responses. Some have refused to engage in consultations and have instead focused on resisting State encroachment into their territories. Others have organized their own consultation processes based on their interpretation of their rights under international law standards and their own customary practices and realities[9]. Others still have focused on strengthening their autonomy and self-governance capacity[10]. As part of this mix of strategies, a growing number of indigenous peoples have developed, or are in the process of developing, what are frequently referred to as autonomous FPIC protocols. These protocols, policies, and normative frameworks are externally facing self-governance instruments that formalize the concerned indigenous peoples' own laws, practices and procedures for regulating consultation and FPIC processes with third parties.

As living self-government instruments, FPIC protocols vary in terms of their specificity and technicality. They provide actors seeking to operate in or near the territories of indigenous peoples with context specific indigenous-rights-based principles, rules and frameworks within which they should operate when consulting with indigenous peoples and seeking their FPIC. They also elaborate on related principles, concepts and rights pertaining to self-government, autonomy, territory, identity and spiritual and cultural values and worldviews. In so doing, they provide indigenous peoples' own interpretation of their rights. They also establish the conditions under which consultation and consent seeking processes are considered legitimate by the concerned peoples. Failure to guarantee these conditions places the enjoyment of their rights at risk and according to these FPIC protocols renders the consultation processes and consent invalid. Such circumstances include, for example, consultation processes that may result in activities of armed actors in or near their territories or which cause division in their communities[11].

These FPIC protocols have a long lineage. Indigenous peoples have always had their own protocols governing engagement with third parties through which they permitted or refused access to their territories. Such protocols tended to be part of the oral traditions embedded in the customs and laws of indigenous communities. For many communities, engagement with third parties continues to be regulated through non-documented systems based on customary

law. These customary laws and oral traditions have survived despite centuries of colonialization and efforts by States to eradicate them. Their flexibility to address evolving threats and the inability of external actors to easily appropriate them are arguably part of the reason for their durability.

Documentation of these rules governing engagement with third parties is also something in which some indigenous peoples have historically engaged. Some continue to do so as part of treaties and agreements with States and other actors. Historically, these agreements were often developed under conditions of duress and were uninformed by, or incompatible with, indigenous peoples' customary processes and laws. However, during certain period of history, and in certain contexts, indigenous peoples were able to formalize their engagement with external actors under conditions where power imbalances were less pronounced. Such treaties and agreements, or at least the indigenous interpretation of them, reflected aspects of their customary decision-making processes and laws.[12]

Documenting formalized engagement protocols is not necessarily the optimum approach in all contexts. Neither are FPIC protocols the only approach to autonomous regulation of consultations and consent. Many indigenous peoples conduct their own community consultation processes, based on their interpretation of their right to consultation under international law. They insist on the validity of these processes and their outcomes as exercises of self-determination and autonomy, despite State refusal to recognize them.[13] The absence of a formally documented FPIC protocol must, therefore, never be interpreted as implying that indigenous peoples do not have rules of engagement that govern consultations and FPIC. Similarly, the development of an FPIC protocol should not constrain the future exercise of the right to self-determination. Protocols are living documents and do not freeze customary law or the communities' interpretation of their rights. Instead, they are a means of reaching consensus within their communities on their own interpretation of those rights and related concepts, as well as on processes and methodologies to be publicly shared and followed when engaging with the State and other third parties.

Three waves of consultation protocol development can be identified since the early 2000s. The first emerged in the context of extensive experience of indigenous peoples, in particular Canadian First Nations, in negotiating directly with mining companies. Development of a number of these protocols, policies and guidelines commenced in the early to mid-2000's. They vary significantly in their content and approach. Some provide general principles governing engagement with all external actors,[14] while others offer detailed rules that regulate the life-cycle of mining activities.[15] Others consist of a series of templates and guidelines that establish rules governing exploration and conditions for activities which could follow it.[16] These protocols and negotiating approaches inspired indigenous and tribal peoples in countries such as Suriname to develop similar instruments and to invoke them in their engagement with corporations.[17]

The second category are referred to as community bio-cultural protocols. These emerged in the late 2000's in the context of the implementation of access and benefit sharing agreements under Article 8j of the Convention on Biological Diversity (CBD). Numerous indigenous and tribal peoples in Guatemala, Honduras, India, Kenya, Malaysia, Panama, Peru, and South Africa have developed, or are developing, such protocols.[18] These bio-cultural protocols address consultation and FPIC to varying degrees. Some of them are more akin to land use plans than frameworks, primarily aimed at regulating consultation and consent. Many, such as the 2009 Lingayats Bio-cultural in India, only briefly touch on the topic of consultation in the context of access to genetic resources or

traditional knowledge.[19] Others, such as the 2012 protocol of the Miskito people, offer more expansive guidance, affirming that communities cannot be approached individually and outlining certain decision-making procedures.[20]

While these protocols articulate the principles underpinning good faith consultations, they provide little detail on interfaces with different State institutions and procedures which those actors must follow in order to obtain FPIC. Their focus tends to be on engagement with third parties in general, rather than the role of the State and its duty under IHRL. The fact that they emerged from the CBD, rather than the human rights law framework, may explain this. Similar consultation protocols, such as that of the Toledo Alcaldes Association in Belize, have also been developed in the context of implementing projects involving forest carbon stocks (Reducing Emissions from Deforestation and Forest Degradation, or REDD+), and make little reference to IHRL or the role of the State. Another body of protocols addresses the responsibility of researchers and educators to seek indigenous peoples' FPIC for research on, or use of, traditional cultural knowledge.[21] In some cases the same protocols addressing development projects also cover research activities.[22]

The third main category of FPIC protocols, and the core focus of this report, are more recent self-governance instruments that are grounded in IHRL. While relevant for all actors seeking to engage with indigenous peoples, they primarily address the State's obligations and indigenous peoples' rights under IHRL, national law and indigenous customary law. Most of these protocols have been developed in Latin America, primarily by indigenous peoples in Colombia and Brazil.[23]

This development is one of several factors that makes the Latin American region particularly interesting in terms of assessing the potential role of FPIC protocols in protecting rights. Latin America is the continent with the strongest legal recognition of indigenous peoples' rights. This includes jurisprudence of the Inter-American Court on Human Rights, which elaborates on the free prior and informed aspects of consultation and affirms the duty of States to obtain FPIC.[24] There is widespread ratification of International Labour Organisation (ILO) Convention 169 throughout the region, and provisions of several national Constitutions recognize indigenous peoples' collective rights.

Indigenous peoples in Latin America also tend to be more organized and networked than in other regions. At the same time, violations of their rights - including consultation and consent rights - are prevalent across the region. Latin America is also known for an extensive regulatory approach combined with "wide discretionary power for officials", something reflected in a high level of corruption in the natural resource sector and corporate control over politics.[25] On a per-capita basis it is the most violent continent. An alarming number of indigenous leaders have been killed, and some indigenous peoples in countries such as Brazil and Colombia face existential threats due to violent conflict and repressive regimes opposed to their interests.[26]

Confronted with this reality, indigenous peoples in Latin America successfully mobilized to demand that States fulfil their duty to conduct prior consultations in order to obtain their FPIC as a means for protecting their rights. They were bitterly disappointed with how this duty was interpreted and implemented. In response they are asserting autonomy over their territories and developing FPIC protocols, along with other self-government instruments. These trends are particularly notable in the three case study countries, Colombia, Brazil and Peru.

Recognition of FPIC protocols

The development of FPIC protocols by indigenous peoples is consistent with the advice of

successive UN Special Rapporteurs on the rights of indigenous peoples. During his mandate, professor James Anaya focused on the right to consultation in the context of extractive industry activities. His reports to the Human Rights Council between 2009 and 2013 repeatedly encouraged indigenous peoples to organize themselves institutionally, so that they are prepared for consultations and FPIC seeking processes.[27] By doing so, he explained to States that indigenous peoples would be demonstrating their willingness to engage in good faith.

The Special Rapporteur also elaborated on the pre-conditions for good faith consultations. In addition to formalized recognition of indigenous peoples' rights, the conditions included the need for consultations on how indigenous peoples should be consulted ("*consulta sobre la consulta*" or "consultation on consultations"). FPIC protocols directly address many of these preconditions for good faith consultations. Furthermore, through their development each indigenous people can establish their own specific pre-conditions for good faith consultations. The subsequent Special Rapporteur, Vicky Tauli-Corpuz, identified FPIC protocols as examples of good practice during her 2016 mission to Brazil and encouraged the Brazilian Government to ensure that they are respected.[28] These recommendations have been echoed by the UN Expert Mechanism on the Rights of Indigenous Peoples in its 2018 report on FPIC, which identified respect for FPIC protocols as central to the conduct of good faith consultations.[29]

Recognition of FPIC protocols has also come from a range of other actors. The Office of the United Nations High Commissioner for Human Rights (OHCHR) in Colombia, with support from the Spanish development agency AECID, provided extensive technical assistance to four indigenous peoples in the development of protocols between 2015 and 2017. Together with the OHCHR in Geneva, it organized a regional workshop on FPIC protocols in Colombia in December 2018. The workshop sought to share lessons from the development of the protocols and increase their visibility, highlighting the important role they can play in regulating consultations.[30]

In 2011, the United Nations Development Programme (UNDP) collaborated with the Federation for Self-Determination of Indigenous Peoples in Paraguay in the development of a national FPIC protocol which was formally recognized by a presidential decree in December 2018.[31] The decree recognizes the protocol as an important opportunity for the Paraguayan State to address the vacuum that exists in the State's regulation of indigenous peoples' rights as recognized under IHRL.[32] International environmental organizations have also offered support to protocol development. The Nagoya Protocol to the CBD on Access and Benefit Sharing refers to the role of community protocols and the need for awareness raising in relation to them.[33] The International Union for the Conservation of Nature (IUCN), in conjunction with the German ministry for international cooperation and development (BMZ), has also supported the development of bio-cultural protocols.[34] Industry bodies, such as the International Council for Mining and Metals (ICMM) and its members, have also expressed an interest in the growing development of FPIC protocols as a basis for engagement with indigenous peoples.[35]

At the national level there has also been important recognition of FPIC protocols. In 2016, the Argentinian National Ombudsman issued a resolution, recognizing the FPIC protocol of 33 communities of the Kollo and Atacama people of the Salinas Grandes y Laguna de Guayatayoc.[36] The resolution called on all relevant government ministries and agencies to recognize and respect the protocol. There have also been several important court rulings at the national level recognizing the validity of FPIC protocols. These include the 2006 decision of the Superior Court of Ontario addressing the

Kitchenuhmaykoosib Inninuwug (KI) protocol, the 2016 ruling of the Constitutional Court of Colombia calling for consultation to respect the Embera Chamí's protocol and the 2018 ruling of the Federal Court in Brazil requiring that any future consultations with the Juruna respect their FPIC protocol.[37] Finally, protocol development is supported by a range of non-governmental organizations and networks which have documented experiences with their development in numerous contexts, in particular addressing bio-cultural protocols.[38]

Terminology

Before delving further into the content of FPIC protocols, a brief discussion on terminology is important. As mentioned above, the term "FPIC protocol" or "autonomous FPIC protocol" is used by indigenous peoples as shorthand to describe documents that formalize their engagement rules and procedures in relation to consultations aimed at obtaining their FPIC. This terminology is used by the four peoples in the case studies in this report. Other terms, such as regulatory or normative frameworks, policies, templates, guidelines and manifestos, are also used by indigenous peoples, or are used interchangeably, to describe such instruments, and some peoples have their terms in their own languages which they deem culturally appropriate.

Some legitimate concerns have been raised in relation to the term "protocol". One is its technical and procedural connotations, which may obscure the self-determination, customary law and rights assertion dimension of these instruments. Terms which highlight the right of indigenous peoples to legislate in their own territories, such as normative or regulatory frameworks, may better reflect these features, as well as their legal import. Another concern is that the term "protocol" may be used by States to describe instruments which the State has developed to regulate consultations, thereby leading to confusion with indigenous peoples autonomous FPIC protocols.

Despite these potential drawbacks, indigenous peoples' representatives attach importance to the concept of "FPIC protocols" being increasingly globally recognized as embodying indigenous peoples' autonomously developed, rights-based, rules governing consultations and FPIC. This is significant for two reasons. Firstly, the purpose of these instruments is to facilitate rights-based engagement with external actors. Widespread awareness among these actors of the term "FPIC protocols" and its meaning is therefore essential. The term "protocol" might not capture their full import. However, the easily understandable concept of an "engagement protocol", that acts as the basis for consultation and seeking FPIC, is something that the State and other risk-adverse actors might be more open to than the more legalistic sounding "regulatory framework".

Indigenous peoples have therefore adopted this terminology even if the word "protocol" does not necessarily exist in their own language. Secondly, in order to collectively promote the implementation of their internationally recognized rights, indigenous peoples need shared concepts that can be invoked by their communities around the world. As one indigenous representative put it "we need a concept that connects indigenous peoples, States and companies".[39] The growing practice by indigenous peoples to develop FPIC protocols, and their increased recognition by a range of actors, reinforces their importance in consultation processes and the need for all States to respect them. Rather than feel threatened by them, States and companies should see them as an opportunity to understand and ensure respect for indigenous peoples' rights in practice, while providing clarity and certainty for all parties.

Content of FPIC Protocols

The research examined in excess of 30 protocols across 15 countries, all produced between the mid-2000s and 2018, with more protocol development and implementation on-going in

2019. As discussed earlier, these protocols can be broadly categorized into one of three types – those that primarily address corporations, most often mining companies; those that focus on biocultural resources and tend to address all actors in a generic fashion; and those that focus primarily on States and their obligations under international human rights law. Across these three categories there is a significant degree of overlap in protocol content, particularly as all of them tell States and other actors the culturally adequate way of holding consultation processes. This section addresses features of protocols in all three categories, with a primarily focus on those in the latter category.

Diversity of protocols

The absence of a one size fits all for FPIC processes means that there is significant variance across FPIC protocols in terms of their focus, format, and the nature of the processes they prescribe. They range from those that provide general guidance and principles governing consultation and FPIC, to those that take the form of laws and regulation. The former have tended to emerge in contexts where there is limited national level recognition of indigenous peoples rights, and on some occasions have been developed as the basis for legal agreements with companies based on indigenous peoples' rights recognized under IHRL.[41] The latter are often grounded on indigenous peoples' constitutional recognized regulatory powers.[42]

In many cases, they were developed in contexts where concessions had been issued, or projects proceeded, without prior consultation.[43] A number of protocols focus primarily, though not exclusively, on particular activities that are perceived as posing imminent and serious threats to their enjoyment of rights.[44] These threats include mining, oil and gas, hydroelectric and tourism projects, roads, transmission and railway lines, oil pipelines, soya and corn plantations, and agrarian reform programmes. Some protocols are broader in scope, encompassing administrative or legislative measures, as well as projects, that may impact on the concerned peoples.[45]

Protocols also differ radically in terms of their format. Some, such as those produced by indigenous peoples in Brazil, are beautifully presented, including colour photos of the people and their territories, maps, and process flowcharts. They are published in hardcopy, sometimes containing both the indigenous language and the national language.[46] Others are purely text documents containing no graphics or images and are only made available electronically.[47]

The length of protocols also varies significantly. Those that focus on broader land and resource management issues tend to include sections on consultation and FPIC that range from a couple of paragraphs to multiple pages. Those that focus primarily on consultation and FPIC processes also vary significantly in length, ranging from five[48] to 150 pages long, with the more recently developed FPIC protocols in Colombia being among the longest.[49]

General contextual features

Many protocols provide some background on the indigenous or tribal people and on the context in which they decided to develop their protocol. The introductory sections in protocols often provide a degree of historical context, both in terms of the peoples' history of resistance and their experience with previous consultations, or the absence thereof. Where addressed, the reason for the protocol development is usually explained in sections addressing the worldviews and philosophies of the peoples concerned.[50] In other cases a more legalistic format is used, with a preamble providing the contextual information for the protocol's development.[51] In some cases the process through which the protocols were created and how they will be maintained, updated or revised is addressed.[52]

Very often the description the people provide of themselves focuses on their unique relationship

with their territories as central to their identity, for example as people of the river[53] or their identity as Afro-Descendant communities.[54] Importantly, a number of protocols reject the notion of a static conception of "indigenous", noting that indigenous cultures, like all cultures, adapt and change overtime.[55] In addition to indigenous and tribal peoples, protocols have also been developed by traditional communities, such as river based communities in Brazil.[56]

In many cases, the protocols explain that they were developed as a result of the people's past negative experiences with development projects that had been imposed without adequate consultation or consent, and that the people are facing pending threats from projects in or near their territories.[57] In a number of cases, they explain that a driver behind the protocol was to ensure that decisions are made collectively and that individual leaders and communities are not isolated and manipulated.[58]

Peru Block 192

Oil Block 192 in the Peruvian Amazon is one of the emblematic cases of flawed consultation processes in a country with a dedicated law on prior Consultation since 2011. In 2015, after almost 45 years of oil exploitation and extensive environmental and social harms, the Block 192 oil contract was due to be renewed. The indigenous Federations in whose territories the Block is located succeeded in getting the State to agree that the Federations, and not just individual communities, should be consulted and that the contract, and not just the resolution approving it, should be the object of consultation. However, despite this, two of the affected indigenous peoples and their Federations, representing the majority of directly impacted communities, were excluded from the final agreement. A new consultation process commenced in 2018/2019. To avoid a repetition of the previous experience the Federation developed a consultation plan which they demanded the State agrees to. The plan requires: a) respect the majority of the communities and their federations b) interculturality, by respecting their decision-making time and spaces e) due regard to the specific needs of women to guarantee their effective participation f) trustworthy interpreters g) dialogue stages to be held in their territories h) fair compensation for the use of their lands and fair contracts with community enterprises j) protection and recovery of areas of vital importance to them k) participatory design of a new environmental plan l) health study to prevent exposure to toxic substances m) a clause in the contract holding the new operator responsible for maintenance and renewal of pipelines.[59] The initial response of the government agencies was that the law prevents them from complying with some of these demands. For the Federations this amounts to the State using its laws, that supposedly exist to protect their rights, to deny those very rights.

Attention to activities with significant or potentially profound impacts

In many protocols FPIC is deemed necessary for all activities within the territory irrespective of the scale of the impact.[60] However, some protocols differentiate between consultation processes based on the significance of an activity's impact.[61] Some protocols establish rules that regulate the entire consultation and negotiation process in all contexts.[62] Others provide high-level processes that regulate the initial stages of consultation and FPIC processes. These processes cover consultations in relation to projects with a low degree of potential impact or where all the necessary information for decision-making

is available. For projects with potentially significant impacts, where more information is required, these protocols establish a process whereby the concerned indigenous peoples initiate the development of consultation plans that are then agreed and implemented in conjunction with the State.[63]

A number of protocols deem certain pre-identified activities, which the people regard as having profound impacts on their rights and way of life, to be impermissible.[64] Examples include medium or large-scale mining and large-scale hydroelectric projects.[65] In these cases, the development of FPIC protocols provides a space for advance autonomous decision-making on these specific activities, and the protocols go beyond regulating future consultation processes.[66]

In some of these cases where protocols forbid certain activities, the indigenous peoples do not reject consultation, but insist on adherence with their FPIC protocols. This implies that their decision is predetermined until such a time as they decide to revise the protocol.[67] In other cases, they may refuse to even initiate dialogue in such contexts, on the grounds that their decision to withhold FPIC has already been taken. This latter position is consistent with the articulation in many protocols of consultation as a right of, and not obligation on, indigenous peoples.[68]

Relationship with other self-governance instruments and mechanisms

Several FPIC protocols are framed as components of a broader strategy and framework of self-governance. They clarify that they complement and reinforce other instruments in the pursuit of autonomy and self-determined development. For example, in Brazil, the people of the Xingu river refer to their Management Plan for the Xingu Territory in which they define guidelines for culture, territory, economic alternatives, food sovereignty, education and health of their peoples.[69] The Wampis protocol is being developed as a means to implement their Statute.

In Colombia, most protocols refer to the wider framework of community plans and regulatory instruments, including life plans, self-determined development plans, land and resource management plans and the peoples' overarching Creation law ("Ley de Origen").[70] The interface of these instruments with equivalent State instruments is aimed at facilitating intercultural governance. This is reflected in protocol demands that governments work with indigenous peoples to address illegal activities (mining, logging, fishing) in their territories and to assist them to realize the development they want.[71]

These protocols, which regulate relationships with all levels of government (local, regional and national), address scenarios that extend beyond contexts were FPIC is being sought. They are applicable in all situations where decisions relate to lands, natural resources, territories and self-determined development. Implementation of protocols consequently requires respect for indigenous peoples' right to develop their own territorial management plans, to establish indigenous guards and monitors, to strengthen autonomous governance structures, to assert ancestral conceptions of territories and to delimit them based on customary land tenure.

Preconditions

One of the most significant aspects of FPIC protocols is the preconditions they establish for meaningful consultation processes and the measures, in addition to those addressed above, that are deemed to be non-negotiable. In most cases the protocols assert the peoples' rights over their lands, territories and natural resources, and call on the State to respect and protect them and their customary laws, as a pre-requisite to engagement. This includes demands for the state to recognize the integral and unified nature of their territories, especially where titling regimes have failed to do so.

Most protocols provide information on the extent to which the peoples' lands have been recognized by the State and formal titles issued. In cases where titling is incomplete or is inadequate from the perspective of customary land tenure, protocols often outline the outstanding territorial claims. In some cases, the communities have explicitly asserted their claims to subsoil resources, while in other cases it is implicit under claims to natural resources.[72] Almost all protocols call for respect for the peoples' own governance institutions and structures, with most detailing what these structures are. In many cases, specific preconditions arise from the negative past experiences of indigenous peoples due to the lack of good faith consultations and FPIC.[73]

"Time is determined by the moon, not by capital"

Putomayo community representative

Timeframes, timing and consultation stages

The timing of, and timeframe for, decisions is an important issue addressed in all protocols. Many protocols describe past experiences of indigenous peoples with consultation that are only held in relation to compensation and failed to address the planning and implementation stages.[74] To address this, the requirement that consultations be held prior to any decision being made that impacts on the peoples' rights and interests is almost universal in protocols. As some note, unless this occurs, consultations "just serve to validate prior agreements between the government and companies" and serve to cause conflict.[75] Impact assessments are also identified as triggers for consultation and FPIC. While most protocols cover all decisions impacting on rights, their primary focus is often on the initial consultation at the planning and/or implementation stage of projects, and prior to licence or concession issuance, which determine if the project will proceed.

The protocols also address the timeframes for consultations. A general principle is that timeframes and when consultations are to be held will be defined based on the community activities and calendars, and then agreed with the State. In some cases, more detailed guidance on what needs to be included in the consultation timeframe is provided. Timeframes are contingent on the level of information available. Trips to other communities may be required, and time may also be allocated to conduct participatory impact assessments and for consideration of alternative options or project configurations.[76]

Most protocols identify specific stages in the consultation process.[77] Depending on the target of the protocol these steps may involve either the State or the project proponent.[78] These typically, though by no means always, include: a) request for consultation (given the remoteness of some Amazonian communities some protocols provide significant details regarding how the request is to be communicated)[79] b) initial internal discussions on whether to engage in consultations with the State and/or other external actors, c) giving or withholding consent to proceed with consultations; d) development of a consultation plan; e) information gathering meetings (premised on the conduct of approved participatory impact assessments and respect for traditional knowledge); f) internal discussions/consultations at community and people levels; g) follow-up information gathering meetings; h) internal decision-making meetings; i) communication of a decision to give or withhold FPIC. Several protocols address the negotiation of agreements in cases where FPIC is granted. Some stipulate that the requirement for consultations in subsequent stages is to be included in agreements.[80] Many also address monitoring of subsequent steps and any agreements reached as well as conditions leading to their annulment.[81] Some protocols establish specific rituals to be conducted at various stages of these processes.[82]

Legal bases affirmed in protocols

The authority of FPIC protocols lies both in their bases in ancestral practices and customary laws and in the contemporary recognition of indigenous peoples' self-governance and autonomy rights. As ancestral practices they have always been used, albeit under different terminology, to regulate interactions with outsiders and to defend and protect territories and ways of life. In their current form they are manifestations of the right to regulate, which flows from self-determination, self-governance and autonomy. A range of legal frameworks - including international and regional instruments and jurisprudence; national constitutions, legislation, regulation and jurisprudence; indigenous law frameworks; and even colonial laws - are invoked in protocols. These frameworks and instruments are addressed in the preambles, annexes, and core provisions of protocols.[83] In some cases, references are made to flaws in national law and regulation on FPIC, as well as how the protocol seeks to address these deficiencies.[84]

This reference to national and international law goes hand in hand with affirmations of the role that State, civil society, indigenous and international actors play in the consultation and consent seeking processes. In some cases, specific government institutions (including bodies such as national human rights institutions, federal prosecutors and ombudsman) are identified as mandatory participants in FPIC processes, often for oversight purposes, as are specific ministries and individuals with decision-making authority.

International bodies such as the OHCHR and the European Union are addressed in some protocols. A general principle affirmed in most protocols is that the relevant indigenous people have the right to decide who they wish to involve in the process for advice and oversight purposes, be this international organizations, civil society, other indigenous organization or networks, or other allies they deem appropriate.

Definition of concepts, principles and non-negotiables

Another important feature of many protocols is that they define key concepts and principles that are distinct to each people and are fundamental to understanding their rights and realities. Concepts such as territory, identity, autonomy, self-government, self-determined development, consultation, free, prior, informed, consent, patrimony, sacred sites are frequently defined.[85] Core principles that are elaborated typically include respect for land rights and indigenous governance, good faith, respect for indigenous knowledge, customary laws and practices, and intercultural dialogue.

These definitions and principles ground concepts that are used in IHRL standards in the lived reality and customary laws of indigenous peoples. They translate the international normative framework into something that can be implemented in a culturally appropriate manner and give meaning and content to rights in specific contexts.

A common characteristic of protocols is that they frequently establish a series of non-negotiable rules for consultation and FPIC.[86] Among these are affirmations that relocation is always unacceptable; the rejection of certain types of activities or impacts that are regarded as incompatible with the way of life and survival of a people; the affirmation of the right to decide what happens in their territories, at times clarifying that the supporting rationale for a decision will be provided.

While the majority of protocols affirm the right to give or withhold FPIC, in very few cases is the language of "veto" used to describe this decision-making right.[87] Where it is used, it is grounded on the fact that such development projects would have a profound impacts on rights and pose a threat to survival as a people, something which all protocols affirm is non-negotiable.

Other non-negotiables are the requirements that protocols be accepted as a basis for consultations and the rejection of putting indigenous peoples in a position where they effectively have to trade consent to projects for recognition of land rights. In addition, many protocols establish circumstances that render consultations or consent void. Such conditions include the failure to meet the "free", "prior", or "informed" criteria, the creation of division within communities as a result of consultation processes, the presence of armed groups during consultations, and any offers of money, threats or attempts to unduly influence decision outcomes.

Representation, who is to be consulted and how decisions are taken

A core component of all protocols is the section addressing who is to be consulted and the roles of various actors in the decision-making process. A focus on inclusivity tends to be a common feature of most protocols, with *inter alia* elders, youth, persons with disabilities, indigenous guards and warriors, community leaders and monitors identified as actors in the consultation processes. In a significant number of protocols, the importance of ensuring the effective participation of women is highlighted, as is the risk that they face as a result of non-consensual projects.[88] Rights-based protocols offer a culturally appropriate means for communities to address this issue themselves, rather than have external modalities of participation imposed upon them. In some cases, specific roles are assigned to teachers and health workers.[89] Another important issue which receives special attention in some protocols is the right of the people to select reliable translators.[90]

Some protocols also address the question of whether those who no longer reside in the community should be able to participate in consultation processes. Among the Brazilian protocols, the Xingu Protocol states that relatives who live in the city cannot speak on their behalf, while the protocols of the Munduruku and the river people of Pimental e São Francisco state that students who are studying in cities must be able to participate.[91] Many protocols highlight that the peoples' organizations must be consulted, but that they cannot be the only ones to be consulted as the decisions are taken collectively by the people.[92] How this is implemented in practice varies depending on the peoples' governance structures and decision-making processes.

The question of who represents the community, the role of leaders or chiefs and of community members in the process of decision-making, the modalities of consultations, and the form in which decisions are taken, occupies a central part of FPIC protocols. Issues addressed include: where meetings are to be held (most protocols affirming it must be within the indigenous peoples' territory); who is to be involved in (including the freedom to invite third parties and decisions over corporate actor involvement) and who will coordinate the meetings; who covers the costs of meeting (either the State or the project proponent, depending on who the protocol is primarily directed to); how and by whom meetings are documented and recorded and who owns the information generated.

The distinction between information sharing meetings and decision-making meetings is made clear in most protocols. The former involves the State, the corporation and those actors deemed necessary by the indigenous people, while the latter are internal meetings to which attendance is limited to those invited by the people. The requirement to ensure that indigenous knowledge is given the same weight as non-indigenous knowledge is also a common theme.[93] In the context of internal decision-making, protocols address issues such as how matters are discussed, and how consensus is sought. What is meant by consensus is also addressed in several protocols.[94]

Most protocols insist on decisions being taken at the level of the people and not at individual

community level, and in all cases not exclusively by an individual leader. Those protocols that recognize community level decision-making require that all impacted communities be involved, and often maintain some degree of oversight and support at the level of the people.[95] Protocols clarify that this focus on ensuring that communities and individuals are not isolated in the context of consultation processes, and preventing a divide and conquer approach used to fabricate consent, emerges from past experiences in which their governance structures were undermined.[96]

In some cases, protocols address multiple peoples and provide an overview of how these peoples organize themselves to address and make decisions on matters of collective concern.[97] Often these peoples share a common landscape, be it a mountain range or river basin, and what impacts one impacts all.[98] They also address relationships of indigenous peoples with tribal, traditional and non-indigenous communities.[99] In this regard, they act as instruments for addressing divisions between or within communities or peoples, and for formalizing modalities of cooperation.[100] Some protocols address the rights of peoples in voluntary isolation living in or near the lands of those developing the protocol. They stress the need to respect the fact that these peoples have, by definition, withheld their consent to any activities impacting on their rights.[101]

OVERVIEW OF THE CONTEXT, CONTENT AND CONTRIBUTION OF THE CASE STUDY PROTOCOLS

Many of the features outlined in the previous section are addressed in the Juruna, Embera Chamí and Palenke protocols and are being considered as part of the on-going protocol development by the Wampis. These four emblematic cases were selected because of the contexts which gave rise to the protocol development, the content of the protocols and their contribution to protecting the rights of the concerned peoples. All four protocols also have distinct features that reflect each peoples' experience and realities and the national context within which they operate.

The Juruna Protocol

The Juruna are one of the peoples of the Xingu river in the state of Para in Brazil. Since 2015 they experienced profound impacts on their rights due to the damming of the Xingu by the Belo Monte dam, the third largest hydroelectric project in the world. The dam had been mired in controversy from the mid-1970s when it was first proposed. Its construction in the 2000s was characterized by allegations of corruption, a series of flawed impact assessments, and inadequate consultation with the Juruna, as recognized by the Inter-American Commission on Human Rights in 2011. In 2012, an environmental license was issued to the Canadian Belo Sun mining company, again in the absence of any meaningful consultation. The planned large-scale gold mine is located within 10km of the Juruna territory and 50km from the Belo Monte dam. It compounds the dam's impacts and further threatens the Juruna's rights and survival as a people.

The Juruna completed the development of their FPIC protocol in 2017. Among the many interesting features of the protocol is its strong emphasis on the role of the communities in designing environmental impact assessments. In cases where the Juruna agree to proceed with a consultation and require further information in order to make their final decision, the protocol envisages a two-tire consultation process involving the creation of a consultation plan together with the Government. The protocol also requires the active involvement of governmental bodies, such as the Federal Prosecutors Office (MPF) and the Indigenous Peoples Agency FUNAI, in consultation processes. The

role of these oversight and advisory bodies is of particular importance in the Brazilian context, given the remoteness and small population numbers of many Brazilian indigenous peoples. This, together with their lack of political power, renders them particularly vulnerable to abuse by powerful third parties with interests in their lands prior to, during and following consultation processes.

The development of the Juruna Protocol played an important role in uniting the people, after years of divisive external influence in the context of the dam and mining projects. An interesting feature of their protocol is that it addresses how decisions are to be made in the absence of consensus. In such exceptional circumstances a vote can be called. However, in that scenario the Protocol ensures that all communities have an equal say in decision-making, independent of their respective population sizes.[102] In 2018, the Juruna won an important legal case in the Federal Court suspending the mining project and affirming the need for a consultation process that respects their FPIC Protocol. Their subsequent application of their FPIC Protocol led to the previously granted environmental approval process for the Belo Sun mine being declared invalid.

The Embera Chamí Protocol

In 2008 the Embera Chamí people of the Resguardo Indígena Cañamomo Lomaprieta - an Indigenous Reserve in the mountainous region of the Department of Caldas, Colombia - realized that mining companies were conducting fly-over exploration activities in their territories. In 2011 they discovered that the entire Resguardo territory (4,826 hectares) was under application for large-scale mining concessions, some of which had already been issued without any consultation. This existential threat to their territory and way of life, which involves small scale ancestral mining, arose in the context of on-going violent armed conflict in Colombia as well as frequent killings of Embera Chamí leaders who attempted to protect their lands and resources from outside interests.

In response, the Resguardo authorities developed a regulatory framework in 2012 governing all forms of mining in their territory. The framework is grounded on their constitutional right to regulate, as well as their rights under IHRL, the jurisprudence of the Colombian Constitutional Court and their own indigenous law. It consists of three interrelated legal resolutions. One is the FPIC protocol with which all external actors must comply if seeking to implement any activities impacting on the Resguardo. This includes legislative and administrative measures, concession issuance and project activities. Another resolution regulates ancestral mining, including who can conduct it and how it is to be conducted, and establishes a body to oversee its implementation. The third resolution prohibits medium and large-scale mining in the Resguardo territory. This regulatory framework is part of a broader strategy addressing territorial defence and self-government. These are reinforced through a range of activities, including the development of a life or development plan (*plan de vida*), efforts to secure territorial boundaries, and the establishment of indigenous guards and environmental monitors. Among the many interesting features of the Resguardo protocol, is its focus on ensuring that consultations do not generate any risks to the Embera Chamí people or their territory, deeming it void if they do. Consultations which, for example, could result in the entry of armed actors into the Resguardo would fall into this category.

The existence of the FPIC protocol has had a deterrent effect on mining companies and no company has managed to commence mining activities in the Resguardo since the resolutions were issued. In 2016, the Colombian Constitutional Court affirmed the need to respect the Embera Chamí's protocols and procedures in relation to FPIC (Case T-530/2016). It also ordered the demarcation of the Resguardo

territory and reaffirmed their right to regulate mining practices therein. In order to strengthen the implementation of their protocol the Resguardo has initiated projects to implement these aspects of the Court decision.

Since 2009, the Embera Chamí have worked in close cooperation with the Afro-Descendant communities of the Palenke Alto Cauca. These communities have also developed an FPIC protocol and implemented it in the context of the Salvajina hydroelectric project. The dam was constructed in their territory without prior consultation and the protocol enabled these communities to negotiate the terms and conditions of impact assessments as required by a decision of the Colombian Constitutional Court.[103] A central concern for these Palenke communities and the Embera Chamí is the continued killings of their leaders. Instead of reducing this threat, the Colombian peace process has potentially compounded it. It failed to ensure that their rights and their leaders are adequately protected, that on-going violent conflicts are stopped, and the presence of illegal actors eliminated, before promoting controversial development projects in their territories.

The Wampis Protocol

The Wampis nation's territory is in the department of Loreto in the north west of the Peruvian Amazon. In November 2015 the Wampis declared their nation's Autonomous Territorial Government and issued their collective governing Statute. They were the first indigenous people in Peru to do this and have inspired other indigenous peoples throughout the region to consider similar approaches. The Statute and Government are an exercise of their right to autonomy and are grounded in international, constitutional and Wampis law. They are premised on the recognition of the Wampis ancestral integral territory and establish the governance structures through which the Wampis will administer and maintain this territory as a single integral entity. The Statute addresses both the administration of internal affairs, as well as external governance, and establishes the requirement for consultation and FPIC in relation to externally proposed activities.

The Wampis have a long history of projects being imposed in their territory without prior consultation. An example is Oil Block 116, where in 2014 - together with their Awajun neighbour - the Wampis mounted a legal challenge to the project. A landmark ruling, issued in 2017, affirmed the requirement for consultation and FPIC in relation to oil exploitation and suspended the project. The Wampis have witnessed how indigenous peoples in Peru, including the Federations in whose territory Oil Block 192 (see box on page 23) is located, were denied their rights in the implementation of the State's 2011 prior consultation law. In preparation for State initiated consultation processes, they are developing an FPIC protocol grounded on their governing Statute. It will serve to govern the State's implementation of its prior consultation law and ensure that processes aimed at obtaining the Wampis' FPIC proceed in accordance with IHRL standards and the Wampis Statute.

The Wampis FPIC Protocol is being developed as part of a broader strategy of self-determined development based on their assertion of autonomy and their vision of an integral territory. It will establish pre-conditions for good faith consultations, including the formalization of their rights to their integral territories and to self-government. It will also provide the basis for negotiations with the State and the identification of areas where consultations are of mutual benefit. In keeping with the Court ruling and their rights under IHRL, the protocol will address situations where Wampis FPIC is required, including for projects that pose significant risks or threaten cultural or physical survival, and will address the bases upon which FPIC can be granted or withheld.

The experience of each of these peoples offers unique insights into the development, content and potential contribution of FPIC protocols in specific contexts. These experiences and the lessons they offer will be probed in detail in the three case study chapters.

The concluding chapter of the report will focus on the broader question of the potential contribution of FPIC protocols to the realization of indigenous peoples' rights.

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THE JURUNA (YUDJÁ) PEOPLE'S PROTOCOL: A RESPONSE TO A HARD-LEARNED LESSON

By Biviane Rojas Garzon

"We are not prepared to allow the Government to once again walk all over our rights. (…) The decisions that determine our present and our future can no longer be made exclusively by the Government.

We know we have a right to be consulted, to defend our land and our traditions, to fight for decent living conditions and to choose our own development priorities. Neither the Government nor any company can deny us these rights. That is why we developed our protocol and we hope that everybody will be aware of it and respect it."

Juruna Protocol

BACKGROUND

The Juruna, or *Yudjá*, people describe themselves as the owners of the Xingu river. The Xingu river is the largest clear water tributary of the Amazon river and its waters are rich in biodiversity and endemic species. It is located in the agricultural and energy frontier of the Brazilian Amazon. Since November 2015 it has been dammed by the Belo Monte hydroelectric power plant, the third largest hydroelectric project in the world. As a result, the Juruna people's territory – which essentially comprises of their river - faces a serious threat of extinction. Their fight against the destruction of the Xingu river, and by extension their own disappearance as a people, is the primary struggle of the Juruna. It is the most important contextual consideration for understanding the development and implementation of their autonomous consultation and consent protocol.

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The Juruna know the Xingu river better than anyone. They have lived with it, and from it, for generations. They are experienced sailors and fishermen, renowned for 'having canoes instead of having feet'.[104] The Juruna have a deep understanding of the seasonal behaviour of the river and employ a variety of fishing techniques to catch fish for consumption and for ornaments. For many years this has guaranteed them a secure food source and sufficient income to provide dignified livelihoods for their families.

For decades, the Juruna married members of other indigenous peoples and traditional river communities known as *"ribereños"*.[105] They have endured numerous extractive activities in their territory and have survived huge influxes of Brazilian immigrants and foreigners into their territory in search of rubber, fur and gold. Despite this they have not become "less indigenous" or lost their traditional knowledge of the river and the forest. However, as part of their survival strategy during the second half of the 20th Century the Juruna stopped speaking their language. This was to render themselves invisible among the mestizo population of the region, and thereby avoid the risk of being exterminated. The Juruna of the Volta Grande do Xingu (the Big Bend of the Xingu) are now attempting to restore their language through exchanges with a group of Juruna who live in the Xingu Indigenous Land (TIX)[106] located in the state of Mato Grosso who managed to keep the Yudjá language and traditions alive.[107]

It is important to highlight this because the Brazilian Government and corporations have challenged the indigenous identity of the Juruna given that they do not speak their language, and this, in turn, has been used to challenge the legitimacy of their land and political rights.

The Brazilian state recognizes the territorial rights of indigenous peoples through the identification, demarcation and titling of indigenous lands. These lands that are traditionally occupied by indigenous peoples remain the property of the State and are inalienable, imprescriptible and non-transferable. They are destined for indigenous peoples' permanent possession and they have exclusive use rights over the soil, rivers and lakes therein (Federal Constitution 1988, Art. 231). This recognition

prevents the removal of indigenous peoples from their customary lands, guaranteeing them rights over their lands that pre-date the creation of the Brazilian State.

At present, it is not possible to conduct mining operations within indigenous lands. Existing large mines that have an impact on indigenous lands are all located outside demarcated indigenous territories. The 1988 Federal Constitution states that the exploration of mineral resources on indigenous lands depends on the authorization of the National Congress and on the enactment of a specific law that defines their participation in the benefits generated by the exploitation. Congressional authorisation is contingent on consultations with the directly affected indigenous peoples prior to approval of exploration of areas within indigenous lands (Art. 231).

In 1996, Bill no 1.610/96 was tabled before Congress with a view to regulating mining within indigenous lands, but it was never approved. However, the current Federal Government, elected in 2018, has promoted the authorization of mining activities within indigenous lands as a priority since its first days in office.[108] The need to advance the implementation of the indigenous peoples' right to consultation and consent is more pressing than ever given this context.

The Juruna of the Volta Grande do Xingu live in the *Tierra Indígena Paquiçamba* (Paquiçamba Indigenous Land), which was finally recognized and approved as indigenous land by the Brazilian State in 1991. This followed a long process of identification that lasted more than 20 years and resulted in the recognition of a territory that was far smaller than their traditional lands, and too small for their needs.

In 2000, the Fundação Nacional do Índio (National Indian Foundation, or FUNAI), the Brazilian Governmental body responsible for protecting indigenous interests, carried out new demarcation studies, including the portion of the islands in the Xingu river that had been excluded from the first demarcation. The expansion of the Paquiçamba Indigenous Land was approved in November 2012, some 12 years later.

The new demarcation expanded the traditional land area from 4,348 hectares to 15,733, constituting a threefold increase of the area initially recognized in 1991.

It is important to emphasize that 89% of the Juruna territory is composed of small islands and canals that run along the Volta Grande do Xingu. In other words, the Paquiçamba traditional land consists primarily of the Xingu river. Any change to the Xingu river has a direct impact on the territorial rights of the Juruna.

Despite the challenges the Juruna face in their struggle to guarantee recognition of their rights over the Xingu river, they continue to assert their authority over decisions that affect the river. They have demonstrated this in their intense struggle against the construction of the Belo Monte hydroelectric power plant and the development of the Belo Sun gold mine, which are the primary threats to their territory.

The Belo Monte hydroelectric power plant is located within the Juruna traditional territory. It required the diversion of the Xingu River from the entire Volta Grande do Xingu region, a stretch of more than 100 km in which there are two indigenous territories and hundreds of traditional river community (*ribereños*) settlements. Following the construction of the Belo Monte dam, only a small volume of water remains in the Volta Grande do Xingu region. This water volume is artificially controlled by the hydroelectric company that holds the concession at the levels it needs for power generation.[109]

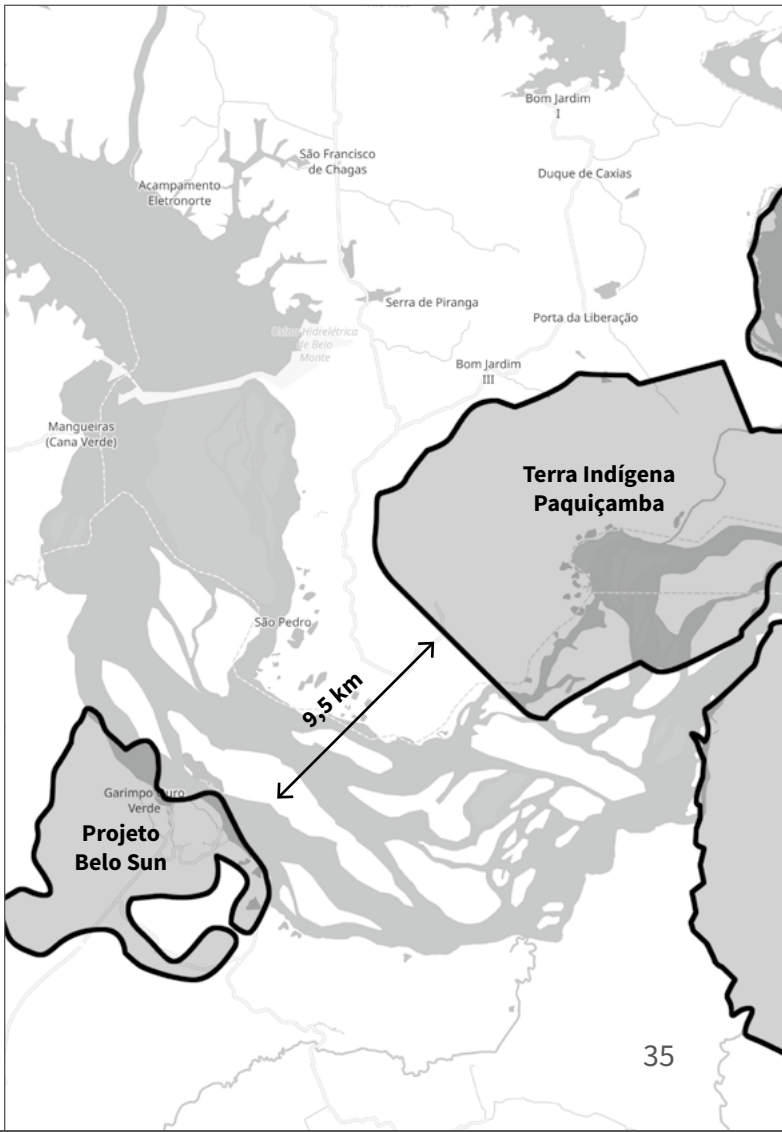
For many years the indigenous peoples of the Xingu, in particular the Juruna, fought against the construction of the Belo Monte dam. Despite this the Federal Government succeeded in imposing it. In so doing, the Government disregarded both national and international court decisions denouncing the social and environmental impacts and violations of human rights caused by the construction and operation of the dam. At the root of many of the problems related to the Belo Monte dam was the total absence of a process of free, prior and informed consultation with all the affected indigenous communities. The Government never denied its obligation to consult the affected indigenous peoples, however it limited the dialogue processes with them to mere information sharing meetings that took place only after the construction of the hydroelectric power plant had been approved.

In 2011, the lack of consultation for the Belo Monte hydroelectric power plant led the Inter-American Commission on Human Rights (IACHR) to call for its construction to be suspended until a proper consultation process was completed.[110] However, the Brazilian Government ignored the recommendation of the IACHR and continued with the construction, with no intention of establishing a dialogue with the directly affected peoples, including the Juruna.

The construction of the reservoir's dikes commenced in June 2011. By November 2015, the Xingu River was completely dammed and permanently diverted from the Volta Grande do Xingu Paquiçamba and Arara indigenous lands. Since then, the Juruna have consistently denounced the serious social and environmental impacts caused by the construction and operation of the Belo Monte dam. These impacts seriously threaten their prospects to remain in their territory and, as a result, their survival as an indigenous people.[111]

This catalogue of human rights violations and direct threats to the physical and cultural survival of the indigenous peoples affected by the Belo Monte dam prompted the *Ministério Público Federal* (Federal Prosecution Service, or MPF) to take legal action. The MPF accused the Brazilian State and the holder of the hydropower concession of committing ethnocide as "evidenced by the destruction of the social organization, customs, languages and traditions of the impacted indigenous peoples".[112]

To compound this situation, in 2012 the Secretary of State for the Environment and Sustainability of the state of Pará (SEMAS) issued an environmental license for what would be the largest open-pit gold mining project in Brazil, the "Volta Grande" project. The project was to be developed in the same Volta Grande do Xingu region, less than 10 km from Juruna lands.



The mining project, led by the Canadian mining company Belo Sun (which is a subsidiary of Forbes & Manhattan Inc., a private merchant bank), is within the constituency of Senator José Porfirio (PA), less than 50 km from the main dam of the Belo Monte hydroelectric power plant and 9.5 km from the Paquiçamba Indigenous Land.

The mining project is expected to remove almost 40 million tons of rock over the course of 17 years. Through the use of cyanide it expects to extract 32.63 tonnes of gold.[113] According to the risk assessments submitted by the mining company to SEMAS the risk of a breach in the tailing pond is high.[114]

The first environmental license for the mine was issued in 2012. It was granted in the absence of any study of potential environmental or other impacts on the indigenous peoples of the region, and without involving them in a process of free, prior and informed consultation. In addition, the environmental permit did not mention the cumulative impacts nor how the existing impacts from the hydroelectric power plant would be compounded by the anticipated impacts from the mine. Nevertheless, environmental authorization to commence construction was issued in January 2017 when Belo Sun obtained its installation licence.

In 2014, the Brazilian MPF had obtained a decision in the Local Federal Court of Altamira ordering the suspension of the environmental licence due to the absence of social and environmental assessments addressing the impacts on the indigenous peoples in the area affected by the mine. However, this decision has never been implemented.[115]

Between 2014 and 2017, Belo Sun and the Government of the state of Pará appealed this decision of the court of first instance in the Regional Federal Court of Justice in Brasilia. They suffered a resounding defeat in December 2017, when the Court reaffirmed the obligation to carry out studies on the potential environmental impacts on the concerned indigenous peoples. It also affirmed the obligation to consult with the directly affected peoples and to recognize, respect and follow their autonomous consultation and FPIC protocol.[116] As outlined below this ruling remains the most significant judicial victory in terms of its recognition of the value of autonomous consultation and FPIC protocols in Brazil.

It is significant that the Protocol was developed precisely during the period when the Juruna were under intense pressures and facing major threats to their rights from these two mega enterprises. The Protocol was completed after Belo Monte dam's first year of operations and following the issuance of the mining license for the Belo Sun mine. This explains the swiftness of the Juruna in the drafting and publication of their protocol which they achieved over the course of a few months in 2017.

The Juruna had started discussing the development of a consultation and FPIC Protocol in 2014, but due to the profound impacts of the dam those discussions were set aside until 2017. Their initial 2014 discussion was inspired by other indigenous peoples, such as the Wajampi and the Munduruku, who were the first ones to publish their protocols in Brazil that year.

The Juruna had closely followed the Munduruku people's struggle to resist hydropower companies' operations in the Tapajós river basin and had supported the Munduruku's publication of their FPIC protocol. That Munduruku Protocol, which played a major role in the Juruna decision to develop their Protocol, was produced in a context where the Government was putting pressure on the Munduruku to agree to a consultation process that merely addressed compensation and mitigation arrangements.[117] The Munduruku were demanding to be consulted on the very feasibility of the hydroelectric

power plants, and not only on compensation arrangements for the damage their construction would cause in the Tapajós river basin.[118] In the case of the Munduruku, the Government insisted that the decision to construct the dams was already taken, and this was something on which the Munduruku could not express a view. The Government further insisted that it was under no obligation to consult them on that decision.[119]

In the second half of 2014 the Juruna invited the MFP of Santarém (who had helped the Munduruku to develop their Protocol), FUNAI of Altamira, and the Instituto Socio-Ambiental (the Social and Environmental Institute, or ISA) a non-governmental organisation that is a local ally of the Juruna, to hold an initial workshop on consultation and FPIC Protocols. From the first meeting, the Juruna were very clear about the importance of, and content that they wanted to include in, their protocol. This objectivity and good faith on behalf of the Juruna throughout the Protocol development was impressive given the imposition of the Belo Monte hydroelectric power plant and the profound consequences which the lack of consultation had for their rights and existence as a people. At the same time, the Juruna demonstrated a clear intent to prevent any repetition of flawed consultation and impact assessment processes, such as those conducted for the Belo Monte project, in the context of the Belo Sun project or with any other proposed major projects impacting on their territories.

Despite their determination to advance with developing the Protocol, it was impossible to do so between the end of 2014 and 2016. This was due to the serious social and environmental impacts caused by the diversion of the Xingu river at the end of 2015, and the commencement of the hydroelectric power plant operations in April 2016."

"The years 2015 and 2016 were very difficult for us in the region of Volta Grande do Xingu. (…) The year 2016 was one of the worst years of our lives, we no longer knew what was happening with the river, it filled up and emptied overnight as if [changing] from winter to summer. My brother died swimming in wells of unknown depths, the fish and turtles died of hunger because ripe fruit began to fall on the dry beaches instead of falling into the river, and the animals were not able to reach the fruit to eat it. We, the Juruna, call the year 2016 the year the world ended. The world as we knew it ceased to exist after the Xingu river was diverted." [120]

Because of this, it was only in 2017 that the Juruna resumed their internal discussions to develop their consultation and FPIC Protocol. The urgency to complete the discussions to agree and develop the text to be published arose from the fact that the Government had granted a license for the development of the Belo Sun mine without consulting the Juruna, despite its profound impacts on their rights.

The Juruna reinitiated their work on the Protocol determined to prevent the development of the Belo Sun mine in their territory in same way the Belo Monte hydroelectric was imposed on them. This explains why the Juruna Protocol repeatedly refers to the need to prevent the repetition of past mistakes. A key point that is stressed in the Protocol is that it is useless to consult indigenous peoples after the damage is done and is irreversible.

To resume the talks about the Protocol, the Juruna again requested technical support from ISA. ISA maintains a close and permanent alliance with the Juruna on other issues, mainly with the village of Muratu, which it has been helping since 2013 to develop a process for independent monitoring of the impacts of Belo Monte dam.[121] Coincidentally, ISA is part of the Amazon Cooperation Network (RCA), the main association of Brazilian indigenous and indigenous support organizations that promotes the development of autonomous consultation and FPIC Protocols. This meant that the Juruna could easily reach an agreement with ISA to help them finish the development and publication of their Protocol. Having accepted the invitation, ISA requested resources and technical support from RCA and agreed a work plan that involved meetings at the villages as well as general assemblies to define and ratify the final text.

These meetings were organized in all the villages with the participation of leaders, women, public servants (teachers, health workers, etc.) and three technical advisers from ISA (two lawyers and an anthropologist). The aim of the meetings was to reactivate the last internal agreements concerning decision-making processes involving the different villages, and the currently operational rules of political representation of the Juruna people and the Paquiçamba Indigenous Land.

The lessons the Juruna learnt in the context of the Belo Monte dam about the dangers of fragmented negotiation processes involving only some leaders, and conducted without publicity or transparency, were clearly and objectively presented at the meetings.

Most of the Juruna were very clear on how they wanted to be heard and participate effectively in decisions that affected them. The importance of remaining united, avoiding more internal divisions and, above all, describing the types of things they did not want to re-occur in a dialogue process with the Government, or with other companies, was repeatedly stressed during the meetings. That clear and objective experience of the Juruna inspired a very significant part of the Juruna Protocol that deals with the definition of the principles that should guide the entire consultation process. These principles are also translated into specific rules within the Protocol. Thus, for the Juruna, all consultation processes must at minimum comply with these principles:

> *"**Respect.** Observing our rules, our customs and our time. (…) **Transparency.** So that we all know what is happening. (…) **Good faith and honesty.** So that we have confidence in the dialogue process and the development of agreements. (…) **Free from physical or moral pressure.** We will not accept the presence of private security guards or police forces who want to intimidate our people. Nor do we accept attempts at agreements with leaders or individuals in return for favours or goods."*[122]

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The observance of these principles is translated into very specific rules within the Protocol, such as respect for the timing of traditional activities when it comes to scheduling meeting dates, the obligation to record and publish all consultation meetings, the need to have meetings that are exclusively informative, and the importance of independent technical advice.

From the first meeting, most of the participants expressed support for most of the rules described in the Protocol. The Protocol development consisted of a process in which existing and regularly used community rules were updated, and rules which had been abandoned in contexts of high political or economic pressure, but that they considered important enough, were restored or updated. In general terms, the discussions during the Protocol development meetings focused on updating existing internal rules and structures rather than defining new organizational or political representation rules.

It was only during the last meeting, attended by leaders of all the villages, that a brand-new rule was established for cases where a decision needed to be made in the absence of consensus. In such cases the Juruna decided that the decision would be put it to a vote. However, making decisions based on individual voting is not a common practice among the Juruna. Despite this, they decided that in the absence of consensus, voting was the best way to make decisions that represent them all and thereby avoid internal divisions. The discussion about this rule was very difficult. Although there are three villages, one of them has a larger population than the other two. A voting system based purely on the number of individual votes would always give its population an exclusive final say in the most controversial decisions.

The discussion around how to frame this rule in the Protocol focused on the need for each village to have the same political weight in decision-making, irrespective of its population. After much discussion, a voting rule was agreed that limits each village to 10 adult representatives.

> *"How do we make decisions? We talk until we reach a decision agreed by all. We will seek consensus in the internal deliberative meetings. If consensus is not possible, ten adult representatives from each village, chosen by us, will vote."*[123]

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That rule, while obviously novel, was the only one that was created during the development of the Protocol. It is important to note that, since the Protocol entered into force in September 2017, no decisions have been made by voting, because the Juruna have made all decisions based on consensus. This demonstrates that, in practice, the absence of consensus among the Juruna signifies the absence of a decision.

On the other hand, the rule which received the strongest support and emphasis was the rule that chiefs or leaders cannot make decisions individually. Previous examples of where a

chief had individually entered into agreements with the Government or with companies that affected the entire indigenous land were raised in every meeting.

The lack of transparency in the negotiations held outside the indigenous land was also highly criticized and identified as a practice that the Protocol should reject. For this reason, the Protocol includes a rule which requires that Juruna decisions are always made with the joint participation of the three villages. That rule has forced all village chiefs to take decisions in public meetings before those decisions can be legitimately communicated externally. Without doubt, the Protocol has so far proven its worth as an instrument for strengthening Juruna political unity. Since its publication the chiefs of each of the three villages have all striven to avoid unilateral decision-making.

CONTENT

The Juruna Protocol is divided mainly into three parts. The first part describes who the Juruna are, their territory, the current socio-political context and the reasons why they decided to discuss, agree and publish their own consultation and FPIC Protocol. The second part describes the actual rules of the Protocol in the form of answers to the following questions: what should be subjected to consultation, when, how, with whom and for what. The third and final part consists of a reproduction of the articles of the Federal Constitution of Brazil, which recognizes the land, cultural and political rights of indigenous peoples, and the articles of the ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples that refer to the right to consultation and consent.

The Juruna Protocol is clearly addressed to the Brazilian State, primarily to the different levels of government. From the introduction it is possible to see that the Protocol was developed to inform the federal, state and local governments that they have the obligation to consult the Juruna about decisions involving their land and their rights. The references to other actors, such as companies or non-governmental organizations, are marginal. The engagement of these actors in the consultation process will always depend on an explicit invitation from the Juruna. In certain asides it is made clear that the Government is regarded as the only legitimate negotiating partner in the consultation process.

> *"Government representatives with authority to make decisions and with technical knowledge to answer our questions shall take part in the consultation. (…) Private companies may be invited, if necessary, to provide clarifications.* ***Public bodies and allies.*** *The FUNAI and the Ministério Público Federal must be involved throughout the consultation process, but no institution shall be able to make decisions on our behalf. We may invite independent specialists and legal advisers not linked to companies or Government bodies (…)."*[124]

The fact that the Juruna have addressed their consultation and FPIC Protocol primarily to the Government has to do with the way in which they were subjected to fragmented negotiations with many private companies over programs for monitoring and mitigating the impacts of the Belo Monte dam. To give an idea of the extent to which the Juruna were under siege in 2013 there were more than 200 companies present in the territory, subcontracted to finish studies, define monitoring programs and implement mitigation actions. This was without any consultation having been conducted on

the feasibility of the hydroelectric power plant, the conditions under which it was to be built, and the prevention, mitigation and damage compensation obligations.

The aim of the Juruna Protocol rule that recognizes the Government as the only negotiating partner is to focus the negotiation on the one actor competent to make decisions and coordinate third party actions. The Protocol also requires the Government to be represented by decision-makers. This reflects the Juruna's previous experience of frustrated negotiations because the people who claim to represent the Government had no authority and no decision-making powers.

It is worth mentioning one particular rule of the Juruna Protocol that defines the requirements that Government representatives must meet to take part in a consultation process with them, considering that the ultimate purpose of the consultation is to reach agreements that are binding on all parties:

"On the part of the Government interested in the consultation. Government representatives with authority to make decisions and with technical knowledge to answer our questions shall take part in the consultation. The Government must avoid changing the negotiating partners in mid-process. Private entrepreneurs may be invited, if necessary, to provide clarifications." [125]

The Protocol makes it clear that only those meetings that follow the rules described therein can be recognized as free, prior and informed consultations by the Juruna.

It is worth emphasising the reference in the Protocol to the Juruna's right to not participate in consultation processes they are not interested in, or which do not observe their Protocol. In other words, a fundamental rule of the Juruna Protocol is the voluntary nature of their participation in a consultation process. This means that the Juruna do not recognize any obligation to take part in any consultation that is solely in the interest of the Government.

The Juruna Protocol reiterates the importance and usefulness of holding consultations before decisions are made, and not after they have been implemented in order to legitimize them. During the discussion about this rule the Juruna mentioned several times the feeling that they were being forced to waste time, or that the decision-making meetings are useless because at the end of the process they will change nothing.

Clearly, the Juruna are worn out after taking part in meetings with the Government in which their views or thoughts are not considered when it comes to making decisions. In this case, they referred to meetings related to indigenous health, which is a context where there are formal consultation mechanisms for public policies, but where the results never reflect the indigenous participation. The Protocol makes it clear that they do not want to waste more time.

"Consultations can only concern proposals or ideas, never decisions already made. Consultations on new enterprises must occur from their inception or planning stage. A consultation needs to take place in advance for it to be useful. In other words, the result of the consultation must serve to influence the decision and not just to legitimize it." [126]

This rule is also rooted in the experience of the Juruna with the many meetings focused on the Belo Monte dam where the Government never showed any interest in listening to what the Juruna had to say, let alone incorporate indigenous considerations into its decision. For this reason, the Juruna do not recognize any of the meetings held in the context of the Belo Monte dam as consultations, at best they refer to such meetings as informative presentations that do not constitute a true dialogue with the aim of reaching a joint agreement.

The differentiation that the Juruna make between purely information gathering meetings and consultation processes is reflected in the Protocol paragraph where the former are described as meetings whose only purpose is to gather information from the Government and receive answers in order to understand the consequences of the any proposal for their rights, territory and way of life. The Juruna make it clear in the Protocol that they cannot be required to make decisions during information gathering meetings.

The Juruna Protocol pays special attention to the preparation and understanding of information prior to making any decision. Again, this reflects the experience of the Juruna with the Belo Monte dam process. The Protocol's detailed focus on the production of environmental impact studies and the engagement of independent experts reflect the lessons learned by the Juruna with the licensing of the hydroelectric power dam:

"To carry out studies, jointly or with third parties, is an essential part of the informative stage of the consultation process, as set out in the ILO Convention 169, Article 7.3. For that, we need the presence of the FUNAI and technical and legal advisers we can trust. The informative stage of the consultation process must include the joint development of terms of reference for environmental impact studies and an assessment of their outcomes. All decisions made in the context of the implementation and assessment of the studies must serve to inform the consultation process decisions. The approval of the terms of reference and impact studies is not to be confused with the approval of the proposal under consultation. There can be as many informative meetings as necessary. Informative meetings shall be attended by Government and private company experts capable of answering questions and clearing up any doubts. (…)

Depending on the consultation, in the informative stage of the process, we might make exchange visits to learn about similar experiences and gather information that can help us make decisions." [127]

The importance that the Juruna attribute to the possibility of directly experiencing situations that are similar to those being proposed, through trips where they have the possibility of exchanging information with people in specific situations, is noteworthy. The idea to include the possibility of sharing experiences as a source of information arose in relation to the need to be consulted about the Belo Sun project. The Juruna do not trust the technical information submitted by the Government and the company. They want to go to a region where a mine like the one proposed for the Volta Grande do Xingu already exists and experience it for themselves.

Another feature of the Juruna Protocol that is worth highlighting is the definition of who are the legitimate Juruna representatives that can take part in the consultation process, given that the Protocol establishes that leaders and chiefs cannot make decisions on their own. Instead the Protocol reinforces the importance of the involvement of communities in decision-making, as well as the lack of authority of associations or other type of organisations to replace the communities in consultation processes.

"On the part of the Juruna. Consultations must be undertaken with the engagement of as many people from the three villages of the Paquiçamba Indigenous Land as possible. Villages cannot be consulted separately, and the villagers cannot be consulted individually. The consultation meetings must always be attended by leaders of all the villages, including women, men, the elders and children." [128]

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Finally, the Juruna Protocol briefly describes the "Consultation Plan" as the instrument that should help in each concrete case to interpret the guidelines and principles of the Protocol in accordance with the specifics of the decision under discussion. The Protocol establishes a set of general rules that must be interpreted and applied depending on the needs of each consultation. For this reason, the Consultation Plan is more specific and defines timelines, actors, information requirements and resources required for each specific case.

An important element of the Consultation Plan, as defined in the Juruna Protocol, is that the initiative to develop it must arise from the Juruna themselves. They are the ones that establish the basis for negotiations with the Government. In other words, the eventual joint approval of a Consultation Plan, by the Juruna and the Government, has its origins in an initial proposal by the Juruna. The idea that the initiative must arise from the Juruna is meant to help them retain control of the process from the outset. However, this first step is hampered by a lack of resources, as the budget for the consultation process is decided precisely during the negotiation of the Consultation Plan. Therefore, the cost of the development of an initial draft Consultation Plan, as described in the Protocol, must be borne solely by the Juruna.

This limitation can be overcome by calling on allies like the MPF, FUNAI or NGOs at the outset of the process. In the case of the Belo Sun mine, for example, the company offered to hire anthropologists to help the Juruna propose a Consultation Plan. The Juruna rejected the technical advice because they did not consider it to be independent or trustworthy.

Finally, it is important to conclude that, when compared with other consultation and FPIC Protocols that exist in Brazil, the Juruna Protocol is particularly detailed in terms of information regarding the procedures, actors and instruments required for its implementation. However, it does not include a section about following up on agreements in a post-consultation stage. This omission is reflective of the fact that before drawing up their Protocol, the Juruna have never been involved in a remotely adequate consultation process. Their lack of experience in following up on agreements explains the absence of references to that stage and its subsequent inclusion in the Protocol. The main objective of the Juruna Protocol, therefore, is to get the Government to recognize its obligation to conduct consultations, primarily the federal and the state Governments which continue authorizing projects that have significant impacts on their territory without consulting them.

CONTRIBUTIONS

The development of the Juruna Protocol has been very important for the internal consolidation of the social organization and the political representation of the Juruna of the Paquiçamba Indigenous Land. Its publication has united them after years of intense internal divisions during the environmental authorization and construction of the Belo Monte hydroelectric power plant. The main challenge the Juruna currently face is to rebuild and maintain their unity and political control over the territory.

The recent traumatic experience caused by the intense social and environmental impacts involved in the construction of the Belo Monte plant is something that the Juruna refuse to relive. Because of this, they are determined to be better organized to defend their rights. The Juruna see the Protocol as an opportunity to stop history from repeating itself.

The case which most clearly demonstrates this new approach is regarding Belo Sun. The mere threat of the proposed mine was without doubt the main driver that sped up the process of discussion and adoption of the Protocol. The level of detail and safeguards described in the Juruna Protocol clearly illustrate the extent to which they have learnt about the principles and rules that must guide dialogue with all levels of government.

The Protocol emphasises the Juruna people's demand for consultations to be conducted in line with their own rules, customs, traditions and representative institutions, and explains what exactly that means. This level of detail on the right to consultation increased the faith in it of the judges who decided the legal case in relation to the Belo Sun project. It also reinforced its credibility in eyes of allies, such as the Ministério Público Federal, which felt more empowered to demand fulfilment of the obligation to consult when they had the Protocol in hand.

In the legal case, the Regional Federal Court of Justice in Brasilia recognized that the Government of the state of Pará had the duty to consult the Juruna people before issuing the Belo Sun mining license. The Court affirmed that the law requires carrying out studies of the environmental impacts of the mine on the indigenous peoples of the region and requires following a process of free, prior and informed consultation with these peoples, respecting the rules of consultation established in existing protocols, such as the Juruna Protocol.[129]

This decision, issued in December 2017, represented an important achievement not only for the Juruna people, but for all indigenous peoples and traditional communities in Brazil who have been developing their own protocols since 2014 but who have not yet had them recognized in a court decision.

The judicial recognition of the binding nature of the Juruna protocol made it possible to reconsider to an earlier inadequately completed administrative stage in the project authorization process. In practice this meant that FUNAI could continue developing the terms of reference for the environmental impact studies in cooperation with the Juruna, as established in their protocol.

This change in the administrative stage of the project is very significant. It underlines the importance of indigenous peoples' participation in the determination of the type of information that must be provided in the consultation process from the outset. Rather than being merely passive recipients of information produced by others, without even knowing its relevance to the impacts that concern them, they must be active participants in its definition and production.

The court decision in the case of Belo Sun sets an important precedent for determining the opportune timing to conduct consultations within the sequencing of administrative decisions on environmental licensing of projects and activities that impact indigenous peoples. Following the court decision, Belo Sun attempted to initiate a consultation process directly with the indigenous people, without involving any public body. It did this so that could inform the judge that the obligation to consult was being complied with.

The company's attempt to expedite the consultation was completely at odds with the rules established in the Juruna Protocol. The Protocol is explicit in stating that private companies are not legitimate negotiating partners to discuss the environmental authorization of any enterprise given that, under the Juruna Protocol, the presence of the company in a consultation process is totally dependent on it being invited by the indigenous people, or by the Government, to support the process in a technical capacity.

Because of this, the Juruna sent a formal notice to the Regional Federal Court of Justice in Brasilia, FUNAI and the Government of the state of Pará expressing their disagreement with the company's initiative and demanding compliance with their consultation and FPIC Protocol. They also requested the presence of public officials to discuss the development of environmental studies and the initiation of the consultation process by discussing a consultation plan that respects and implements their Protocol.

The fact that the Juruna Protocol explicitly requires the terms of reference for environmental impact studies to be considered is clearly a result of the lessons the Juruna learnt from the Belo Monte dam environmental licensing process. The Juruna had the opportunity to see how lengthy and expensive studies often failed to provide them with accurate and appropriate answers to their most urgent questions about the impacts and consequences of the project. This experience with Belo Monte made clear to them the importance of engaging in the process of developing environmental studies from the outset.

For this reason, the Juruna Protocol states that engaging in the definition of questions about what must be studied, and how it must be studied, is as important as engaging in the implementation of impact studies. Therefore, by applying their Protocol, the Juruna forced FUNAI to revoke the authorization it had given to Belo Sun to carry out studies on the basis of questions that had been developed without consulting the Juruna.

Currently the mining license of the Belo Sun project remains suspended and the development of the environmental impact studies has not started yet. It is not possible to say that the Protocol is being fully implemented, because it is still only being used as a tool to demand respect for the Juruna's right to consultation. For now, the Government of the state of Pará continues to refuse to carry out the consultation on the environmental authorization for the Belo Sun project. At best, in order to obey the court order that requires the consultation to be carried out and the Protocol to be respected, the Government will ask FUNAI to follow the necessary procedures, but the Government has no intention to take part in them.

The Government of the state of Pará believes that the consultation must be carried out by the body responsible for protecting indigenous rights (FUNAI), and afterwards it should inform them of the outcome. It is highly unlikely that the Government bodies that make decisions about extractive activities such as mining will assume the obligation to conduct consultations themselves, let alone the obligation to incorporate consultation processes into the procedures of administrative decision-making.

The main obstacles to implementing the Juruna Protocol arise from the fact that the right to consultation is not institutionalized in the Government of Brazil. The courts must order the consultations on a case by case basis because the Government does not spontaneously conduct them. Even worse, no Government body understands that it must consult on its own decisions. At best the various Government bodies understand that only FUNAI is obliged to conduct a consultation, even though in practice it does not have the power to influence the final planning decisions of the Government, nor the power to oppose decisions of the federal, state or local governments.

The Juruna Protocol clearly states that FUNAI should just be a facilitator of consultation processes, helping with the logistics of the process and its organization, but not a negotiating partner, in the sense of being the entity or public body that makes the decision under consultation. Nevertheless, FUNAI is still the only public negotiating partner offered to indigenous peoples, although it hardly ever has the control or the authority to take the decisions that are under consultation.

Finally, we must recognize as an obstacle to the implementation of the Juruna Protocol, and all protocols in general, the fact that indigenous peoples lack resources of their own to independently develop the proposed consultation plans at the initial stage of each consultation. Relying on public resources, private company resources, or even allies such as NGOs, severely limits their control over the consultation process from the outset. It is difficult for them to retain leadership of the process without resources of their own. Mobilizing people and devoting time, without resources to pay those costs, remains an Achilles heel for the implementation of FPIC Protocols.

One of the main lessons learned for future protocols is the need to engage public bodies responsible for protecting indigenous rights, such as ombudsmen or public prosecutors, in the development of protocols from the beginning of the process. This is not only because the engagement of these bodies implies an official recognition of the process, but also because together with them it is possible to identify sources of public resources to support the mobilization of the population and the development of proposals for consultation plans.

In the case of Brazil, in the current political context, where civil society is questioned and persecuted, it is essential that the process of developing and implementing protocols be supported by bodies such as the Ministério Público Federal, the Defensoría del Pueblo (Ombudsman's Office) and FUNAI.

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Undoubtedly, the publication of the Juruna Protocol empowered this indigenous people in its relationship with the State and with private companies that have an interest in the natural resources in its territory. The Protocol helped establish clear and objective rules for all actors, it removed the ambiguity of the roles of the private companies and the Governments during dialogues with them, and most importantly, it strengthened the Juruna's internal unity to deal with threats to the integrity of its territory and its future as an indigenous people.

The implementation of the Protocol as a dialogue instrument did not start smoothly. Nevertheless, the Juruna achieved judicial recognition of the binding nature of their protocol, and thereby set an important precedent for all indigenous peoples, quilombolas (Afro-Brazilian) and traditional communities that have been publishing protocols and fighting for their rights in Brazil. Undoubtedly, the implementation of the Juruna Protocol will continue to be a ground-breaking and emblematic case in Brazil.

UNINVITED 'GUESTS': HARNESSING FREE, PRIOR AND INFORMED CONSENT IN COLOMBIA

By Viviane Weitzner

"It isn't consultation, it's not prior, it's not free—it's forced. We haven't experienced prior consultation. It's always after, and it's not free. The state is far more a friend with the company, than with communities."

Carlos Eduardo Gómez Restrepo
Former Chief Governor, Resguardo Indígena Cañamomo Lomaprieta

"Now we have to take a step forward from consultation to consent. That is, we have to move forward on the road to consent, because that is the new international standard that is already recognized. Here in Colombia they [the state & companies] are terrified to speak about consent… fear, it's fear."

Luis Arias
Chief Counsellor, National Indigenous Organization of Colombia (ONIC)

"We know now that with 'post-conflict' will come an avalanche of projects and we need to be prepared. For that we need to strengthen the internal regulations of our Community Councils and disseminate the contents of our community Protocol, as it will be a fundamental tool to defend our living space"

Armando Caracas
Afro-Descendant Leader, Palenke Alto Cauca-Proceso de Comunidades Negras

INTRODUCTION: AN UNINVITED 'GUEST'

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In March 2008, members of the 32 Embera Chamí communities who make up the *Resguardo Indígena Cañamomo Lomaprieta*, an Indigenous Reserve located high up in Colombia's coffee lands in the Department of Caldas, looked up into the sky, with fear: hovering over one of their revered sacred mountains—which houses their guardian spirits—the Embera Chamí saw a helicopter with a big ball dangling under it. The people panicked, and ran in fear; some hid, thinking they would be shot down at any moment. This was Colombia, during a time of internal armed conflict, and people thought the helicopter was a lethal war machine. This helicopter came back day after day for close to a month, flying low over the sacred mountain, generating *zozobra*, anxiety, among the people.

Only later, following its own investigations, did the Cabildo, the Traditional Authority of the Resguardo, discover that the helicopter was prospecting for gold from the skies. It was flown by Colombian Goldfields, a junior Canadian mining company commissioned by South Africa's Anglo-Gold Ashanti. This uninvited 'guest' arrived unannounced, the Colombian State having failed to ensure that the company first consult with and obtain the free, prior and informed consent (FPIC) of the Embera Chamí. The effect was to generate fear, distrust and anger among the people, while upsetting and unbalancing the sacred protector spirits living in the mountain.[130]

As the then Chief Governor of the Resguardo, Héctor Jaime Vinasco, explained:

> *"My reaction to the company was one of immediate opposition, of rejection, because they had violated the tranquility of the community, they had disrespected us in our own house, but also because we felt it was a direct challenge to us and a threat. The traditional authorities' attitude and response was to denounce the situation and file a complaint. But that wasn't the same attitude of many community members who wished they had an armed weapon to shoot… What we lived was chaotic."* [131]

Colombian Goldfields was only one of several companies with interests in the gold-rich territory of the Resguardo. Following the global financial downturn, gold prices skyrocketed in the late 2000s and even war-torn Colombia came on the radar of gold investors, with mining companies being wooed by the Government. The Resguardo is located on one of the richest gold belts in Colombia. Its operational ancestral gold mines pre-exist the formation of the Colombian State and triggered a rush of interest from national and multinational

companies and speculators. In 2011, the Resguardo authorities learned that almost every square inch of its territory, spanning some 4826 hectares, was being claimed by mining companies, with several mining concessions already issued, all without any prior consultation or consent processes. At the same time, hydro-electric companies with an interest in harnessing power from the Resguardo's rivers appeared. One even began construction of a small hydro-electricity plant, again without respecting the rights of the Embera Chamí and following due process around consultation and consent.

These mounting territorial pressures and human rights violations spurred the Resguardo authorities into action. Internally, to protect and organize its own ancestral mining practices and livelihoods, the Cabildo established the Association of Ancestral Miners, ASOMICARS. Exercising its 'special jurisdiction' and right to law-make in its ancestral territory (a right enshrined in article 246 of Colombia's Constitution), the Cabildo also issued a series of laws aimed at protecting ancestral mining, defending its territory from outside developments, and upholding the rights of its people. These include Resolution 031, setting out the rules and regulations around ancestral mining, including in relation to who can mine, acceptable mining techniques and technology and prohibited substances such as cyanide and mercury; Resolution 046, declaring the Resguardo a no-go zone for medium and large-scale mining; and Resolution 048, formalizing the Resguardo's Protocol for prior consultation and free, prior and informed consent with which all external actors must comply.

The Resguardo authorities sought the assistance of national and international allies in their struggle to defend their rights. To this end, they undertook a range of capacity-strengthening workshops around indigenous rights, with a focus on free, prior and informed consent, developing their own videos and training manuals. In 2009, they joined forces with the Black Communities of the Palenke Alto Cauca, to weave joint strategies around territorial defence and collective rights of ethnic peoples.[132] The Cabildo also initiated a series of legal actions culminating in the precedent-setting Constitutional Court decision T-530 of September 2016. Among other things, T-530/16 suspended the issuing of mining concessions over Resguardo territory and ordered its delimitation and demarcation and required that free prior and informed consent be obtained in accordance with Resguardo's own protocols.

This chapter outlines the content and scope of the Resguardo's Protocol on free, prior and informed consent, and offers a brief discussion on how it has been used to date. It then reflects on the context of lethal violence in which consultation and consent processes are initiated and conducted in Colombia. This reflection is informed by the experience, perspectives and consultation and FPIC Protocol of the Black Communities of the Palenke Alto Cauca, with whom the Resguardo has forged a close alliance. The chapter closes by teasing out challenges around attempting to uphold and implement FPIC in the context of Colombia's internal armed conflict and the implications of this for the realization of the rights of Indigenous and Tribal peoples. It draws on research and fieldwork from collaborative projects spanning from 2009 to the present.

CONTENT OF THE PROTOCOL: INNOVATIONS, SCOPE AND NATURE

The Resguardo's rules and regulations around FPIC harness this self-determination decision-making right and appropriate its procedural mechanisms as a means to counter state-defined *'consultas exprés'* (express consultations). Colombia has ratified ILO Convention 169,

the American Convention on Human Rights, the International Convention for the Elimination of all forms Racial Discrimination and it supports the UN Declaration on the Rights of Indigenous Peoples. However, successive governments have whittled down guarantees to participation, consultation and consent timeframes and processes to such a degree that the latest Ministry of Interior guidelines have earned the moniker of *'consultas exprés'* or even *'super exprés'*.[133] Compounding this, in September 2018, the conservative Duque government developed a proposal for a law that, if it passes in Congress, would further diminish hard-won rights.[134] Given this reality, a growing number of Indigenous leaders and organizations maintain that there should be no national regulations or law on consultation or consent. Instead they argue that the necessary legal framework already exists through international conventions that form part of Colombia's Constitutional framework. In keeping with international norms, they maintain that FPIC processes regarding specific projects should be driven and articulated by the potentially affected Indigenous Authorities in their own communities and territories, through their own norms and processes, such as those legislated by the Resguardo Indígena Cañamomo Lomaprieta.

Indeed, the Resguardo's Protocol is recognized as one of the first such formal protocols to be developed by an Indigenous Authority in Colombia. Approved by the Chief and Council on May 29, 2012, this Protocol is a "living document" enshrined in Resolution 048, which "establishes and regulates the Resguardo Indígena Cañamomo Lomaprieta's Protocols on free, prior and informed consultation and free, prior and informed consent (Riosucio and Supía Caldas)".[135] While providing a brief overview of the Protocol's contents, and in particular how it defines and addresses FPIC in the context of armed conflict, the chapter underscores that FPIC is part and parcel of a larger set of inextricably related considerations, including around territory, self-government, culture, identity and autonomy, on which the Protocol also elaborates.

The Resguardo's Protocol spans some 28 pages and comprises 8 chapters. It is drafted as a 'resolution' or law that begins with a series of considerations referring to and citing provisions from the national and international normative framework on consultation and FPIC, including jurisprudence from Colombia's Constitutional Court and the Inter-American Court on Human Rights. The final paragraph of its preamble affirms the concept of *gobierno propio* (self-government) that underpins the Protocol. Importantly, as with all the Resguardo 'resolutions', the opening paragraph of Resolution 048's preamble reaffirms the Cabildo.

> *"as the maximum authority of the Resguardo exercising the legal powers conferred by the Law of Origin, the Higher Law, Law 89 of 1890 and the 'constitutional block' that refers to the rights of indigenous peoples, both individual and collective, especially the rights to autonomy (articles 246 and 330 of the Constitution, ILO Convention 169, Law 89 of 1890, Decrees 2164 of 1995 and 1088 of 1993), relating to our own organizational and indigenous authorities systems, recognized as of public character by the Constitution."*

It goes on to list other rights related to culture, beliefs, customs, indigenous identity, territory, and to the collective property rights of *resguardos* and the relation of communities with their territories, stating that "this also implies, respect for our sacred sites, our full use and enjoyment of

our lands, **and the non-intervention of illegal armed groups** in these" (emphasis added).[136]

The resolution's substantive provisions are grouped into 8 chapters. Chapter 1 covers concepts, definitions and principles underpinning the process of consultation and FPIC, with articles on: territory; identity; autonomy; self-government (*gobierno propio*); self-determined development; sacred sites; heritage; free, prior informed consultation; and free, prior and informed consent, among others. Chapter 2 presents the 'reach' or scope of the Protocol, such as legislative and administrative acts, and development projects. Importantly, this chapter spells out very clearly that the Protocol applies to administrative acts, including the issuing of mining concessions, mining titles and development plans. Chapter 3 outlines procedures for undertaking consultation and FPIC. Chapter 4 addresses the various agencies and participants of the process. Chapter 5 specifies the conditions under which a process of consultation and consent will be deemed invalid. Chapters 6, 7 and 8 outline procedures for consultation and consent processes for legislative acts, administrative acts, and development and infrastructure projects, respectively.

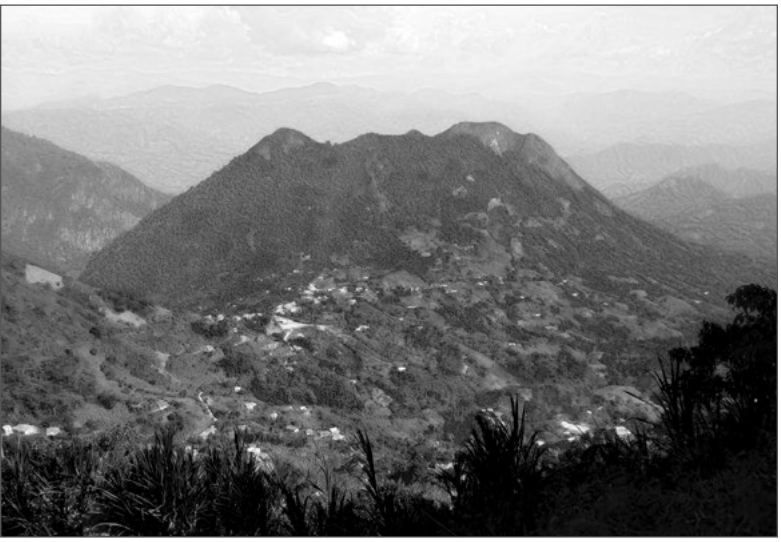
In these chapters the Protocol addresses in detail the various types of consultation and consent processes that might be undertaken, and how they should be conducted in accordance with the principle of self-government. It defines consent as:

> ***Article 10: Free Prior and Informed Consent.***
> *It is a right of ethnic peoples intimately linked to the fundamental right of free, prior and informed consultation. It is what materializes and gives useful and pragmatic life to this right; you cannot understand consultation without consent. It is also the process by which the indigenous community or people makes a positive or negative decision regarding what is being consulted in the corresponding phase. It must be free of pressure, before any actions by external stakeholders, and must involve widespread information for a good decision to be made*[137]

The Protocol then defines the principles of 'free', 'prior', 'informed', 'good faith', and 'appropriate proceedings'. The Protocol's articulation of the 'free' component of FPIC is of particular significance in the context of lethal violence and armed conflict:

> ***Article 11. The Principle of Free:***
> *When it is described as free, this means the process must be developed without pressure of any kind; without bribes or economic agreements with community members or community leaders, without blackmail or extortion, without political pressure or legal intimidation,* ***without threats from the State or from companies or from irregular groups****, without any coercion to the community and its leaders, without divisions within the communities generated by those interested in the project that is being consulted, without promises that motivate such division. Any violation of this principle will invalidate the process of consultation and prior, free and informed consent, and will be sufficient reason for the community and its authorities to cancel said process*[138]

An innovative aspect of the Protocol—in addition to its technical and detailed nature as a component of a broader Resguardo-developed legal framework—is that it explicitly specifies that if any of its principles *are not* upheld, then the whole process will be invalidated and subject to cancellation by the Resguardo authorities. Even more striking is that the Protocol dedicates an entire chapter to restrictive conditions that would invalidate a process of consultation and FPIC. Among some of the reasons listed are when the direct or indirect impacts of a project, *or even the very process of consultation*, "generate or result in risks for the survival of the indigenous people of the Resguardo and the integrity of the territory" (Article 30); or when "it is identified that the project harms or may violate some of the fundamental rights of the population of the Resguardo or that may violate and put at risk human rights **because it activates the actors of the armed conflict in the Resguardo's territory and areas surrounding it**" (Article 32) (emphasis added).[139] This then is how the Resguardo is attempting to control the potential infiltration into consultation processes of the illegal armed actors that fuel Colombia's armed conflict—by invoking its self-government power to call off and invalidate the consultation process, thereby immediately and explicitly denying consent for the proposed project, vitiating also any consent that may have been forthcoming under inappropriate conditions.



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THE FPIC PROTOCOL – ONLY ONE IN A MIX OF IMPORTANT TOOLS TOWARDS SELF-DETERMINATION

While the FPIC Protocol is a key piece of Resguardo legislation, it is only one important element in a mix of other critical tools that support the Resguardo's pursuit of self-determination. Firstly, it is one in a suite of laws that protects the Resguardo's territory from unwanted developments. As discussed above, it needs to be seen alongside these parallel laws, for example, the resolution that declares the whole territory a no-go zone for medium and large-scale mining.

The Protocol also needs to be considered in conjunction with plans, policies and measures adopted by the Resguardo authorities and communities in the pursuit of self-determined development. These include the Resguardo's *Plan de Vida*, its Life Plan, that the Cabildo has established to guide decision-making in accordance with the Resguardo's aspirations for its territory and people. Alongside this, the Cabildo has ongoing organizational strengthening and alliance-building efforts. These range from working towards more gender parity in terms of women's representation in governance; to training on territorial and human rights; to building and reinforcing networks with other peoples and ethnic groups in Colombia (for example the Black Communities of the Palenke Alto Cauca) and more recently, with Indigenous peoples internationally (for example, the Wampis and Shipibo peoples of Peru). The Cabildo has also developed relations with a range of national and international actors, from NGOs, to academia, to foreign embassies in Colombia and UN bodies. It can draw on these relationships and alliances when unwanted developments or uninvited guests threaten the Resguardo territory. Indeed, the Resguardo Cañamomo is

increasingly regarded as an example from which other peoples in Colombia can learn. Indigenous peoples have come to visit from as far away as Putumayo and Nariño to benefit from Cañamomo's experience, while neighbouring resguardos also regard Cañamomo as a go-to for support in issues around territorial defence.

Perhaps one of the most important anchors for the Cabildo's organizational efforts is the role which spirituality plays in guiding decision-making and ensuring community cohesion and strength. Spiritual ceremony underpins Cañamomo's governance, and traditional healers play a key role in preparing spaces necessary for good decision-making and community assemblies. The central role of the autonomous, unarmed Indigenous Guard (the Guardia) also needs to be highlighted as the key mechanism through which the Cabildo's legislation and decision-making is upheld in practice. The Guardia are on the frontlines in terms of patrolling the Resguardo territory and identifying any uninvited guests. In the current context of increased violence against social leaders in post-Peace Accord Colombia, the Cabildo is focussing on strengthening this institution, growing its numbers, and encouraging participation of women and youth.

The Cabildo regards legal action at the national and international level as critical in upholding its right to self-determination. It has won some precedent-setting decisions invoking the requirement to consult in order to obtain FPIC. For example, Decision T-698/11 of 2011 with regards to the construction of telecommunication towers that it opposed; and more recently, Decision T-530/16 of 2016, as touched on in the introduction. T-530/16 stopped short of meeting the Cabildo's demand to declare concessions issued without its free, prior and informed consent to be null and void. However, the Decision did suspend the issuance of mining concessions until the Resguardo's lands are delimited, demarcated and titled; with the Court ordering consultation for any exploration activities that take place following the delimitation process by those who have titles over Resguardo lands. The Court also recognized the authority of the Cabildo to legislate in its territory, including permitting ancestral mining (in coordination with the state), and recognized the Resguardo's FPIC Protocol as the mechanism to be used in consultation processes.

Finally, mobilizations and public protest are a powerful tool the Resguardo uses, sometimes in tandem with other strategies, or sometimes when all else fails. Taking to the streets is a key recourse used by Indigenous, Black, Campesino and other peoples across Colombia to pressure the Government to uphold their rights and to implement agreements. These then are some of the critical tools in the Cabildo's toolbox that need to be considered alongside its FPIC Protocol in terms of upholding self-determination and autonomy.

CHALLENGES AND OPPORTUNITIES – USING THE FPIC PROTOCOL

Despite its content being pathbreaking in many respects, in practice there are multiple challenges involved in implementing the Resguardo's FPIC Protocol. Compliance with the steps outlined in the Protocol for consultation processes aimed at obtaining their consent is of fundamental importance to protect the rights of the Resguardo communities. However, to date the value of the Resguardo's Protocol in and of itself has been **far more symbolic than operational**. In other words, it has served the purpose of demonstrating to outsiders that the communities are organized, are well aware of their international rights, and that they have their own self-government instruments. In many cases, this is all that is needed to make compa-

nies think twice about maintaining or developing concessions that overlap with or affect the Resguardo's ancestral territory.

In the words of the president of the Resguardo's ancestral mining association, ASOMICARS:

"Multinationals have come here to ask for that right that the state gave them, to undertake exploration and exploitation. And when we speak to them about consultation and FPIC, they don't go further; because they know that it's the stone in their shoe that presses most in attempting to dabble with Indigenous and Afro-Descendant peoples."

The Resguardo authorities also suspect that the perception that they are well organized and knowledgeable about international human rights law, and their invocation of their own FPIC law, may have led Canadian mining company Seafield to abandon its concession which overlapped Resguardo territory. Another ASOMICARS representative noted that the FPIC Protocol is a very important 'weapon' to stave off incursions by outsiders and to defend the Resguardo territory: *"It is always in our minds, because it is a weapon that we have."* Importantly, aspects of the Protocol should not be triggered at all in the case of medium or large-scale mining interests, as these activities are prohibited in the Resguardo resolution declaring the entire territory off-limits to this type of mining.

Perhaps one of the greatest challenges in upholding FPIC for the Resguardo is state representatives' lack of knowledge of the minimum standards for guaranteeing the respect of indigenous peoples' rights. Indeed, Resguardo authorities are constantly at loggerheads with state representatives who have a very narrow interpretation of prior consultation. These representatives often see *consulta previa* merely as a means of mitigating impacts from projects that will go ahead regardless of the impacts on indigenous peoples' rights and the peoples' position on those impacts, or their own developmental aspirations. These representatives consequently refrain from even referring to consent or only do so by equating it to a veto right without reference to its role in safeguarding other rights. As Carlos Eduardo Gómez Restrepo, one of the Resguardo's former Chief Governors stated:

"The state doesn't value us as communities. They underestimate us. They speak about the "ABC of consultation" [the Ministry of Interior's guidelines for consultation]. They come and they give us a little notebook and a pen, and they tell us that consultation is like this! They tell us—even the Director of Consulta Previa—that we don't have veto rights! They underestimate us; they think that we don't have the political possibilities to assert our rights."

Other state officials have no knowledge at all about rights to consultation, let alone consent, and have at best inadequate and very partial awareness of the contents of ILO Convention 169.

Nevertheless, state discourse around *consulta previa* has a powerful, 'boxing in' or colonizing effect on Indigenous leaders, and as a result it is a constant struggle to encourage leaders to embrace and use the minimum standard of

FPIC in their discourse. To counter this trend, the Resguardo leadership organizes periodic workshops on this international right as part of their ongoing organizational strengthening. A further challenge is that national allies are often also steeped in the language of consultation rather than consent, with an over-reliance on a narrow and antiquated interpretation of ILO Convention 169, rather than referring to or using international human rights instruments to supplement ILO 169, such as UNDRIP, CERD or jurisprudence at the Inter-American level.

In the context of Colombia's armed conflict, standing up for the right to self-determination and autonomy and insisting that FPIC be upheld is a risky proposition, often with lethal consequences. Indeed, all aspects of Indigenous governance in the Resguardo are severely constrained by the realities of armed conflict and violence. Meetings are cut short so people can get home before dark, as a measure to protect their lives. And out of fear that they may be killed, some have decided to leave or refrain from participating in indigenous organizations and meetings altogether. Indeed, selective assassinations and massacres have taken the lives of several Resguardo leaders. Even in the post Peace Accord era, death threats and killings continue at an alarming rate.

This violent reality has been recognized internationally and nationally. The Embera Chami are beneficiaries of on-going precautionary measures first issued in 2002 by the Inter-American Commission on Human Rights, and currently 5 leaders are also under the protection scheme of the National Protection Unit.[140] Indeed, the reality of armed conflict is perhaps the most challenging of all factors for upholding Indigenous peoples rights in the Resguardo, including their right to FPIC. This is particularly the case when criminal armed actors side with companies and the state to pave the way for developments that counter Indigenous aspirations. In the words of former Chief Governor Héctor Jaime Vinasco:

> *"An important number of our people consider that being with the Indigenous organization puts their lives at risk. And it also becomes a problem within families, because families enter into panic and, ultimately, they don't let you act in the same way… there is fear that at any moment they can come, kill you, disappear you… In large part the threats—at least mine—have been made by armed actors who share the ideology or the political thinking about the country's development with certain companies, with certain actors in the territory."*

There is a pervasive absence throughout Colombia of the necessary state apparatus to guarantee the respect for the collective rights of Indigenous and Afro-Descendant peoples. This absence is compounded by widespread corruption of state officials who facilitate the activities of criminal armed actors or other unwanted actors with interests in ancestral lands.[141] This, together with the structural discrimination these peoples face in terms of economic opportunities and livelihoods, challenges the feasibility of ever implementing consultations to obtain FPIC in a manner that is free from manipulation, undue pressure and violence.

The factors constraining respect for indigenous peoples' rights are not limited to Colombia alone. The resistance to FPIC by the states where companies are headquartered also poses a significant challenge for communities when they

seek corporate accountability and redress. In countries such as Canada, home to many of the extractive industry companies with interests in Colombia,[142] this issue has been at the forefront of parliamentary discussions and campaigns by civil society. Following decades of lobbying concrete results are extremely limited. Two recent developments, while still far short of civil society demands, may offer some improvements. In January 2018, the current Trudeau government announced the creation of an ombudsperson's office with powers to investigate complaints and make binding recommendations.[143] Another is the recently announced initiative that will see Canada's domestic law harmonized with the UNDRIP, something which may have implications for its laws and policies pertaining to companies operating overseas, if it gets implemented at all.[144] At the international level there has been recognition of the independent responsibility of corporations to respect human rights, including the requirement for FPIC, though without any immediate legal implications. The intergovernmental discussions and draft treaty on business and human rights may offer some hope in the longer term, if this adequately addresses indigenous peoples' rights. In the meantime, indigenous peoples' own affirmation of, and insistence on, respect for their laws pertaining to FPIC and territorial governance will continue to be of paramount importance.

Given this context, and looking towards the future, increased dissemination of the FPIC Protocol among Resguardo community members and sustained efforts to ensure their use of existing Resguardo tools and legal frameworks will be essential. The Resguardo Chief and Council are well aware of the contents and potential of their Protocol, having developed it together with the Resguardo's advisors and legal team over a two-year period. A broader appreciation across the entire Resguardo community of the potential of this FPIC Protocol could serve to strengthen their capacity to protect against unwanted encroachment into the Resguardo territory and contribute significantly to strengthening the Resguardo's organizations and self-government. Community workshops involving leaders, the Indigenous Guard and other community members addressing the contents of this instrument and how to make maximum usage of it in conjunction with other Resguardo regulation is essential in this regard. An insightful short video with a catchy song about consent has been developed by the Resguardo and could prove a useful means of increasing awareness of the Protocol in the 32 communities, sparking discussion on its use and implementation. In addition to these internal challenges, the Resguardo also faces new external threats.

As mentioned earlier, the Duque government is seeking to diminish and undermine the content of the right to consultation. Yet it is also significantly pushing back gains made through the 2016 Santos Government-Revolutionary Armed Forces of Colombia (FARC) Peace Accords, where FPIC was a critical demand that had been upheld in the agreement's inter-ethnic chapter. Indeed, the Duque Government has jeopardized the possibility of peace becoming a reality at all in Colombia. This is not only because of its failed negotiations with the National Liberation Army (ELN) - the second most influential armed actor involved in Colombia's internal conflict. It is also due to the government's failure to operationalize aspects of the 2016 Peace Accords, such as the transitional justice mechanisms, that would bring to justice actors who have committed crimes against humanity.

Faced with these enormous challenges, and the ongoing interest by outside actors in their gold riches, the Resguardo is developing strategies to confront these realities together with its allies, in particular the Black Communities of the Palenke Alto Cauca. As one component of this rights assertion strategy, the Resguardo will join other organizations to highlight their issues

through international actions, including by engaging with international human rights bodies, such as the Committee on the Elimination of Racial Discrimination. In so doing they will seek greater international recognition of their locally developed FPIC Protocol and other regulatory instruments fundamental to ensure the implementation of internationally recognized rights.

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OTHER EXPERIENCES IN COLOMBIA – BLACK COMMUNITIES OF NORTHERN CAUCA

While this chapter has examined in particular the Protocol of the Resguardo Cañamomo Lomaprieta, it is important to recognize and to highlight also the progress made by other organizations and communities.

For example, the Black Communities of northern Cauca have made a Herculean effort in defending their ancestral territories including through the development of their "Protocols for free prior and informed consultation and consent of the Black Communities of the Northern Cauca". This consultation and FPIC Protocol has been key in consultations and negotiations around the operational management plan of a large-scale hydroelectric dam. The consultation, which took place decades after the dam was constructed, was a 'post' consultation, not 'prior consultation'.[146] Despite the flaws in the process, the affected communities used the opportunity to develop their own FPIC tool, and to increase their organizational strength and rights awareness. This Protocol has since been adopted beyond the original municipalities and Black Community Councils where it was developed. It now extends to the 42 Community Councils that comprise northern Cauca, represented by the Palenke Alto Cauca-Proceso de Comunidades Negras, and the Association of Community Councils of Northern Cauca, ACONC.

This 'living document' consists of 24-pages with four main sections. The first section is a statement of the Protocol's objective. The second section outlines fundamental considerations (principles, reach and key criteria). The third section describes procedures for consultation and FPIC processes (addressing the initial approach; consent to begin the consultation process; participants in the consultation process; pre-consultation; internal consultation; identification of harmful impacts and rights affected; external consultation with third parties; information sharing about the project, analysis and definition of strategies to address the harmful impacts on rights). And the fourth section outlines the procedures for declaring consent to begin a project, works, activity or legislative or administrative measures (agreement-making phase; cross-cutting strategies; follow-upon implementation; advisors and process accompaniment).

Consent is a right of the Black People of Northern Cauca, and it is the purpose and end goal of consultation. The decision of the Community Councils is not exhausted in the consultation process—the Black People of Cauca will define its decisions autonomously and consent can be negative or positive with regards to the intervention of third parties in their territories that affect their social, cultural, economic and political life.

The cultural and environmental objection to projects, activities, administrative and legislative measures is a criterion to determine the consent, or not, of the intervention of third parties.[147]

The Protocol defines consent as:
Importantly, the Protocol enshrines the principle of consenting to be consulted:

- Consent to initiate the consultation process is the result of internal analysis after the approach and presentation by external actors proposing to affect the Black People of northern Cauca and its territory.

- Consenting to the consultation is defined based on the commitment by third parties to respect the principles and criteria of the Black People of northern Cauca established in this Protocol.

- If the presence of third parties or those proposing to influence the life and territory of the Black People of northern Cauca is viable, that is to say, they comply with the principles and criteria set forth in this Protocol, a document will be issued consenting to give a start to the process.

- Only with this consent will the process of consultation begin.

- If the presence of the actors promoting the project, work, activity or legislative or administrative measure is considered unfavourable or contrary to the rights of the Black People of northern Cauca, the executive of the Community Council and the authorities recognized by them will develop a resolution document in which the reasons are expressed for rejecting that the consultation take place, which will be presented to the Ministry of the Interior, the Directorate for Prior Consultation and the Directorate for Ethnic Issues for Black, Afro-Colombian, Palenquera and Raizal Communities.[148]

It is also explicit that the people can exercise the right to withhold consent, and that in such contexts they will issue their reasoning justifying their decision to do so:

Internally, the Black People of northern Cauca will issue a mandate that justifies and illustrates the decision of NO consent to the project, activity, legislative or administrative measure that was considered.[149]

The Protocol specifies how consent will be articulated and declared following consultation. This is primarily based on the peoples' autonomous consideration of the type of impacts on their rights that a project could generate. Should consent be given, a declaration is made to initiate the negotiation stage. Implementation of

agreements are to be monitored through 'mixed' commissions that enable technical, cultural and political analysis. The Protocol also highlights the role of external advisors and technical support throughout the FPIC process, and implementation of agreements. As well as documentation of the process, organizational strengthening of the involved Community Councils is a cross-cutting strategy throughout the FPIC process.

Aside from these process innovations—in particular the provisions clarifying the need for consent in order to initiate a consultation process, and the fact that interested third parties will receive a copy of the Protocol upon approaching the Black Communities—its section outlining fundamental considerations and guiding principles are the foundation upon which the Protocol rests and from which it derives its power. The fundamental considerations the Protocol clearly lays include: who the traditional authorities are; what the territory is comprised of; the forms of self-government; the principles governing justice; and the ethno-development/*Plan del Buen Vivir*. Having established the underpinning normative framework, including self-government and national and international frameworks and jurisprudence,[150] 1t outlines a series of guiding principles, beginning with the following considerations:

The life and dignity of the Afro People of North Cauca is not negotiable; *sacred places such as cemeteries, corridors of life such as water sources, hunting sites, old mothers, historical patrimonies, are not negotiable; The collective well-being and the common interest must always be above private and individual interests, and of the interventions that are made or intended to be made within the territory.*

These are powerful umbrella statements and guiding principles for a people living in an area that has been among the most affected by the violence of Colombia's armed conflict.

Community perspectives on the Protocol

In the Palenke, development of the FPIC Protocol commenced in 2009 in the context of an inter-ethnic project between the Resguardo and the Palenke. As a living document it has continued to be expanded based on learnings and experience and is now being applied in the case of the Salvajina dam. Internal narrative reports from the Palenke's inter-ethnic project coordinator reveal how important the process of developing the Protocol has been. Communities have used the discussion space to think and even dream their territories into the future, with their instrument for consultation and consent spurring an articulation of what the good life, *buen vivir*, should look like. It has also been used for capacity strengthening on ethnic rights. The project coordinator also explained that the Protocol has primarily been used by two communities but the Palenke's hope is that the Protocol will be adapted for all *consejos communitarios* (community councils) in the northern Cauca:

So far, what has been advanced in terms of the Protocols is part of an exercise carried out in the municipalities of Suárez and Buenos Aires. This is understandable because, due to its geostrategic location and the possession of water and gold resources, they have been targeted by extractive economic powers that through dispossession, selective assassinations, massacres and narco-paramilitary invasion have acted as a means to go about emptying

the territories systematically, for their ultimate possession. The hope [with the Protocols] is to spread the experience to all regions where there are ethnic communities, but the challenge is to be able to carry out their implementation in the concrete.[151]

The Protocol has now been taken up by community councils in the municipalities of Puerto Tejada, Padilla, Caloto, Santander de Quilichao, Guachené, Miranda, Villa Rica, who have *"adopted [the Protocol] as their own, declaring it a basic tool for addressing consultation processes"*.[152] An important outcome of discussions involving these communities was that this Protocol will not only be used for projects or activities related to mining, but also in addressing legislative or administrative projects affecting Afro-Descendant communities in northern Cauca. This Protocol is seen as the key mechanism for territorial defence, it is the means to exercise the rights *"to continue being and existing in the territories."* Consolidating, strengthening and applying it as a means to safeguard territory has taken on increased urgency *"in light of the multiple external threats, from national and multinational investments that intend to appropriate the natural resources of ancestral territories"*.[153]

Consultation and FPIC Protocols are seen as a means for facilitating discussion within the community, increasing awareness of rights, and providing a tool to enable the assertion of community-based decisions. This is how one young Black activist woman underscored the importance of the FPIC Protocol:

I really see these Protocols as something very positive, because they are tools that help us to engage the discussion. Because, as a community, many times, we are not aware of things that happen. Then, when we sit down, and the talks and workshops about these consultation Protocols are given to us, then we get an idea that we also have rights, and that is what many people do not know. So, that makes it easier for us to have the tools, both legal and spiritual tools, so that we ourselves can say 'this project does not enter our communities, this we will not let take place'.

The communities have also reflected on the challenges involved in developing their Protocol. One community member highlighted the danger of having small groups of more politically oriented leaders spurring the process, and the need to make process even more inclusive, particularly in Cauca:

I think we have been failing in this, that it is us women and male leaders that have been developing these Protocols but not fully linked to the community. ... And I believe that, the derecho propio [our own law] implies that, that among ourselves we have to establish rules that we all build; we do not have to write them because, we know, we cannot fail them, for ethics, for love, for everything we feel.

From the perspective of the Cauca leaders who believe in the potential of the Protocol, there are nevertheless challenges, both from an internal and external perspective, in terms of implementing it in practice.

According to the analysis conducted by the Palenke's inter-ethnic Project coordinator, progress has been made in Protocol development and outreach. Community members regard it as an important mechanism for safeguarding natural resources, territorial, cultural, economic and social rights in the context of external actors seeking to enter their territories. Challenges arise, however, in the context of projects that involve, or are championed by, community members themselves. In these cases, interested community representatives present the Protocol as an obstacle to activities. Other members of the Palenke regard this anti-Protocol posture to be the product of 'bad faith' strategies deployed by outside interests who use money to co-opt community members, who in turn resist internal regulations. In some cases, companies promote these strategies. In others, criminal groups are behind them, co-opting leaders *"not only so they defend the operation of illegal and criminal operations; but also, so they go against the implementation and exercise of consultation and consent."*.[154] The effect is to increase the risk of threats against those who promote implementation of community Protocol principles. Community organization and unity is also weakened, as this anti-Protocol sentiment generates mistrust and inhibits communication, in so doing it undermines self-government and causes serious damage to the communities' social fabric.

Even if the community FPIC Protocol, as evidenced by its implementation in the context of the Salvajina dam, together with Law 70 of 1993, which recognized the rights of Afro-Colombian communities, are considered *"the highest successes in terms of normativity and recognition by the Colombian State,"* there is an urgent need to continue awareness raising among community members:

> *"because, as has been repeated in many occasions, our weakness is that not all people in the communities know about Law 70, consultation, and consent even less; some don't even know that they live in a territory that has as its own administrative unit that is a considered as authority".*[155]

The Palenke's Project coordinator's internal report also highlighted the significance of the community consultation and FPIC Protocol as a tool to achieve *buen vivir*, community aspirations of living well:

> *Quite simply, the good or bad so-called development (extractive economic development) has not brought any benefit to everyday life, or any satisfaction to its landscape of misery. For this reason, the 'why' of the Protocol finds its answer in the desperate and almost agonizing call that the community makes to be able to guarantee the bare minimum for its existence. The 'for what?' is nothing more than to resist the prognosis of disappearance.* ***The Consultation and Consent Protocol is life, it is to enable life, and it is for life. It is, as one community member said "the magna carta of the community… it is the spirit of the community ['el sentido de comunidad']," built from the grassroots in meetings, conversation groups, gatherings and workshops.***[156]

In short, while initially promoted by a small group of community leaders, the workshops to develop the community FPIC Protocol initiated wide-ranging discussions that, in and of themselves, contributed to organizational strengthening, and capacity building particularly among youth. The hope is that these Protocols can play a pivotal role in preventing the territorial and cultural loss that is propelled by market forces, both legal and illegal, and the associated economic pressure experienced by communities. Preventing this is perhaps a tall order; but clearly in the eyes of the communities these Protocols offer a possibility that fuels hope.

Following the negotiation of the Peace Accords between the Santos government and the FARC, community leaders are looking to the community Protocol with even more urgency. In the words of Armando Caracas Carabalí, coordinator of the Black Communities' autonomous land stewards, known as the *Guardia Cimarrona*: *"We know now that with 'post-conflict' will come an avalanche of projects and it is necessary that we be prepared. For that we need to strengthen the internal regulations of our consejos and disseminate the contents of our community Protocol, as it will be a fundamental tool to defend our living space".*[157] A core component of the Peace Accords negotiated between the Santos Government and the FARC-EP was the inter-ethnic chapter. It renders all activities implemented through the Peace Accord subject to free, prior and informed consent. However, in the current political context of the Duque government, the implementation of these agreements—not to mention the negotiation of further agreements with other groups implicated in Colombia's internal armed conflict, namely the ELN—very much hangs in the balance.

CLOSING REFLECTIONS AND KEY QUESTIONS

There is no doubt that the lethal context of violence in Colombia—and the types of illicit activities that affect self-determination and autonomy, alongside the threats from more apparently mainstream projects that may also be entangled with illicit economies and forces—push considerations around upholding free, prior and informed consent into an extremely complex landscape and lens of analysis. If it is already a challenge to uphold FPIC in areas where criminal armed actors do not pervade everyday life, this challenge becomes enormously magnified when the economy is controlled by illicit actors and their activities, particularly in resource-rich areas. The key question in this context is whether the possibility of "free" prior and informed consent can take place at all. In the words of Black activist Marlin Mancilla: ***"How are we going to undertake consultation in the middle of armed conflict,*** *when for consultation you require transparency… that it be free?* ***When consultation takes place in the middle of an armed conflict, it will not be 'free'"*** (emphasis added).

In this context Indigenous and Black peoples' governance is not only severely undermined, leaders are actively being persecuted and killed for standing up for their rights. This reality is becoming even sharper following the Santos Government-FARC Peace Accords signed in November 2016, with reports indicating that in the first few months of 2019, a leader was killed every three days.[158] Security concerns have intensified in the Resguardo, where threats are escalating against leaders, especially those involved in regulating the Resguardo's gold. In the Palenke Alto Cauca, there has been an invasion of criminal armed actors. They are not only interested in the Palenke's ancestral gold, but also in growing illicit crops, such as marijuana and coca; the gold and drug economies

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are closely entangled as a means to launder the proceeds of narcotrafficking and channel it back into the formal economy. In this context, the very hope of free, prior and informed consent –that it can enable life to continue for Indigenous and Black ancestral peoples and ensure the integrity of their territories– becomes a double-edged sword, as those fighting to uphold this right are selectively deprived of their lives, through a systematic attempt to outlaw and eradicate Indigenous or Black law and practices. This situation is compounded by the perspective of foreign interests that Colombia is now 'post conflict', with new plans for investments in mining, oil and gas, tourism and agribusiness creating ever more territorial pressures. In the final analysis however, the knowledge that FPIC is a minimum standard under international law generates hope for these communities, motivating them to continue to defend their lands and ways of life, following the footsteps of their ancestors and enabling possibilities for their future generations. In this context, multi-pronged approaches to upholding rights are needed, well beyond national law, whether enshrined in their own Protocols, or through international rights instruments.

THE WAMPIS NATION'S FPIC PROTOCOL – A STATUTE BASED TOOL TO DEFEND AN INTEGRAL TERRITORY

By Tami Okamoto and Cathal Doyle

'Territory is not only a vision, concept or idea, but a system of life'

Shapiom Noningo, Wampis Representative

'The lawyers… interpret according to their interests, so we also have to be good interpreters of Convention 169. Picking up the spirit of it all. That is our experience.'

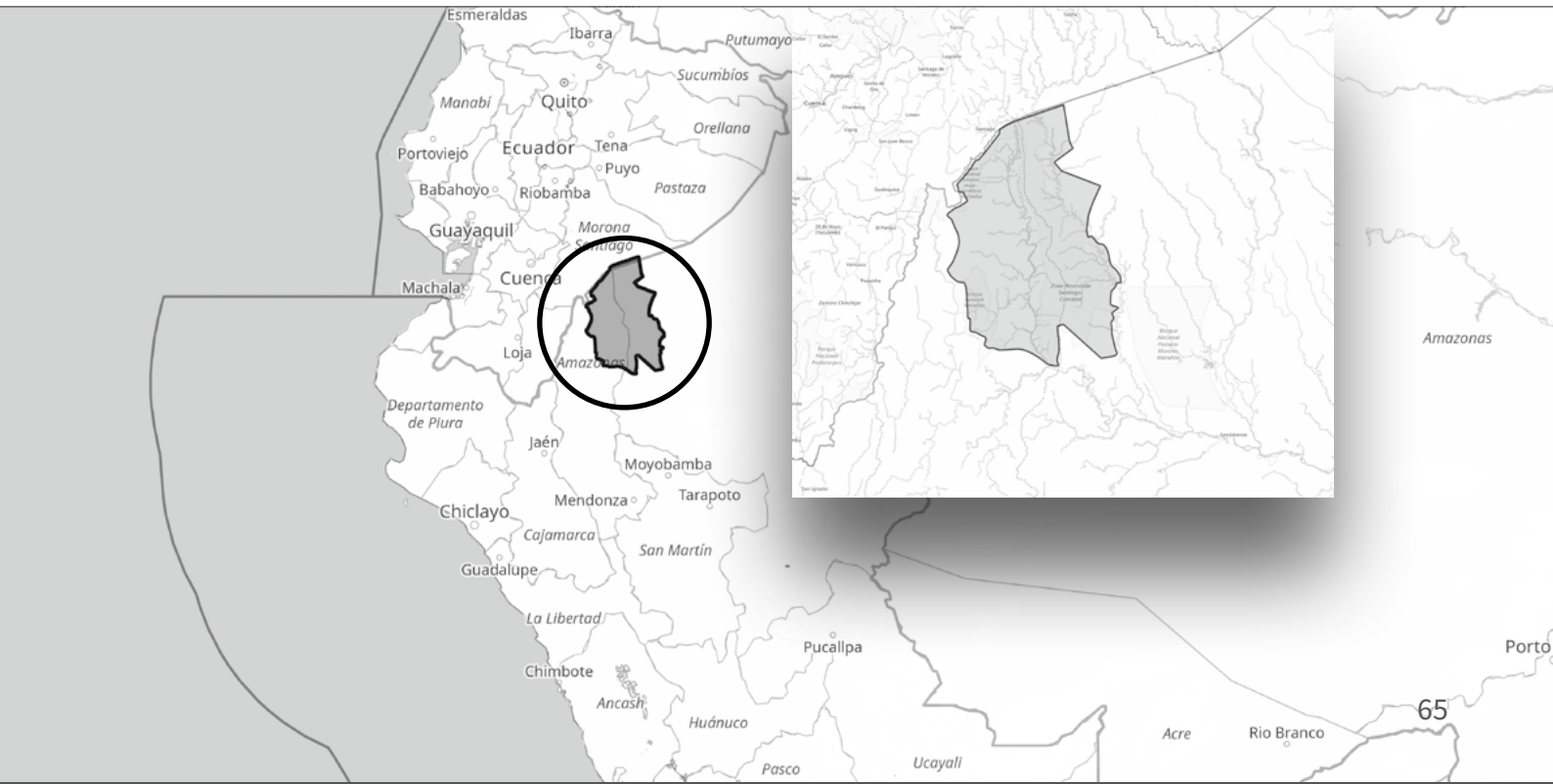
Shapiom Noningo, Wampis Representative

'The lawyers… interpret according to their interests, so we also have to be good interpreters of Convention 169. Picking up the spirit of it all. That is our experience.'

Wrays Perez Ramirez, Wampis Representative [159]

The consultation processes provided for by International Treaties are the consequence of the right to self-determination and the expression of mutual respect between the Peruvian State and the indigenous peoples and nations of Peru.

Wampis Statute Article 33



INTRODUCTION

The Wampis territory is in the northern Peruvian Amazon, in the district of Rio Santiago, province of Condorcanqui, department of Amazonas and in the district of Morona, province of Datem del Marañón, department of Loreto. As with many other indigenous peoples in the Amazon, the Wampis have been faced with waves of State and private actors attempting to exploit natural resources located in their territories.

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Logging, mining, oil, hydroelectric and infrastructure projects are among the challenges they have faced or are currently facing. A half-a-century old oil pipeline traverses the southern border of their territory and regularly causes oil spills. Illegal mining and logging have caused serious damage to their ecosystem and have impacted negatively on the social fabric of their communities. There is a constant threat of road construction and a plan exists, that is strongly opposed by the Wampis, to build a major hydroelectric project on the borders of their integral territory

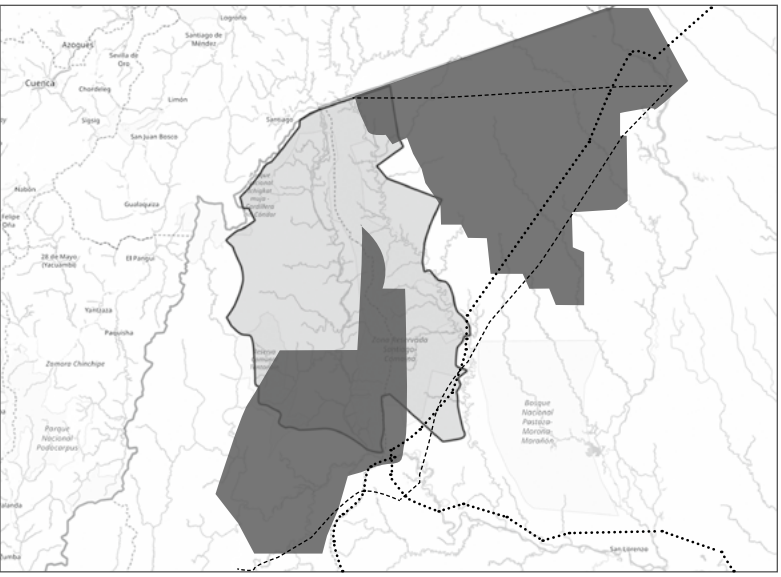
Compounding these threats to their way of life, an oil concession was granted in their territory in 2006 without any consultation. The Wampis efforts to ensure due process protection of their rights through a good faith consultation process were frustrated by the Ministry of Energy and Mines and the Ministry of Culture. Both held that the right to consultation could not be exercised, despite ILO Convention 169 having been in force in Peru since 1995, as the 2011 Peruvian law on prior consultation came into force after the concession had been issued.

Faced with these challenges the Wampis adopted a two-tier approach. On the one hand, they decided to assert their right to autonomy and self-government. After years of preparation, on 29 November 2015, they issued their Statute and declared the Wampis Nation's Autonomous Territorial Government (GTAN-Wampis) - the first indigenous government to be established in Peru. The Wampis Statute, the equivalent of a nation-state's Constitution, is a 38-page document consisting of 94 provisions. It was approved by the Wampis nation on 29 November 2015. According to the Wampis, their Government, and the Statute which underpins it, 'was born as a genuine collective and historic expression of the Wampis people, in the exercise of their right to autonomy, with the aim of achieving *Tarimat Pujut (Buen Vivir/the good life)*'.[160]

In parallel to their assertion of self-governance in 2014, the Wampis Government, together with their Awajun neighbours, took a legal challenge to the issuance of the concession for oil block 116 in their territory. On 28 March 2017, the Court of First Instance found in their favour. The Court ordered the Government to consult with and obtain the free prior and informed consent (FPIC) of the Wampis and Awajun before any concessions were issued or activities commenced in their territory.

The ruling, which invoked previous decisions of the Constitutional Court and of the Inter-American Court of Human Rights (IACtHR), was significant for three reasons. Firstly, it held that the right to consultation existed since the entry into force of ILO Convention 169 and was independent of the enactment of the Peruvian law on prior consultation in 2011. The Court therefore ordered the suspension of all exploitation and exploration licences in the area, as well as all oil and gas activities in the block. Secondly, it not only affirmed the right

to consultation but, drawing on the *Saramaka v Suriname* decision of the IACtHR, it affirmed that the FPIC of the Wampis was required for any new contract. This affirmation of the requirement for FPIC is reinforced by the Wampis assertion of their autonomous territorial government and their Statute. Thirdly, it addressed the sequencing and the on-going nature of consultations and FPIC, clarifying that consultation and FPIC were required for both the contract and at the environmental impact assessment stage.



Map of the Integral Territory of the Wampis nation (gray overlay), two oil block concessions (darkgray overlay), and cross-cut on its southern border by a pipeline (dotted line) and a potential road (dashed line). Taken from Okamoto and GTANW (2019).

The decision was challenged by the Ministry of Energy and Mines, PeruPetro (the State company responsible for promoting and negotiating contracts for oil exploration and exploitation) and the oil companies involved in Block 116. In August 2018, the Second Civil Court upheld the decision. The Wampis see this outcome as evidence that some judges have grasped the intent of ILO Convention 169 and are aligned with IHRL standards, despite the profound crisis in which the Peruvian justice system currently finds itself.

The Government is now expected to apply its Consultation law in relation to Block 116. Based on flaws in the law's regulation and negative experiences of other indigenous peoples with Government run consultation processes, the Wampis believe that such a consultation would not guarantee respect for their rights or enable them to give or withhold their FPIC. They consider the Court ruling as highlighting the legislative and regulatory changes that the Government needs to make to remedy deficiencies in this Consultation law and its implementation.

They have therefore decided to take proactive measures to protect their self-government and territorial right to give or withhold FPIC in accordance with their Statute. Internally, they have discussed various strategies, including organizing their own self-consultation in advance of any consultation process initiated by the State. Having considered these various strategies, including rejecting the notion of consultations entirely, the Wampis Government and nation decided to develop their own consultation and FPIC Protocol, which they envisage as complementing their existing constitutional Statute and serving to reinforce their governance structure and their territorial integrity.

Before discussing what the Wampis plan to address in their Protocol, it is important to briefly contextualize its development in light of the deficiencies in the regulation and implementation of the Peruvian law on consultation. Another important contextual factor is the Wampis understanding of territory and governance. For the Wampis these concepts are intrinsically interrelated and indivisible, and together they underpin their autonomous initiative. An overview of the Wampis vision of territorial integrity and their governing structure is therefore provided. This is followed by an analysis of the role which their Statute plays as a framework for the development of an FPIC Protocol and an outline of their initial approach to the development of a Wampis consultation and FPIC Protocol.

THE PERUVIAN CONSULTATION LAW AND ITS IMPLEMENTATION

> *'The purpose of consultation is to reach an agreement or consent'*
>
> **(Peruvian Law of Consultation, art. 3)**

> *'In the event that an agreement is not reached, it is up to the state entities to adopt all the necessary measures to guarantee the collective rights of indigenous or native peoples and the rights to life, integrity, and full development'*
>
> **(Peruvian Law of Consultation, art. 15)**

Since its enactment in 2011 the Peruvian Government has presented its law on prior consultation to the international community as a model for how consultation should be conducted. The law was aimed at giving effect to Peru's obligations under ILO Convention 169 and was drafted in a context of widespread social conflicts around extractive industry projects. The trigger for its enactment was a violent confrontation between indigenous community members and police near the Amazonian city of Bagua in 2009. This conflict, known as the *'Baguazo'*, resulted in 33 deaths and left over 200 injured. The tragic event arose in the context of protests related to the absence of consultation on decrees regulating extractive industry activities in the Amazon, and the unwillingness of the Peruvian State to address the concerns of indigenous peoples whose territorial rights were impacted. Shortly prior to the Bagua events, the then Peruvian President, Alan García, published defamatory statements in national media equating indigenous peoples (among them, people resisting oil exploitation) to dogs in a manger.

Following the *Baguazo*, a national coordination group on the development of Amazonian indigenous peoples was created. The group established several roundtables, one of which was mandated - with the participation of indigenous peoples - to develop a draft consultation law. The draft law was approved by Congress on 19 May 2010. However, at the end of the process on the insistence of the Executive, a provision was introduced in Article 15, without consulting indigenous peoples, stating that the Government will make the final decision if consent is withheld. The law entered into force on 7 September 2011.

In 2011, a further consultative process was established to develop the law's implementing regulations. Most of the indigenous groups participating in the process withdrew when the government refused to incorporate their proposals on obtaining consent in accordance with international human rights law standards. The ensuing implementing rules, issued in 2012, further restrict consultation timeframes and processes. These deficiencies have been compounded by poor implementation practices across a range of sectors, in particular in the oil, gas and mining sectors, that are inconsistent with the principles governing consultation processes.[161]

The flaws in these consultation processes arise for a range of issues.[161] One of the primary factors is that they do not occur within an adequate framework of recognition of rights by the State. Another related factor is the State's failure to systematically tackle historical and contemporary structural discrimination against indigenous peoples. The legacy of historical slavery and denial of citizenship to indigenous peoples looms large. While the extreme abuses (such as mutilations, inhuman workload, physical and

sexual violence) are no longer prevalent, the discriminatory societal attitudes underpinning them remain. This is reflected in the absence of adequate education and health services and infrastructure, the exclusion of indigenous peoples from decision-making processes that have profound impacts on their way of life, and the on-going impacts of land dispossession, all of which existing law, policy and government practice fail to adequately address.[163]

The traumatic experiences of Amazonian indigenous peoples as a result of colonial practices continued to manifest themselves during the 19th and 20th Century and live on in the memory of these peoples. They are compounded by the on-going environmental harms and human rights violations arising from State or third-party imposed activities in their territories. The relevance of these historical experiences and contemporary realities are ignored by the bureaucratic machinery of the State when consulting with those peoples regarding projects with potentially profound impacts on their territories and ways of life. In addition, this bureaucratic State machinery is also blind to the complex relationships that exist between Amazonian peoples and its consultation processes fail to cater to the diverse political, historical and cultural realities of each distinct group. The State does not ask them how they wish to be consulted and ensure they have the necessary time and space to decide this among themselves, free from external pressure. Instead, it imposes a uniform process in which all the peoples are grouped together as if they were one homogeneous group. Rather than provide avenues for resolving existing or potential tensions and reaching consensus between peoples and communities, the processes serve to foment and deepen differences, often leading to (at times violent) divisions and a lack of harmony in their daily coexistence.

Another manifestation of this bureaucratic approach in Peruvian consultation processes is the absence of genuine intercultural dialogue. This is, in part, due to the lack of understanding of indigenous peoples' rights, cultures and realities in the government agencies responsible for facilitating consultation processes. Essentially, these institutions as they are currently composed are incapable of genuine intercultural dialogue. Many staff lack exposure to and training on indigenous peoples' rights, cultures and protocols. This leads to inappropriate approaches to engaging with indigenous peoples as well as a perceived lack of respect for their processes, authorities and worldviews.

The State institutions of which these staff form a part, in particular those promoting extractive industry projects, are in many instances the very entities that are implicated in past - generally unremedied - violations of indigenous peoples' rights. These institutions are largely oblivious to their discriminatory legacy and its continued manifestation in their approach to engagements with indigenous peoples. From their point of view, the fact that the State defines the rules of engagement and maintains the ultimate decision-making power on matters of profound, and even existential importance to those with whom it is engaging, is not an issue. At an institutional level this attitude is reflected in the subjugation of the Ministry of Culture, the governmental entity in charge of protecting indigenous rights, to the political whim and power of the Government ministries that promote natural resource exploitation projects in indigenous territories.
The prior consultation law and its implementing rules - which include an eight-step consultation process - purport to provide for meaningful good faith consultations that are free, prior and informed as well as being aimed at obtaining consent and reaching agreements. However, they fail on all these criteria when critiqued from the perspective on international human rights law standards.

There is no consistency across sectors (e.g. oil and gas, mining, energy, agribusiness, tourism)

as to when consultations are to be conducted, and in no case are they actually conducted prior to the key decision-making stages where impacts on indigenous peoples' rights can be prevented or mitigated. For this to happen, consultations would be necessary before the negotiation of contractual clauses or the issuance of concessions and prior to the conduct of participatory, environmental, social and human rights impact assessments.

At present, consultations in the mining sector only happen after impact assessments are conducted, while in the oil and gas sector they happen at the contracting stage, but are focused purely on the decree approving the contract and not on the contractual clauses themselves. Viewed from a rights-protection perspective, these processes are therefore largely rubber-stamping exercises. Their sequencing divorces consultation from key decision-making milestones, so that it can be considered neither meaningful nor prior. The failure to consult before decisions impacting on rights are made is incompatible with the notion of seeking FPIC under international law.

Similarly, State run consultation processes are grossly deficient from the perspective of providing comprehensive information to the concerned indigenous peoples on the potential impacts and benefits of proposed projects that would enable them to make fully informed decisions. Information is partial and piecemeal, provided too late for meaningful consideration by the communities and their authorities, and is biased toward reaching the outcome desired by the Government agencies promoting the project. The very fact that State actors involved in the consultation process have an inadequate, and often discriminatory, understanding of indigenous peoples' rights renders them incapable of informing those peoples of their rights. Rather than assist in balancing power asymmetries arising from imbalances in access to information, consultation processes exacerbate them.

Another significant deficiency in the State's consultation processes is the lack of weight accorded to indigenous knowledge. Instead of envisaging consultations as a two-way intercultural dialogue, in which the State learns from indigenous peoples as much as indigenous peoples learn from the State, consultation processes are construed as a one-way flow of - unfortunately all too often limited, distorted and biased - information from the State to indigenous peoples. A clear example of where this issue arises is in the context of determining impact areas. In many cases, impacts on indigenous peoples territorial, self-governance and cultural rights can only be determined by, or at the very least in close cooperation with, the concerned peoples. However, faced with a one-way flow of information they are effectively excluded from meaningful participation in the assessment of the nature and extent of impacts.

Viewed from the perspective of a process that should place indigenous peoples in a position where they can make decisions that are "free" from coercion or undue influence, the State's eight step process again fails rather dismally. Indigenous peoples are denied the time and space that they need to freely consider and deliberate over the various implications that a project may potentially have on their rights, way of life and future. Timeframes tend to be imposed upon them, as are locations in which they will be consulted. These fail to adequately address the realities of the peoples in question, limiting the possibility for community members and leaders to participate fully and freely in consultation processes. They also impose restrictions on decision-making that are not in accordance with the people's own practices and customs.

Finally, the law and its implementing regulations are clearly at odds with the notion of respect for indigenous peoples autonomous decision-making rights and the principle of obtaining consent for potentially significant

impacts on their rights. The fact that the law stipulates that the Government will take the final decision imposes significant constraints on indigenous peoples' right to self-governance and self-determination. This declaration from the outset, that one party's deliberations and decisions can be unilaterally dismissed by the others, is irreconcilable with the concept of good faith consultations, negotiations and consent. In such a context, "agreements", if they are reached, are imposed rather than entered into freely on the basis of consent. This approach leads to consultation processes that are divisive and insincere, geared towards realizing a pre-determined outcome, and that seek to minimize benefits and rights-protecting measures.

The disassociation of consent from peoples' self-governance, territorial and cultural rights facilitates the inappropriate equation of FPIC to a 'veto power'. It forecloses any analysis of why consent is required and what the profound and disproportionate implications of ignoring it are for the peoples concerned. This disingenuous approach further entrenches power asymmetries and dissociates consultation and consent seeking processes from the collective rights framework that they exist to safeguard.

In order to tackle this power asymmetry and ground consultation and FPIC in the indigenous rights framework, indigenous peoples are asserting their own conceptions of territory and their own governance structures and demanding that the State and other actors recognize and respect them. These demands are grounded in IHRL and are increasingly supported by judicial rulings.

The Wampis nation is an emblematic example of this assertion of autonomy. An overview of their conception of territory and their governing structure offers some context as to how their Statute and Protocol will regulate consultation and FPIC in a culturally appropriate manner.

THE WAMPIS VISION OF TERRITORIAL INTEGRITY

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Constituency of the Wampis Nation's Autonomous Territorial Government (GTANW) on November 2015 in the Soledad community. Picture credits: GTANW and Elena Campos Cea

Territory is considered by the Wampis, and by many other Amazonian indigenous peoples, not simply as place, or as an abstract notion related to jurisdiction, but as the organizing basis of indigenous life. As the Wampis representative Shapiom Noningo (2017) explains 'territory is not only a vision, concept or idea, but a system of life' (cf. also Wrays Pérez, 2018). Wampis territory, or *Iña Wampísti Nunke*, is defined in their governmental statutes as 'integral and unified,' comprising of 'the total habitat [their] people have occupied and utilised ancestrally… and that [they] continue to use' (Wampis Statute, art. 23). Wampis territory is intertwined with their identity, language, culture, and their own forms of governing their affairs (Wampis 2015, art. 2). As the Wampis say, 'our people and those who comprise it are part of this territory and its components' (Wampis Statute, art. 21). This 'concept of life rooted in territory' is echoed in the deeds of their ancestors and in the knowl-

edge, wisdom and philosophies they have inherited from them (Wampis Statute, art. 46k).[164]

The Wampis have asserted that this integral and unified vision of territory is the only conception of territory capable of guaranteeing their nation's *buen vivir* (Wampis Statute, art. 23). *Buen vivir*, often translated as good living or living well, is an indigenous concept that embodies the well-being, way and quality of life of a people and is premised on their having control over their own future. According to the Wampis *buen vivir* comprises of 'dignified subsistence, autonomous, self-determined and culturally appropriate development, food sovereignty and security of their families'. This, they hold, is necessary to allow them 'to develop the social, economic, political and cultural relations that guarantee the protection and adequate management of nature and the environment' (Wampis Statute, art. 23).

In essence, the Wampis Government exercises a form of 'territorial governance' where territory and governance co-exist, rendering the Wampis way of life and existence possible.[165] Territorial governance, as defined and currently implemented by the Wampis, is not temporal in nature. It is not merely the aspiration of a few indigenous leaders or even 'the awakening of the current indigenous generation.' Instead, for the Wampis, it is part of much larger socio-historical processes. It embodies their endurance and their struggles to defend their territory. They trace these continuous struggles for survival from the time of the Inca Empire, through the colonial and republican periods, and up to the present day.

The Wampis also recognise that their contemporary governance structure emerged in response to a series of transformations in the international legal, economic, cultural and political order. Fundamental, to the Wampis vision of an integral territory, and their strategy to realize it, is that they are not seeking state recognition or authorization in order to exercise territorial autonomy and self-governance. Instead, they hold these to be inherent rights which they exercise *de facto* as indigenous peoples.[166] This de-facto exercise of self-governance is realized through their constitutionally (Wampis Statute) defined governance structure.

THE WAMPIS GOVERNING STRUCTURE

Basic governance structure and authorities of the Wampis Nation Autonomous Territorial Government (GTANW, 2019).

The Wampis governance structure is hierarchical in nature. The *Uun Iruntramu* is the supreme decision-making body of the Wampis Government. It consists of an assembly that is composed of various Wampis members, called Irunin. In addition to the *Uun Iruntramu*, there are three other levels in the hierarchy. The first is the Central Government. This is responsible for the management and administration of the Wampis Government and is led by an elected Pamuk (president), a vice president, and several Atuuke (directors).

The second element in the governance structure consists of governments of each of the two river basins. They are composed of a *Matsatkamu Iruntramu* (a river basin assembly) and *Irutkamu Iruntramu* (communal assemblies). The *Matsatkamu Iruntramu* has an elected *Waisram* (chief) and *Waisrama Ayatke* (vice-chief). The *Irutkamu Iruntramu* have management boards composed of an *Imaru*, vice-*Imaru*, secretary, treasurer and spokesperson.

Under their traditional governance system, the warriors and visionaries took the lead in decision-making. However, for practical reasons, the Wampis have formalized this democratic voting system to address contemporary decisions. According to their current Statute regulations, a quorum for an *Uun Iruntramu* requires the presence of more than half of its members and decisions are taken by majority vote (Wampis Statute Art 51).

The *Uun Iruntramu* holds ordinary sessions three times a year and when necessary extraordinary assemblies, all of which are announced by the *Pamuk*. If the Pamuk refuses to call a session, or the members of the Central Government are completely absent, the *Uun Iruntramu* can self-convene for assembly sessions. The Statute regulates membership, leadership, and election processes. The *Irunin* are elected in Wampis communal assemblies and currently number 102 representatives. To be eligible for election they must speak Wampis language and have been born in Wampis territory and live there. Their immediate re-election after a period of office in the *Uun Iruntramu* is not permitted, although re-election for a subsequent period is permitted. The *Pamuk* is elected by popular vote, as opposed to in communal assemblies. The office is held for five years and the position must alternate between the two river basins, with the vice-president of the GTAN-Wampis always coming from the other river basin to that of the *Pamuk*.

WAMPIS STATUTE: A FRAMEWORK FOR DEVELOPMENT OF AN FPIC PROTOCOL

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The Wampis governance system is central to the exercise of their collective rights, including their right to give or withhold their FPIC. Article 12 of their Statute outlines their collective self-determination, autonomy, self-governance, territorial and cultural rights as a people and a nation. It includes their right to consultation and FPIC for all state initiatives that could directly affect those collective rights.

As mentioned above, the Wampis have decided to prioritise the elaboration of an FPIC Protocol during 2019. They envisage it as a mechanism through which they, as a nation, will regulate how they will exercise this right in accordance with the principles elaborated in their Statute. This section of the case study provides an overview of the relevant Statute provisions, grouped under seven topics.

FPIC as an exercise of Wampis' own form of decision-making

> *Prior consultation must comply with the provisions established in ILO Convention 169 …, in the [UNDRIP], in the jurisprudence of the Constitutional Court of Peru and in the jurisprudence of the [IACtHR], as well as in the national regulations that develop the adequate implementation of these principles and procedures. … consultations must be carried out in accordance with the forms determined by the consulted peoples and nations.*
>
> **Wampis Statute, art. 33**

> *No one may take advantage of communal autonomy to justify decisions which should be taken by the Wampis Nation as a whole, in accordance with ILO Convention 169, and in conformity with our own traditional and autonomous ways of resolving and making decisions, as defined in this Statute.*
>
> **Wampis Statute, art. 34.1**

The Wampis' FPIC Protocol will serve two primary purposes. Firstly, it aims to increase awareness and understanding of external actors - in particular the Peruvian State - of the Wampis decision-making process. Secondly, it will be a means to insist on respect for their process whenever an initiative that may affect their territory arises. Territorial control is collective right of the Wampis nation as a whole. They are opposed to consultation processes that could fragment their nation into atomized communities in the context of decisions on matters that impact on their integral territory. To avoid this, their Statute establishes that the Wampis Government exercises authority *vis-à-vis* the Peruvian State and represents the Wampis at the international level. Decision-making authority in relation to Wampis territorial sovereignty and integrity is therefore vested in their government and is not devolved to individual communities. By extension, the Wampis Government, as opposed to other indigenous organisations and/or individual communities, is the entity that must be consulted in relation to all matters that affect the integrity of Wampis territory. It is also the entity that will provide or withhold FPIC on behalf of the Wampis nation following a decision-making process that they will develop and control themselves.

The involvement of the *Uun Iruntramu* (Central Government) is therefore critical to the overarching methodology and principles that the Wampis have established for FPIC processes. According to the Wampis Statute, the *Uun Iruntramu* is responsible to 'authorise, approve, or disapprove covenants and contracts that they consider could potentially affect the collective rights of the Wampis nation' (Wampis Statute, art. 50.2h). In extraordinary assemblies, the *Matsatkamu Iruntramu* (river basin government) is also responsible to 'participate in prior and informed consultations on administrative and legislative measures or any plan, programme or project that could impact on or affect the collective rights of the Wampis nation in the river basin' (Wampis Statute, art 62.2c). The Pamuk also plays a key role in FPIC processes as he/she has the mandate to represent the Wampis nation, and 'promote and coordinate mechanisms to ensure harmonious and democratic relationships' with national, regional, and municipal governments (Wampis Statute, art. 55.1g).

Private negotiations are forbidden during consultation processes and decisions are 'always [to] be taken within the territory, in public and in a manner agreed upon by the Territorial Government authorities together with the pertinent authorities of the State.' Any decisions that are 'made outside the channels established' by the Statute are deemed void (Wampis Statute, art. 34.4).

The basis of FPIC in integral territory and its role in protecting it

> *'The territory of the Wampis Nation is one. The official processes of prior consultation for initiatives related to the extractive hydrocarbons industries, energy or other large-scale projects directly affect the entire territory of the Wampis Nation and are a matter that must always be addressed by the Wampis Nation as a collective, this being the entity that determines the effects of an initiative and which bodies must participate in the process'*
>
> **Wampis Statute, art. 34.1**

Among the minimum criteria in the Wampis Statute governing consultations is the respect for the Wampis conception of their 'territory as one'. The Statute elaborates on the Wampis' particular relationship with territory and its centrality to their form of governance and overall well-being as a nation. This indivisibility of territory is of fundamental importance when contrasted with State or corporate identification of "affected areas" or "impact areas". The latter fail to account for the full extent of impacts of projects when understood through the Wampis' conception of one integral territory.

The interconnectedness of environmental impacts is reflected in the fact that contamination frequently extends well beyond the borders of an oil block drawn on a map. The experience of Amazonian indigenous communities has been that animals, upon which they rely for their subsistence, are contaminated in one area and then roam throughout their territory (unrestricted by project boundaries) while downstream waterways that are the source of fish (and central to the protein intake of the indigenous peoples), as well as drinking and bathing water are also contaminated far from the project site. [167]

The Wampis territory is also 'one' in terms of its social construction. For example, immigration of, primarily male, non-Wampis into any part of their territories has a potentially profound impact on the communities' social fabric and values. Similarly, if decisions were taken by individual communities the unity of the people is fractured and a context that is generative of division is created. From a cultural and spiritual perspective, the territory is also one, as damage to culturally significant areas in any part of the territory cause harm to the entire people. For these and other reasons, the need for FPIC at the level of the people or nation is implicit in the idea of one integral territory and is essential for its maintenance and protection into the future.

Determining procedure-oriented criteria for consultation processes

The Wampis Statute establishes a series of procedural criteria with which any consultation processes involving their people must comply. They include the need for adequate time and space to cater to their realities and processes. These processes are consistent with the organisational and practical considerations of many Amazonian indigenous peoples around meetings and decision-making. These peoples tend to take decisions only when they are physically together and after collectively and exhaustively

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deliberating on issues. Everyone who wants to do so is provided with an opportunity to express their views in order to reach a consensus wherever possible. Furthermore, like the Wampis territory which spans almost 1.4 million hectares (equivalent in size to Wales), many Amazonian indigenous territories are extensive. This means that significant preparation is needed for gatherings, as the logistics and resources to convene (sometimes week-long) meetings have their own unique complexities. A sufficiently long timeframe is crucial in these contexts, as community members may need to mobilise for days to get to the community where the meeting is held, especially when this involves extensive travel by river. It also has implications in terms of the time necessary to notify all community members and for the plan for such trips.

The Statute stipulates that information is to be provided sufficiently prior to any decision and must be 'suited to the gravity of the decision'. This is deemed necessary so that the Wampis 'can receive adequate professional advice and a realistic assessment of possible impacts, disadvantages and advantages of each alternative' (Wampis Statute, art. 34.2). Documents are to be translated into the Wampis language and consultation processes are to include translators that are recognized by the Wampis people (Wampis Statute, art. 3).[168]

The Statute defines 'good faith' in practical terms, stating that it implies the absence of 'usual practices of pressure, organisational division, corrupting leaders, local consultations or confrontations'. Instead, it requires information that 'is sincere and responsible, so that the appropriate decisions can be made according to our interests as a people' (Wampis Statute, art. 34.3). Processes that are improvised, lack transparency, or are executed under pressure, are deemed to be at odds with the Wampis cosmovision, their liberty and their self-determination (Wampis Statute, art. 34.2). Moreover, the Wampis hold the State responsible for any harms caused to people or damages to the environment arising from 'misleading, partial, or inadequate information' (Wampis Statute, art. 34.3).

The Statute's affirmation of the requirement for FPIC for protected areas

The Statute clarifies that FPIC is required for the declaration of protected areas within Wampis territory (including National Parks, National Reserves, Historic Sanctuaries, Conservation Areas, Communal Reserves, among others). This it affirms is consistent with international treaties and jurisprudence and Peruvian legislation. Existing protected areas 'maintain their status as traditional territory', and the Wampis assert their pre-existing rights over these areas. The Statute affirms that these areas are the property of the Wampis nation (in accordance with their right to ancestral and traditional occupation and use) and highlights that these areas have been conserved precisely because of their occupation by the Wampis since time immemorial (Wampis Statute, art. 38).

In the case of protected areas that were already created without their FPIC – such as Ichigkat Muja National Park, Tuntanain Communal Reserve, and Santiago-Comaina Reserve Zona - the Statute states that the Wampis do not renounce their traditional territorial rights and the Wampis Government maintains the right to evaluate different avenues available to them, including taking joint conservation actions together with the Peruvian State. If the legal status of protected areas serves to weaken effective conservation, introduces threats to the preservation of resources, or affects their traditional use by Wampis families, the nation 'will reserve itself the right to manage their restitution' in accordance with Article 28(1) of the UNDRIP (Wampis Statute, art. 38).

The Statute's position on acts that violate the right to consultation

The Wampis Statute lists three scenarios that are considered to violate the right to consultation: the entry of companies or steps to facilitate their entry before the completion of formal consultation processes by the State; 'clandestine or individual or separate deals' with extractive companies or collaborators; or attempts to conduct prior or parallel consultation processes to the State initiated consultations.

Article 35 of the Statute unambiguously states that 'no legal or illegal extractive company, whether mining, oil, gas, or other is allowed to enter the communities of the Wampis nation's integral territory without a prior and informed formal consultation process carried out by the State, as provided for in ILO Convention 169 and the present Statute' (Wampis Statute, art. 35). Any agreement or consent provided to companies through a separate process prior to the completion of the official consultation process between the State and their people is deemed 'invalid and illicit'.

This is reinforced by Article 36(3) which holds that such extractive companies or entrepreneurs will be declared *persona non grata*, banned from working in the territory and may be subject to criminal complaints. Article 36(1) of the Statute invokes article 18 of ILO Convention 169 which prohibits unauthorized intrusion into their territories. It states that the belongings of any company that enters their territory, before a State initiated prior consultation is conducted, will be 'pre-emptively immobilized to prevent their continued illegal circulation through the communities and they will be commanded to leave immediately'. It also states that such companies will be subject to sanctions and fines in accordance with Article 149 of the State Constitution.

Article 36(2) makes 'clandestine or individual or separate deals' with companies or entrepreneurs, and 'collaborating in campaigns to facilitate their entry prior to formal consultation process with the State', a crime against the Wampis people. The matter is even more serious if the deal is made by a leader who is a member of their governing bodies.

Article 37 of the Statute forewarns the Peruvian State of the Wampis intension to defend their rights in international venues if ever the State decides to undertake projects with potentially significant impacts in their territory without consultation and without having obtained their FPIC. Under the Statute, the Wampis Government is tasked to seek reparations and restitution for any harm caused in accordance with international treaties protecting their people's rights.

Rules governing sacred areas

The Wampis Statute addresses the fundamental importance of sacred areas and their centrality to Wampis self-governance and their existence as a people. Among the areas listed are the Kampankias, Tuntanain and Winchikim Nain mountains, the latter also known as Ichigkat Muja in the Awajun language. Other sacred areas are included in the Wampis ethno-cultural

map and are also subject to the same protection (Wampis Statute, art. 39). These sacred areas are treated as the 'cultural and spiritual patrimony' of the Wampis nation. The Statute affirms that 'for no reason will [the Wampis nation] relinquish its control and administration' over these areas or allow any non-consented impacts or interference (Wampis Statute, art. 39).

Regulating engagement with companies following a consultation process

In cases where a legitimate prior consultation process leads to FPIC being granted to proceed with negotiations on a development project or activity impacting on their territory, the Wampis Government will then enact regulations that determine the scope and limits of those negotiations to be held between themselves, the Peruvian State and any third parties that are involved. It is only following this stage that companies can dialogue with the Wampis. The Wampis regulation will also address the monitoring, compensation and benefit-sharing mechanisms that need to be established to facilitate and oversee these negotiations and their outcomes (Wampis Statute, art. 37).

These provisions of the Wampis Statute provide the contextual framework for the articulation of their FPIC Protocol. This was reinforced by the affirmation in 2017 by the Peruvian Courts of the requirement to obtain their FPIC to measures with potentially significant impacts, in accordance with the jurisprudence of the IACtHR. This ruling is regarded by the Wampis as being of fundamental importance to ensuring their territorial integrity and exercise their right to self-governance as established in their Statute. Their development of the FPIC Protocol is part of a process of reflection on the implications of this decision for future engagement with the State.

POTENTIAL CONTRIBUTION OF AN AUTONOMOUS FPIC PROTOCOL IN THE WAMPIS CONTEXT

The Wampis decision to develop an FPIC Protocol

The Wampis regard the Peruvian State's attempts to circumvent the requirement to consult in good faith in order to obtain FPIC as a breach of its obligation to respect, protect and fulfil their rights. They insist that respect for Wampis territorial and governance rights implies that measures they deem to have significant impacts on those rights cannot proceed without their FPIC. In such cases, the State must respect the outcome of good faith consultations, as to do otherwise would be inconsistent with its obligation to guarantee their fundamental rights.

Because the State refuses to acknowledge this, and because it has thus far failed to implement good faith consultations based on genuine inter-cultural dialogue with Amazonian peoples, the Wampis have rejected the application of the 2011 consultation law and its implementing regulation in their territories. They see existing State-defined consultation timeframes and processes as overly restrictive, homogenous and culturally inappropriate, constituting an infringement of their rights, rather than a mechanism to guarantee their realization.

Faced with this reality, initial discussions among the Wampis leaders considered outright rejection of any State initiated consultation process. Following the landmark Court decision in 2017 (upheld in 2018), and aware that they will inevitably face a State-initiated consultation processes in the future, the Wampis decided that developing their own FPIC Protocol could constitute a more effective route

through which to guarantee the protection of their rights in accordance with their Statute.

Content of the Wampis FPIC Protocol

This FPIC Protocol will be grounded on provisions of the Wampis Statute outlined above, the Court decision affirming their right to give or withhold FPIC to any project with potentially significant impacts, and international law jurisprudence and standards. The Wampis regard the protocol development and implementation as an exercise of self-governance. It will embody their own form of thinking, be premised on their unique conception of the integral territory, and regulate if, how, when, and where consultations are to be held. It will also address the triggers for the requirement to obtain their FPIC and how, when and on what basis the Wampis will decide to grant or withhold their consent.

Several elements of such a protocol, and the principles it will embody, already exist in the Wampis Statute. The development of the FPIC Protocol would provide a means to systematize these elements into an operational framework which forms the basis for engagement with the State in relation to proposed activities in or near their territories. It would serve to formalize and elaborate on the principles and procedures with which the Wampis require the State to comply in any consultation process that it seeks to initiate with them.

The development of the protocol would also afford the Wampis an opportunity to engage their neighbours, the Awajun people, in jointly discussing how to make decisions in relation to projects or measures that affect both their peoples and territories. A formalized protocol would also help to ensure that the decision-making processes and powers of municipal governments, as well as regional and national government bodies, are exercised consistently with the core right of the Wampis Government to govern their integral territory.

The planned FPIC Protocol is one of several tools which the Wampis are developing in their efforts to strengthen their self-governance. Among the other tools are strategic policies addressing self-determined development, territorial defence, and forest management, plans in relation to territorial zoning and regulation of water and other natural resources, and instruments to address health, violence against women, culture, traditional knowledge, economic opportunities and justice.

The protocol will be developed based on the practical experience of the Wampis with externally imposed development activities in their territories, as well as their historical experience of engagement with the State and other actors, and the lessons which they have learned from the experience of other indigenous peoples with consultation and consent seeking processes. Based on this experience the Wampis have provisionally identified three principles that will be embedded in the protocol.

The first principle relates to legitimization of the consultation process. The purpose of consultations with the objective of obtaining FPIC is to protect indigenous peoples' rights. A basic prerequisite for a good faith consultation process is therefore that those rights are formally recognized in law in advance of the process commencing. This requirement relates to: a) territorial rights, including the right to have their integral territory recognized, rather than mere portions of that territory titled to individual communities; b) self-governance rights, including recognizing the Wampis Government and related governance structures as the legitimate interlocutors for the Wampis nation in the context of consultation processes; and c) cultural rights, including in relation to language, protection of sacred areas, forms of dialogue and knowledge, and internal modalities of engagement between communities and peoples.

According to the Wampis, these rights, which are recognized in international law standards and jurisprudence, must now be formally recognized in national law. Rather than remaining at the level of political discourse, this rights recognition must be reflected in law and practice. This is a precondition for the Wampis to be able to engage in good faith consultations in relation to measures that impact on their rights and future. The FPIC Protocol will address this foundational issue of adequate rights recognition and respect as the basic pre-requisite for any efforts to obtain their consent to measures impacting on their rights.

The second principle underpinning the Wampis FPIC Protocol is good faith negotiation to reach mutually beneficial outcomes. The Wampis believe that there are certain activities in relation to which agreement can be reached with the State. Through the conduct of good faith consultation processes in order to obtain their FPIC, any impacts these activities may potentially have would be assessed in conjunction with the Wampis. Consent would be forthcoming provided those impacts were deemed acceptable by the Wampis and proportionate to the benefits envisaged. Such projects could, for example, potentially be in areas such as tourism or sustainable management of forest resources. They would be designed in conjunction with the Wampis in a manner that is consistent with their identity, their territorial vision and their future development plans and aspirations as a people. The implementation of these activities would involve the Wampis acting in partnership with the State and other actors, resulting in benefits for all parties involved.

The third principle relates to the Wampis conception of consent and when it is required. The protocol will establish what consent means for the Wampis. This will go beyond narrow conceptions of consent as framed by the State, which divorce it from the self-government, territorial and cultural rights that underpin it. It is envisaged that the protocol will address both the procedural and substantive dimensions of consent. The procedural dimensions would establish what is necessary for a culturally appropriate process through which rights-based informed consent can be sought and through which it would be freely granted or withheld by the Wampis. The substantive dimension would include an articulation of the foundational rights and principles which underpin the right of the Wampis to say "yes" or "no", or "a conditional yes", to activities that are proposed by the State and which have a direct impact on their territory and rights.

For the Wampis certain activities pose a threat to their existence as people. These potential impacts would alter their way of life to an extent that the Wampis are not prepared to accept. They are completely incompatible with their current way of life and with their self-determined plans for how they wish to live and exist as a people in the future. In such cases, the Wampis would withhold their consent and provide the rights-based reasons upon which they have taken the decision to do so. The Wampis have yet to determine how their FPIC Protocol will regulate decision-making in relation to such scenarios. This will be decided as part of the internal consultation process that will be conducted to develop the protocol.

There are several possible approaches to addressing contexts in which FPIC is deemed by the Wampis to be a mandatory requirement under their Statute, international and national law. The Wampis could decide, for example, that a full-scale consultation process is unnecessary or inappropriate in certain contexts. In this scenario, the FPIC Protocol could affirm that they will take a decision internally before a full-scale consultation process is initiated. That decision, along with the reasons underpinning it, could then be formally communicated to the State. Another approach would be for the protocol to specify that there are certain activities for

which the Wampis have pre-determined that they will always withhold consent, irrespective of any State initiated consultation process. Such scenarios could, for example, be in relation to hydroelectric projects that lead to the flooding of Wampis territory. The FPIC Protocol could lay out the rationale behind this collective decision taken by the Wampis people. The impacts, such as displacement and the profound threats to their way of life and their means of subsistence, could be stipulated by the Wampis as grounds for withholding their consent prior to any such proposals in their territories.

The Wampis have already issued strong pronouncements against a proposed hydroelectric project that would lead to flooding of their territory, arguing that the Government must guarantee their rights and protect their lives and livelihoods and therefore cannot proceed with the project. Similarly, they have seen that other Amazonian communities, such as those affected by Block 192, have not benefited from 50 years of oil exploitation in their territories. Instead, they have been left with serious environmental harms, which the State is unable to remediate, their communities have been divided, armed forces have been deployed in their territories, legal cases have been taken against their leaders, and community members have suffered extreme material and psychological hardship in their struggles to have their rights respected. Indeed, it was these realities and their own experiences led the Wampis to take the legal action in order to prevent the operation of the oil concession in Block 116 which the State had imposed in their territory without consultation or consent.

CONCLUSION

For the Wampis, the development of an FPIC Protocol is part of their pursuit of self-determined development. For genuine FPIC to be given there must be development options from which the Wampis people can choose. To this end, the Wampis nation will seek to develop their own proposals for alternative development options to State proposed extractive industry or large-scale energy projects. This objective is part of a broader dialogue and strategy among Amazonian indigenous peoples to assert their autonomy and strengthen their capacity to be able to propose alternative development models to the State.

The Peruvian Government has an obligation to cooperate with the Wampis and other indigenous peoples in the development of these alternatives. Under Article 2 of ILO Convention 169 it is obliged to develop "with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity", including though:

> **(b)** promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions;
>
> **(c)** assisting the members of the peoples concerned to eliminate socio-economic gaps that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.

By insisting on these three principles within an overarching framework of indigenous autonomy, territorial integrity and self-determined development, the Wampis envisage their FPIC Protocol as a means to exert greater pressure on the Peruvian State to guarantee genuine consul-

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tation and consent seeking processes in accordance with customary law and the self-governance rights of indigenous peoples and thereby enable their self-determined development.

Underpinning the Wampis decision to develop their FPIC Protocol is a focus on the need to ensure that their people are united, that they are continuously enhancing their capacity for self-governance and that there is an increased awareness among community members of their inherent rights. If the Wampis are guaranteed the time, space and resources they require to develop their FPIC Protocol, the internal consultative process involved in doing so would contribute to all there of these objectives. As an instrument of self-governance regulating engagement with third parties, the Wampis Protocol may also eventually offer a useful model for other Peruvian indigenous peoples who are taking steps to assert their right to autonomy, their conceptions of territory and their own autonomous territorial governments.

CONCLUSION - REFLECTION ON CONTRIBUTIONS OF FPIC PROTOCOLS TO RIGHTS REALIZATION

By Cathal Doyle

"If we don't reach an agreement on how to consult, we won't reach an agreement on the proposed project"

Aurelio Chino Dahua, president of the Native Quechan Federation of Pastaza (Fediquep), Peru [169]

"What we want is that they leave us our own models of development and our autonomy to protect and realize them"

Luz Gladis Vila Pihue, President of the Founding Congress of the National Organization of Andean and Amazonian Indigenous Women of Peru (ONAMIAP)[170]

"If a decision on anything that affects or concerns us as peoples has not gone through a form of decision-making we call our own, we cannot say we are indigenous peoples anymore. If we are not able to hold on to our traditions, we then cannot consider ourselves as indigenous peoples"

Virginia Maligaya, Mangyan Alangan Elder (Mindoro, Philippines)

INTRODUCTION

Initial experiences with autonomous free prior and informed consent (FPIC) Protocols demonstrate their potential to contribute to tackling critical shortcomings in existing law, as well as State and corporate practice, around consultation and consent. They have acted as tools for resistance, challenging the absence of, or flaws in, consultation processes and establishing standards and procedures with which future consultation processes must comply. Their legitimacy in this regard has been recognized by national courts as well as local, national and international oversight and administrative bodies.

The autonomous development of these protocols has opened spaces for reflection and dialogue among and between indigenous peoples. These spaces are generally free from the external and internal pressures that inevitably accompany consultation processes. This has allowed indigenous peoples to address how they wish to take decisions when confronted with powerful external actors seeking to operate in their territories, and has contributed to addressing the significant power imbalance that can occur between indigenous peoples and external actors proposing projects of economic interest to the State. It has provided them the time and freedom necessary to articulate what consultation and FPIC mean in their own terms.

The importance which indigenous peoples attribute to protocols is central to assessing their contribution to rights realization. As outlined in the Colombia case study, members of

the Afro-Colombian Communities of northern Cauca regard their protocol as "the key mechanism for territorial defence", and as the means to exercise the right "to continue being and existing in the territories". The very process of discussing the protocol and its development led to community members becoming aware of their rights, enabling them to build the "legal and spiritual tools" to defend their territories.

Several indigenous peoples also point to the significance of simply being able to say "we have these rules" to external actors, be they States, illegal actors, armed groups or corporations. Their experiences suggest that this has altered the power dynamic between them and external actors, leading in some cases to a change in the latter's behaviour and plans. This final chapter will explore the contribution FPIC protocols have made to rights realization, the challenges to their implementation and the potential opportunities they afford to all actors. It will conclude with recommendations to States, corporations and international organizations.

EXISTING AND POTENTIAL CONTRIBUTIONS OF FPIC PROTOCOLS

The role of protocols in building unity and strengthening self-governance

A common reflection among indigenous peoples who have developed FPIC protocols is that the experience has strengthened their self-governance institutions and helped build unity within and across their communities and peoples. Protocol development has also facilitated the resolution of pre-existing tensions between peoples or with other tribal or local communities - tensions that have often arisen due to the absence of good faith consultations on the part of the State in the past. For many indigenous peoples, the process of protocol development has also served to facilitate dialogue between elders and youth, helping to revitalize memory and recover and transmit ancestral knowledge, and has ensured that all members of communities - regardless of their age or gender - are involved in community decision-making processes.

Protocol development has also played an important role in capacity building and empowerment of communities. As mechanisms to strengthen self-government they have helped to build cross community consensus on methodology and processes for internal dialogue and decision-making, as well as external consultation and engagement. External actors – NGOs, indigenous organizations and networks, state actors and international organizations – of the communities' own choosing have supported protocol development. More importantly there has also been significant cross-learning between indigenous and tribal peoples who have developed similar protocols.

FPIC protocol development has provided indigenous peoples with an opportunity to reflect on traditional approaches and rules governing internal decision-making and engagement with external actors, as well as rules regulating decision-making at the people or pan-people level. It has afforded them with an opportunity to strengthen, enhance, formalize or alter these approaches to cater to contemporary challenges and threats.

This has proven necessary as consultation processes have invariably been accompanied by pressure from the State and corporations on communities to deliver the outcome these external actors desire. Conflict and division have ensued, often as a result of incentives offered to, or intimidation of, those wielding decision-making power within communities. The formalization of decision-making rules and structures when engaging with State government institutions, including local govern-

ment, or other external actors has enabled some indigenous peoples to ensure greater internal accountability and reduce the potential for external actors to manipulate individual leaders. Some indigenous peoples have also sought to address pressures that arise in the context of armed actors, be they State, corporate, paramilitary or rebel groups.

The existence of these protocols as formal public instruments regulating State and corporate action has helped limit the potential for this type of undue influence. This has applied even in the context of repressive regimes or violent conflicts, as seen in Brazil and Colombia.

The operation of these instruments has complemented other self-government and territorial defence strategies. This includes the assertion of autonomous governments and integral territories, as in the case of the Wampis; the establishment of environmental monitors or indigenous guards, as in the case of the Embera Chamí; engagement with international and regional mechanisms, as in the case of the Juruna; and alliance building and the enforcement of Court decisions requiring consultations to obtain FPIC, as described in all three case studies. Beyond these local contexts, FPIC protocols are generating significant interest among other indigenous peoples globally and are facilitating cross-learning, solidarity, and strengthening indigenous peoples' collective voice and demands at national, regional and international levels.

The role of protocols in addressing structural discrimination

Discrimination against indigenous peoples is structural in nature in all States in which they reside. They are systematically denied access to spaces where regulation is developed and policy agendas determined. This results in not only the exclusion of indigenous peoples' voice and the denial of their participatory rights, it also means that government institutions remain ignorant of indigenous peoples' realities and rights and are totally unequipped to engage in intercultural dialogue with them based on respect and equality.

It is, nevertheless, important to note that some government bodies, such as the Ministério Público Federal (MPF) in Brazil, and certain individual government officials in all the case study countries, have actively supported indigenous peoples in the realization of their rights, including through the promotion of FPIC and the development of FPIC protocols. These bodies and individuals are to be commended for this important work and should be taken as role models for improved institutional relationships with indigenous peoples.

Contextualizing the implementation of international standards

As with the indigenous rights framework, of which it forms a part, the contemporary norm of consultation and FPIC was affirmed in international instruments based on the demands made by indigenous representatives. The struggle of indigenous peoples now is to ensure its meaningful implementation on the ground. Norm interpretation is always a dynamic process realized at the point of implementation. To be meaningful it must be flexible to cater to the diverse realities of distinct peoples, and it should always seek to guarantee the collective and individual rights of the most vulnerable.

FPIC protocols act as mechanisms for this translation of international norms into practice. They achieve this through concrete rules and procedures that guide implementation while infusing internationally recognized rights with culturally appropriate content. Their development affords indigenous peoples with an opportunity to learn about, and reflect on, their rights under IHRL and corresponding State duties. In so doing, they can determine how national laws should be reconciled with their customary laws and their own interpretations of their rights.

This issue of interpretation in FPIC protocols extends to the entire spectrum of rights - from the right to life, including its subsistence, existence and way of life dimensions, to the right to a healthy environment, with its spiritual and cultural dimensions, to the right to territory, with context specific conceptions of territory as integral and whole and *sui generis* models of territorial government, autonomy and development. In some contexts, indigenous peoples have also used FPIC protocol development as a space in which to articulate and assert their historically ignored customary-law-based claims to rights over subsoil resources.

In this regard, FPIC protocols tackle the predominant tendency of States to monopolize the interpretation and implementation of IHRL instruments and jurisprudence pertaining to indigenous peoples' rights, especially ILO Convention 169 and the UNDRIP. Autonomous protocol development is helping to transform these instruments from State-centric ones, to instruments of autonomy and self-determination in accordance with their original object and purpose. They are repositioning indigenous peoples as empowered actors directing their own participation in decision-making processes, rather than passive subjects the extent and nature of whose participation is determined by States.

Protocols as a means to move beyond the veto/no veto argument

The rule of law implies that people and peoples have fundamental rights that must be respected and that public authorities have no coercive power beyond what the laws give them. To be legitimate, State actions impacting on indigenous territories must be within the confines of the law. This implies that they must be permissible under national, international and indigenous customary law. Rather than recognize the role of FPIC in guaranteeing this, there is a tendency among States, corporations and even among some allies of indigenous peoples, to equate FPIC to a veto power and thereby challenge the duty to obtain indigenous peoples' consent for activities that may have significant impacts on their rights. At times this position is grounded in an outdated interpretation of ILO Convention 169, that fails to consider indigenous peoples' right to self-determination under contemporary IHRL standards and jurisprudence.

Self-determination and FPIC imply a system of legal plurality. As legal instruments grounded in distinct bodies of law – international, national and indigenous law - FPIC protocols serve to constrain State actions in indigenous territories. By articulating the rights-basis for indigenous peoples' decision-making authority and the requirement to obtain their FPIC, they challenge approaches to indigenous rights that seek to reduce FPIC to merely a veto power.

Rather than seeking a veto power for indigenous peoples, what FPIC protocols are doing is exposing and challenging the de-facto existing "veto power" of States and corporations over indigenous peoples' self-determined decisions. These include their decisions on social, cultural and economic development and on the use of natural resources to guarantee their subsistence and survival as peoples. Protocols frequently ground FPIC decisions on the severity of the potential impacts as perceived and articulated by the concerned peoples themselves. They shift the focus of discussions away from an abstract "veto power", to how indigenous peoples' rights should be protected in practice. As such, they are a pragmatic and constructive response to the seemingly perpetual and often disingenuous questioning of whether, why and under what conditions a requirement for FPIC exists.

Protocols and the role of Courts

The right to consultation and consent, while it is generally inadequately implemented, nevertheless remains a core instrument in indigenous peoples' struggle for respect for their self-gov-

ernance and territorial rights. Access to remedy, where adequate consultations are not held, is central to this. The rule of law requires that independent judges protect rights and enforce limits on state power. Throughout the world, but especially in Latin America, the right to petition national and regional courts to challenge flawed or inadequate consultation processes remains fundamental to indigenous peoples' struggles. While many judges lack familiarity with the indigenous rights framework that underpins the requirement for consultation and FPIC, this is gradually changing; courts are increasingly ordering projects to be suspended until prior consultations are held in accordance with international standards.

This widespread judicialization of consultation is evidence of the immaturity of State institutions and processes when it comes to respecting and protecting indigenous peoples' rights. While legal avenues are essential in such a context, purely juridical approaches to consultation and consent are inadequate to ensure implementation of consultation and FPIC. Indigenous representatives have highlighted that rulings are not always culturally appropriate and often do not respond to the realities in which they live. In addition, taking legal challenges imposes huge burdens on communities and decisions are frequently not implemented in good faith.

Protocols have a potentially important role to play in addressing these challenges. They can educate the judiciary on how consultations should be conducted and FPIC sought in specific contexts. Courts can then articulate general IHRL principles governing consultations and direct government institutions to the concerned people's FPIC protocols for specific rules and implementation guidance. Recent developments in jurisprudence in Brazil and Colombia, where Courts have instructed governments to consult and obtain FPIC in accordance with indigenous peoples' protocols, are evidence of this synergy. Similarly, in the case of the Wampis, the Peruvian court's affirmation of the requirement for FPIC was an important impetus for the development of an FPIC protocol by the Wampis. The Wampis decided this was necessary to ensure that the ruling was implemented in accordance with IHRL and their interpretation of their rights, and not an ill-informed and arguable self-serving State interpretation of those rights.

Challenges to and opportunities for realizing the potential of FPIC protocols

FPIC Protocol development is a political process which each indigenous people are free to initiate if they so choose. Their development is increasingly common in several jurisdictions. However, as the case studies demonstrate, significant obstacles remain to be overcome if their full potential is to be realized. These obstacles arise as a result of the actions and inactions of State, corporate and other actors. Foremost among them is the lack of political will on the part of States to recognize indigenous peoples' rights and to establish the necessary culturally appropriate legislative and policy frameworks to implement them. An example of this is the failure of States to recognize the implications of indigenous peoples' right to autonomy. Most national governments remain unwilling to formally recognize indigenous peoples' governments, even when they have been formally constructed and publicly declared and seek to work constructively with them, as in the case of the Wampis in Peru.

This lack of rights recognition is compounded by the limited capacity and a lack of intercultural understanding in State institutions and the often invisible, but nevertheless enormous, influence extractive, energy and agribusiness corporations wield over decision-making processes which impact on indigenous peoples' rights. This power dynamic is reflected in the growing tendency of foreign, in particular Canadian, mining companies to take arbitration cases against States, such as Colombia and

Peru, under international investment agreements in contexts where mining projects are suspended due to the lack of good faith consultation and FPIC. A related issue is the role that home states of corporations, most notably Canada, in encouraging regressive provisions in mining regulation in countries such as Colombia. At the same time, most home states fail to provide access to extraterritorial remedies for indigenous peoples impacted by the activities of their corporations.

The presence and influence of armed state and corporate actors and illegal groups in indigenous territories, including non-state armed actors, drug traffickers, illegal miners and loggers, create contexts in which the very notion of "free" consultations and consent is an oxymoron. Historical harms and divisions, contexts of violence, conflict, corruption, and power inequalities - often arising from externally imposed development activities - are further challenges to both the development and implementation of FPIC Protocols.

The development of a FPIC Protocol is no guarantee that external threats or internal challenges can be overcome. The resistance of national governments means that their effectiveness and long-term contribution will, in part, depend on how they are positioned politically before international organizations. The importance of this is already reflected in guidance emanating from IHRL mechanisms directing governments to recognize them as legitimate exercises of autonomy and self-determination. Therefore, while they are developed locally, the process of ensuring that national governments accord due respect to them will require mobilization of indigenous peoples at national and international levels. Permanent mobilization will also be necessary at the local level to address internal challenges. As living documents, their enforcement requires constant awareness raising and support within communities to maintain their relevance and ensure the on-going capacity building that is needed to adapt to new challenges.

Indigenous peoples - from the Munduruku in Brazil to the Subanon in the Philippines - regard their FPIC protocols as manifestations of their collective wills and a means to pursue self-determined development. To date, however, FPIC Protocols have primarily benefited indigenous peoples by strengthening self-government capacity and acting as tools of resistance in defence of their territories. With few exceptions, their potential as instruments to regulate good faith consultations and guarantee respect for indigenous peoples' decisions is yet to be fully realized. One promising example of this is the case of the Wajãpi traditional community's protocol in Brazil, where their protocol is acting as a basis for a constructive engagement with the government and reaching agreements in the context of agrarian reform measures near their territory.[171] If this potential of FPIC protocols is realized, they offer significant benefits not only to indigenous peoples but also to States and other actors.

From the perspective of States, FPIC protocols offer a resource efficient and effective manner to implement their duty to respect, protect and fulfil indigenous peoples' rights. As instruments that regulate relationships with the State based on rights, FPIC protocols can play a pivotal role in redirecting State interpretation and implementation of indigenous peoples' rights. They provide an opportunity to build positive relationships with indigenous peoples and have proven to be an effective means of resolving existing conflict in or among indigenous communities and of avoiding future conflict with the State. Depending on the context, some form of national level legislation or regulation may be required in order to compel state institutions to act in a coherent rights-protecting manner. FPIC protocols offer context specific instruments with which this national legislation and policy can be aligned in order to cater to this diversity of indigenous peoples' decision-mak-

ing processes. In so doing, they avoid the imposition of uniform solutions in a context where a diversity of approaches is required and offers the foundation for meaningful consultations that can facilitate a human rights-based model of sustainable development.

This interface between FPIC protocols and national legislation and regulation is an important issue that will have to be addressed on a case by case basis. In some contexts, protocols are serving to fill the void where national legislation or regulation does not exist, as for example is the case in Brazil.[172] They also serve as protections in the context where States, again such as Brazil, are seeking to enact legislation regulating consultations, but are simultaneously taking retrogressive steps in relation to recognition of indigenous peoples' rights. In other cases, where legislation or regulation exists, but is incompatible with indigenous peoples' rights under IHRL, protocol development can provide an impetus for the reform of such regulation. This is what occurred with the Subanon in the Philippines. In yet other scenarios, such as in Colombia, respect for protocols may be insisted on by indigenous peoples and courts when the requirements of national decrees fall below IHRL standards. Protocols are also being developed in Peru where courts have affirmed the need for FPIC in accordance with IHRL standards but where this is not provided for under national legislation and regulation. The widespread absence of good faith consultation and consent in relation to legislation and regulations governing consultations is, in and off itself, a manifestation of the lack of good faith on the part of the State and renders FPIC Protocols all the more essential.

From the perspective of project proponents and investors, FPIC Protocols offer greater clarity and certainty in terms of rules of engagement and reduce long-term investment risk exposure. They also assist in the realization of corporate obligations and responsibilities in relation to respect for indigenous peoples' rights. Where FPIC protocols exist, they should be central to corporate human rights due diligence and impact assessments. Respect for them is necessary to prevent and mitigate any potential human rights abuses. They may also provide the basis for monitoring and auditing of FPIC processes by third parties, for agreement negotiation and for addressing grievances.

For international and regional organizations, FPIC Protocols can enhance their capacity to fulfil their obligations to promote and support the implementation of indigenous peoples' rights by offering unique insights into each indigenous peoples' interpretation of those rights. They offer these organizations an effective means of targeting technical and financial assistance to meet the needs of indigenous peoples and provide them with guidance as to how indigenous peoples should be engaged in the context of any development projects that are being promoting. It also provides organizations, such as international or regional human rights bodies, that have oversight roles, with guidance as to how consultation and FPIC processes should be conducted.

CONCLUSION

FPIC protocols are proving to be effective tools to address deficiencies in State understanding of, and willingness to implement, indigenous peoples' rights. They have been developed in contexts where the concept of consultation has been distorted, giving rise to the paradoxical situation whereby consultation and FPIC has been transformed from a rights safeguard to a means to facilitate their denial. Perhaps the most damning demonstration of this is that three decades after the duty to consult in good faith was enshrined in ILO Convention 169, and despite claims by States to have implemented that duty, indigenous peoples repeatedly denounce the fact that there are no examples of its genuine implementation. State rejection of the need for

FPIC and insistence on maintaining control over the implementation of consultations is a manifestation of an unwillingness to alter existing power relations. By operationalizing emaciated consultation processes, States are claiming to respect indigenous peoples' rights in law while rendering them nugatory in practice. If indigenous peoples are not adequately involved in the development and operationalization of consultation processes, and those processes are not contextualized within their realities, they cannot fulfil their core function of protecting indigenous peoples' rights.

Protocols are part of the broader array of proactive initiatives being taken by indigenous people to attempt to rectify this and encourage States to engage with them based on rights, equality and respect. Having been excluded from centres of power for centuries, and forced to be largely rule takers, indigenous peoples are now setting their own agendas and establishing the rules of engagement for external actors from within their own territories. The assertion of their right to give or withhold FPIC through their own processes, and on their own terms, is empowering indigenous peoples to defend their territories and strengthen self-governance. The role of FPIC protocols in helping to strengthen indigenous peoples' unity and to reach internal agreement on decision-making processes has already been demonstrated in certain contexts.

For consultations to be developed and implemented in a manner that is consistent with indigenous peoples' rights FPIC protocols clarify that certain preconditions must be met. These include the empowerment of indigenous peoples and their representative structures; the end of stigmatization, threats, criminalization, and targeted acts of violence against indigenous leaders; the opportunity, time and space for indigenous peoples to consult internally in relation to their decision-making processes and their desired social, cultural and economic development; access to the necessary technical and financial support; and guarantees that their land, cultural and self-government rights will be respected. These pre-conditions are embedded in FPIC protocols. Their continued development and the continued insistence by indigenous peoples on State and corporate compliance with their provisions, may help ensure that these preconditions are eventually acknowledged and fulfilled.

Indigenous peoples have shown good faith in developing FPIC protocols. States now need to show good faith by respecting them. Until this happens, and the necessary preconditions are in place for rights-based consultations to take place, FPIC protocols will continue to act as tools for resistance, education and strengthening self-governance. Inevitably, they will be ignored in certain contexts and will require physical mobilizations, legal actions, political campaigning and international oversight in order to insist on their implementation. If that happens, as it should, FPIC protocols will transition to being important instruments for building genuine rights-based relationships with States and any other actors seeking to engage with indigenous peoples.

> *"Operationalization of FPIC is dependent on a genuine acknowledgment of the right of all indigenous peoples to define their own development paths. This necessitates respect for their rights to be informed and consulted, and to determine under what conditions investment and development projects are allowed to proceed within their territories. This includes the right to accept or reject a particular proposal."* [173]

RECOMMENDATIONS – REALIZING THE POTENTIAL OF FPIC PROTOCOLS

By Cathal Doyle

The Special Rapporteur … noted the good practices and proactive approaches on the part of indigenous peoples to pursue the realization of their rights. These include the development of consultation protocols incorporating the consultation and free, prior and informed consent procedures developed by the Wajãpi in Amapá and the Munduruku in Pará…

The Special Rapporteur recommends that the Government… Acknowledge and support the proactive measures taken by indigenous peoples to realize their rights, including their right to self-determination. This includes observing and responding to consultation and consent protocols developed by indigenous peoples in the context of the State duty to consult;

UN Special Rapporteur on the Rights of Indigenous Peoples Mission to Brazil (2016)

Guidelines or models for seeking free, prior and informed consent that are developed by either States or private actors should not prevail over indigenous peoples' own community protocols ….

The establishment of these protocols is an instrument of empowerment for indigenous peoples, closely linked to their rights to self-determination, participation and the development and maintenance of their own decision-making institutions…

States and the private sector should promote and respect indigenous peoples' own protocols, as an essential means of preparing the State, third parties and indigenous peoples to enter into consultation and cooperation, and for the smooth running of the consultations…

Expert Mechanism on the Rights of Indigenous Peoples Report on FPIC 2018

FOR HOST STATES

1. **Acknowledge the self-determination-based right of indigenous peoples to define their own development paths and the associated duty to obtain FPIC** for development activities in or near their territories that may have a significant impact on their enjoyment of their rights. Support them in the development of their own plans and priorities, free from external pressure.

2. **Recognize and commit to respecting FPIC protocols as a pro-active exercise of the right to self-determination and as living self-government instruments** that form an integral part of the law governing State and corporate actions in relation to indigenous peoples. Respect decisions affirmed in FPIC protocols in relation to no-go areas or activities that are prohibited by indigenous peoples as a result of their potentially profound impacts.

3. **Afford indigenous peoples the necessary time and space to formulate FPIC protocols** and where requested provide technical and financial support for the development, dissemination and implementation of FPIC protocols. **Refrain from holding consultations processes while FPIC protocols are being developed.**

4. **Ensure training and capacity-strengthening on indigenous peoples' rights** as recognized under international human rights law (IHRL) **for all state administrative and oversight bodies**, including the judiciary and those bodies responsible for concession issuance and licencing, and guarantee coherence across these agencies in relation to respect for those rights. Strengthen and guarantee the independence of governmental agencies responsible for facilitating the implementation of indigenous peoples' rights.

5. **Recognize the need for intercultural interpretations of indigenous peoples' rights under IHRL** and the central role of indigenous peoples in determining culturally appropriate modalities for the implementation of these rights and pre-conditions for their realization. This may be realized through written FPIC protocols. In no case should the absence of an FPIC protocol imply that the State does not have a duty to consult and obtain FPIC in accordance with indigenous peoples' customs and practices.

6. **Increase awareness of FPIC Protocols among indigenous peoples and other actors** and encourage and facilitate the sharing of experiences between indigenous peoples in relation to the development and implementation of FPIC protocols.

7. **Follow the guidance offered by UN bodies**, such as the UN Expert Mechanism on the Rights of Indigenous Peoples, the UN Special Rapporteur on the rights of indigenous peoples, as well as regional and national courts in relation to indigenous peoples' rights and respecting FPIC protocols.

8. **Conduct**, in close cooperation with indigenous peoples, **reviews of existing regulatory and policy framework governing activities affecting indigenous peoples**, in order to ensure their consistency with IHRL standards and the concerned indigenous peoples' perspective, needs and aspirations and their FPIC protocols where these exist. These activities include consultations, strategic planning, licensing, issuance of concessions, conduct of impact assessments, determination of mitigation measures and negotiation of benefit agreements. Any laws or regulation governing consultation and FPIC must be developed in close consultation with indigenous peoples.

9. **Ensure that consultations are freely held in good faith by guaranteeing that there is no pressure on indigenous peoples** as a result of military or armed actor presence. This implies establishing no-go zones if requested by indigenous peoples in cases where consultations cannot be conducted 'free' of pressures from these actors.

10. **Suspend all activities conducted in or near indigenous peoples' territories that were not subject to prior good faith consultations** and consult with the peoples concerned in accordance with their own protocols, written or otherwise, to determine culturally appropriate rights-based remedies.

FOR HOME STATES OF COMPANIES AND STATES SPONSORING INVESTMENT

1. **Establish mandatory human rights due diligence legislation** binding on corporations registered in their jurisdictions, including reference to applicable international law in the conduct of such due diligence, and explicitly require respect for indigenous peoples' rights, including compliance with FPIC protocols where they have been developed.

2. **Ensure that international investment agreements are consistent with indigenous peoples' right to give or withhold FPIC t**o investments in or near their territories that have potentially significant impacts on their rights.

3. **Enact extraterritorial legislation to hold their companies better to account for violations of indigenous peoples' rights overseas** and establish affordable, accessible and responsive fora where indigenous peoples can bring allegations of abuses and complaints, including in relation to consultation and FPIC.

4. **Support the development of improved multilateral standards** for corporations, through UN and other multilateral standard-setting arenas, requiring respect for indigenous peoples' rights, effective due diligence processes, and provision of prompt and effective remedy for harms.

FOR PROJECT PROPONENTS

1. **Develop a public policy commitment to respect international standards on indigenous peoples' rights, including the right to consultation and FPIC** under Article 32 of the UN Declaration on the Rights of Indigenous Peoples. This should **a)** Recognize and **publicly acknowledge** that seeking and granting or withholding **FPIC is a process to be defined and managed by** those **indigenous peoples** whose territories and futures are impacted by proposed projects, and avoid any manipulation, or complicity in the manipulation, of such processes. **b) Acknowledge that FPIC protocols reduce long-term investment risk exposure** by offering procedural clarity and certainty and facilitating respect for human rights **c) Encourage States and other corporate actors to respect FPIC protocol implementation.**

2. **Respect FPIC protocols and follow their guidance**, including in relation to areas such as: who is to be consulted; when, how, for how long and where consultations are to be held; how consultations are to be funded; what role is designated to corporations in the consultation process; what pre-conditions must be meet for consultations to proceed; what role is accorded to indigenous peoples in impact assessments and in the determination of impact areas; the importance attributed to traditional knowledge; internal decision-making processes; and activities or measures that are forbidden.

3. Ensure that **FPIC protocols are fully addressed as part of**: a) **human rights due diligence and impact assessments**, b) in the development of measures to prevent and mitigate any potential human rights abuses, c) in oversight and auditing of FPIC processes by third parties, d) in agreement negotiation, and e) in the context of addressing grievances.

4. Avoid participation in consultation processes that are imposed on indigenous peoples and **disengage from projects where there has not been good faith consultations** that resulted in genuine FPIC.

5. In cases where States do not recognize indigenous peoples' rights and the duty to consult in order to obtain their FPIC, **operate 'as if' these international standards were recognized under national law and promote their recognition by States**. If this is not possible, assume that consent has not been granted and withdraw from the project.

6. Suspend projects that have proceeded without consultation and FPIC and, where requested by the concerned peoples, engage with them in accordance with their FPIC protocols.

FOR FINANCIERS AND INVESTORS

1. **Develop a policy,** or revise existing policies, **that commits to only dealing with clients who respect indigenous peoples' rights under IHRL**, including the requirement to consult in order to obtain FPIC and recognize the clear benefits in terms of reduced financial risk in the adoption of FPIC protocols as a culturally appropriate means to implement this requirement.

2. Ensure that clients have policies in place which adhere to the principles of the UN Declaration on the Rights of Indigenous Peoples, including the requirement for FPIC and adherence with FPIC protocols where these exist.

3. **Ensure that clients' due diligence processes assess potential impacts on indigenous peoples** through the conduct of participatory consent-based processes and that documented FPIC has been obtained for any licencing, concession issuance and project activities, in accordance with indigenous peoples' FPIC protocols and IHRL.

4. **Provide access to independent, transparent and credible complaint mechanisms** to address cases where there are allegations of failure to consult in good faith in order to obtain FPIC.

FOR INTERNATIONAL ORGANIZATIONS

(UN bodies, Organisation for Economic Co-operation and Development (OECD), Bilateral Development Agencies)

1. **Ensure that policies recognize the self-determination right of indigenous peoples to give or withhold FPIC.** This should encompass their right to develop guidance in the form of FPIC protocols which guarantee that consultations in order to obtain FPIC are held in a culturally appropriate manner.

2. **Provide technical and financial assistance to indigenous peoples to facilitate the development of FPIC protocols** where requested by them to do so.

3. **Complaint mechanisms should play an active role in the oversight or adjudication of consultation and FPIC processes where requested by indigenous peoples to do so**, and **a)** ensure that consultation processes are consistent with the FPIC protocols, customs and practices of the concerned indigenous peoples; **b)** direct governments to recognize FPIC protocols as a legitimate exercise of autonomy that must be respected and supported as part of their duty to protect indigenous peoples' human rights **c)** ground the requirement to obtain FPIC in the broader indigenous rights framework from which it emerges and which it serves to safeguard.

4. **Develop binding requirements, including further guidance, for corporations** acting in areas that may result in impacts on indigenous peoples' rights. Such guidance should outline minimum requirements for human rights due diligence, impact assessments, and remedy provisions that are required under international law.

SUGGESTIONS FOR INDIGENOUS PEOPLES

1. Where deemed appropriate by the concerned indigenous people, **share experiences with other indigenous peoples of FPIC protocol development**, including the rationale behind their development, the process through which they were developed and the contribution they have made to rights-realization, and their limitations and potential.

2. In light of customary law and practices and the challenges faced in relation to potential externally proposed development activities, **examine the experiences of other indigenous peoples with FPIC Protocol development and implementation** to assess their potential for strengthening structures and processes to be better equipped to deal with external agents.

3. **Consider framing FPIC protocols within the broader question of self-determined development a) as living documents that are components of broader governance strategies** with a process in place for their revision whenever deemed necessary by your communities or when faced with unforeseen circumstances and **b)** by insisting on your right to determine you own development path in advance of any consultations and doing so in advance of, or in parallel, with internal discussions in relation to the content of FPIC Protocols.

4. **Make use of FPIC protocol development to become familiar with your rights under IHRL** and to develop your peoples' own interpretation of those rights and to use them as a platform for articulating demands to the State and other actors.

5. Consider and, where deemed appropriate, **document as part of FPIC protocol development topics such as:** a) **pre-conditions for the conduct of FPIC processes, including in relation to rights recognition and addressing legacy issues**; b) principles and rights underpinning FPIC processes; c) the role of internal and external actors in FPIC processes, including who is to be consulted, who is to participate and how; e) the role of your peoples and communities in impact assessments and development of baseline data; f) activities in relation to which you are willing or not willing to be consulted; g) community decision-making processes and h) measures that vitiate consultation processes and consent.

6. **Decide if FPIC protocols should be used in place of, or in conjunction with, national regulation** and assess what the implications of this are for the development of legislation and policy.

7. **Collaborate with other indigenous peoples to amplify the collective impact of FPIC protocols at the national and international levels.**

8. **Insist that as rights-based self-governance tools, FPIC protocols should serve as educational instruments for all actors** seeking to engage with indigenous peoples or overseeing the realization of their rights, including the judiciary and other State actors who have responsibilities to facilitate the realization of indigenous peoples' rights.

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1. The protocols from these 20 countries are available in the project protocol database which will be made publicly accessible in a subsequent stage of the project. For further information contact the report editors.
2. In December 2018, two of the authors participated in a workshop organized by the OHCHR in Colombia addressing autonomous FPIC protocols in the Latin American region. In March 2019 a workshop was organized by the Columbia Centre for Sustainable Investment and Middlesex University School of Law which addressed the role of FPIC protocols and involved indigenous representatives and support organizations from involved in the Peruvian and Brazilian case study, as well as representatives from other Latin American and African countries.
3. Report of the Special Rapporteur on the rights of indigenous peoples - International investment agreements, including bilateral investment treaties and investment chapters of free trade agreements (2016) UN Doc A/HRC/33/42.
4. Protocolo de Consulta dos Povos do Território Indígena do Xingu, Associação Terra Indígena Xingu (Sao Paulo, 2017) (henceforth Xingu Protocol).
5. Xingu Protocol (supra fn 4) p17. The Xingu protocol points to the mainstream media's misrepresentation of their views, which inaccurately held that they had approved a road that was in built in their territories without any consultation.
6. Kaliña and Lokono Peoples v Suriname (2015) (Merits, Reparations and Costs) Inter-American Court for Human Rights (Ser. C) No. 309.
7. See Doyle C. and J. Cariño (2013) Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector (PIPLinks, ECCR, Middlesex University London) for an overview of some Canadian cases (henceforth Doyle and Cariño).
8. Doyle and Cariño (supra fn 7).
9. IBIS (2013) Guidelines for Implementing the Right of Indigenous Peoples to Free, Prior and Informed Consent (Copenhagen, 2013) (henceforth IBIS FPIC Guidelines), Xingu Protocol (supra fn 4).
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11. Resolution No. 048 Por Medio de la cual se establecen y reglamentan los protocolos propios de consulta previa, libre, e informada y de consentimiento, previo libre e informado del Resguardo Indígena de Canamomo Lomaprieta, Riosucio y Supia Caldas. 29 de Mayo de 2012 (henceforth Resguardo Protocol) Article 30 See also Herrera, F. and A. Felipe Garcia (2012) Estrategias y Mecanismos de Protección de Pueblos Indígenas Frente a Proyectos Mineros y Energéticos: La Experiencia del Resguardo Indígena Cañamomo Lomaprieta (Riosucio, Resguardo Indigena de Canamomo y Lomoprieta) (henceforth Herrera and Garcia).
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13. IBIS FPIC Guidelines (supra fn 9); An example is the Xinha people in Guatemala who regard consultation and consent as an ancestral right. They see it as a means of maintaining equilibrium in their communities and of involving people of all ages, genders and beliefs in decision-making. Based on their interpretation of their right to consultation they conducted their own internal intercultural consultation process through which they decided to declare their territory free of mining. Presentation of Xinha people Cartagena Columbia (2018).
14. Kitchenuhmaykoosib Inninuwug (KI) First Nation protocol: A Set of Protocols for the Kitchenuhmaykoosib Inninuwug (June 5, 2011) (henceforth Kitchenuhmaykoosib Inninuwug (KI) Protocol).
15. Taku River Tlingit First Nation Mining Policy, March 2007.
16. See Doyle and Cariño (supra fn 7) addressing Lutsel K'e Dene First Nation (LKDFN) experience.

17. FPP (2007) Free, Prior and Informed Consent: Two Cases from Suriname. FPIC Working Papers, (Moron in Marsh, Forest Peoples Programme) (henceforth FPP, 2007); See also the following protocols written in Dutch: Overeenkomst tussen de Inheemse volken van West Suriname en BHP Billiton en Suralco NV (2006); and Suriname protocol of the Casipora, Redi Doti, Pierrekondre and Powaka communities Procedure voor activiteiten van derden binnen het inheems gebied van de inheemse gemeenschappen van het district Para 'OSIP FPIC Protocol' (2007) (henceforth Suriname Protocols).

18. A body of guidance has been developed by support organizations to assist with the development of biocultural protocols see for example Holly Shrumm and Harry Jonas (eds) (2012) Biocultural Community Protocols: A Toolkit for Community Facilitators (Natural Justice: Cape Town).

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20. Protocolo Bio-cultural del Pueblo Indígena Miskitu: El derecho al consentimiento libre, previo e informado en nuestro territorio de La Muskitia Hondureña (2012) (henceforth Miskitu Protocol).

21. For example: Alaska Federation of Natives Guidelines for Research (2006); Guidelines for Respecting Cultural Knowledge adopted by the Assembly of Alaska Native Educators Anchorage, Alaska February 1, 2000.

22. Protocol of the Casipora, Redi Doti, Pierrekondre and Powaka communities in Suriname "Procedure voor activiteiten van derden binnen het inheems gebied van de inheemse gemeenschappen van het district Para 'OSIP FPIC Protocol'".

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27. Annual Reports of the UN Special Rapporteur on the rights of indigenous peoples to the UN Human Rights Council and General Assembly from 2009 to 2013 UN Docs: A/HRC/12/34; A/HRC/15/37; A/HRC/18/35; A/66/288; A/HRC/21/47; A/HRC/24/41.

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31. Presidencia de la República del Paraguay Ministerio de Educación y Ciencias, Decree 1039, 28 December 2018 (henceforth Paraguay Protocol)

32. Paraguay Protocol ibid.

33. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity (2011) Article 12.

34. Community Biocultural Protocols Building Mechanisms for Access and Benefit Sharing among the Communities of the Potato Park based on Customary Quechua Norms (ANDES (Peru), the Potato Park Communities and IIED, October 2011); see also Miskitu Protocol (supra fn 20).

35. Doyle and Cariño (supra fn 7). However, in specific contexts, such as in Suriname, ICMM members have failed to recognize provisions in these protocols so when requested by indigenous peoples, see FPP, 2007 (supra fn 17).

36. Argentinian Ombudsman Resolution 'Defensor del Pueblo de la Nación Republica Argentina Buenos Aires Act. No 5147/13' 12 May 2016.

37. Decision of the Superior Court of Ontario Platinex v Kitchenuhmaykoosib Inninuwug First Nation, 2006 CanLII 26171 (ON S.C.) addressing the Kitchenuhmaykoosib Inninuwug (KI) Protocol (supra fn 14); Colombian Constitutional Court decision T-530 of September 2016 addressing the Embera Chami protocol; Decision of the Brazilian Federal Court APELAÇÃO CÍVEL N. 0002505-70.2013.4.01.3903/PA, Desembargador Federal Jirair Aram Me-Guerian. Sexta Turma do TRF da 1ª Região – 06.12.2017 addressing the Protocolo de Consulta Juruna (Yudjá) da Terra Indígena Paquiçamba da Volta Grande do rio Xingu. (RCA, ISA, Vitória do Xingu, 2017) (henceforth Juruna Protocol).

38. These include: Natural Justice, Indigenous & Community Areas Consortium (ICCA), International Institute for Environment and Development (IIED), Forest Peoples Programme (FPP), Rede de Cooperação Amazônica (RCA), Rainforest Foundation Norway.

39. Hector Jaime Vinasco, ex-Governor and Coordinator of Natural Resources and Mining Program, Resguardo Indigena de Canamomo y Lomoprieta, statement at Geneva FPIC Protocol Workshop November 2019.

40. Suriname Protocols (supra fn 17), Bethany Village (Guyana) Free, Prior, Informed Consent (FPIC) Protocol (2017) (henceforth Bethany Village Protocol).

41. Proposed Agreement between the Indigenous Peoples of West Suriname and BHP-Billiton and Suralco NV.

42. Such as the 2013 Guarani legal framework on consultation (La Nación Guaraní de Bolivia, Ley Marco de Consulta) which is linked to the Bolivian; This is a common feature of Colombian Protocols see for example the Resguardo Protocol (supra fn 11).

43. Protocolo para la Consulta y Consentimiento, Previos, Libres e Informados del Pueblo Negro Norte-Caucano. Palenke Alto Cauca-PCN (2017).

44. For example, the Kitchenuhmaykoosib Inninuwug (KI) Protocol (supra fn 14) focused on a pending mining project and was invoked in an injunction case, the Wamimiri Atroari Dehetaka Kinja protocol focuses on a transmission line, and the Juruna Protocol (supra fn 37) focuses on the Belo Sun mining project.

45. For example, the Resguardo Protocol (supra fn 11) and the Protocolo Autonomo –Mandato Del Pueblo Arhuaco- Para El Relacionamiento Con El Mundo Externo Incluyendo La Consulta Y El Consentimiento Previo, Libre E Informado Nabusimake, Sierra Nevada de Santa Marta Junio 2016 – Junio de 2017 (henceforth Arhuaco Protocol).

46. Ie'xime Arynatypy Nypykwatypy Wai miri Atroari Behe Taka, Protocolo de Consulta ao Povo Waimiri Atroari (Roraima, 2018) (henceforth Waimiri Protocol).

47. Subanon Manifesto Pagadian City, Zamboanga del Sur (22 November 2009) (henceforth Subanon Manifesto); Kitchenuhmaykoosib Inninuwug Protocol; Bethany Village Protocol (supra fn 40).

48. Bethany Village Protocol (supra fn 40).

49. Arhuaco Protocol (supra fn 45).

50. Arhuaco Protocol (supra fn 45); Juruna Protocol (supra fn 37).

51. Resguardo Protocol (supra fn 11).

52. Arhuaco Protocol (supra fn 45); and Protocolo para el Relacionamiento del y con el Pueblo Nasa del Resguardo de Cerro Tijeras, Municipio de Suarez Departamento del Cauca -Base Para la Consulta previa interna –externa y el Consentimiento Previo Libre e Informado Autoridades Ancestrales -Thẽ'walawesx- y autoridades de gobierno propio-Kha'buwesx-, líderes y lideresas del Pueblo Nasa -Nasawe'sx- del resguardo de Cerro Tijeras. La Alejandría, febrero de 2016- marzo de 2017 (henceforth Nasa protocol); Protocolo para la Consulta y Consentimiento Previo Libre e Informado del Pueblo Negro Norte Caucano de los Consejos Comunitarios de los Municipios de Suarez y Buenos Aires del Departamento del Cauca, Lideres, Lideresas, del Proceso Organizativo del Norte del Cauca, Representantes y Juntas Directivas de los Consejos Comunitarios de los Municipios de Suarez y Buenos Aires- Cauca, Marzo de 2013 – Febrero de 2014 (henceforth Cauca Communities Protocol)

53. Juruna Protocol (supra fn 37). In all the Colombian protocols the people address their spiritual relationship with their lands.

54. Protocolo Comunitario del Pueblo Negro de las Cuencas de los Ríos Mayorquín, Raposo y Anchicayá Para el Fortaleciemiento Interno y Relacionamiento Intercultural Externo y la Participación en los Procesos de Consulta y Consentimiento Previo, Libre e Informado Buenaventura, noviembre de 2015 - Junio 2017 (henceforth Mayorquín, Raposo y Anchicayá communites Protocol).

55. Xingu Protocol (supra fn 4).

56. Protocolo de Consulta das comunidades ribeirinhas Pimental e São Francisco (Terra de Direitos, Prelazia de Itaituba) (henceforth Pimental and São Francisco communities Protocol).

57. For example, the Brazilian protocols include maps of roads, large scale mines and hydroelectric projects in or near their territories, as well as identifying areas where illegal mines, forestry, fishing is occurring.

58. This is a common theme across Brazilian FPIC protocols.

59. Feconacor, Fediquep, Opikafpe 'Conditions for a Prior Consultation in Good Faith' (Peru 2019) available at observatoriiopetrolero.org.

60. For example, the Subanon Manifesto (supra fn 47) states "The FPIC process shall be required whenever a proposed plan, program, project or activity, whether large or small scale in scope or impact".

61. The draft Wampis Protocol envisages addressing contexts in which consultations on low impact mutually beneficial projects are expected to lead to negotiations. See Wampis case study.

62. This is a common approach of the Colombian protocols.

63. This is a common feature of the some of the Brazilian protocols.

64. See for example the Nasa Protocol (supra fn 52).

65. Resguardo Protocol (supra fn 11); Arhuaco Protocol (supra fn 45); See also Wampis case study.

66. For an account of the process of development of the Resguardo Protocol (supra fn 11) see Herrera and Garcia (supra fn 11).

67. The Resguardo Protocol (supra fn 11) operates in this way for example. Large and medium scale mining is prohibited in a specific resolution and is also prohibited in their consultation protocol. If consulted on these projects the Resguardo will engage but will insist on compliance with its protocol which forbid such mining.

68. Juruna Protocol (supra fn 37).

69. Xingu Protocol (supra fn 4).

70. See for example references to life plans in Colombian protocols.

71. Pi'ôk jakam dja ga me myjja kadjy me imari kumrej me ibê Kayapó-Menkragnoti Instituto Kabu kute me ijo yry ja Protocolo de consulta dos Kayapó-Menkragnoti associados ao Instituto Kabu (henceforth Kayapó-Menkragnoti Protocol).

72. Kitchenuhmaykoosib Inninuwug (KI) Protocol (supra fn 14).

73. From example health risk assessments in relation to toxic substances are among the preconditions in the consultation plan of the Federations for the communities impacted by Oil Block 192 in Peru, where community members have elevated leaves of heavy metals in their blood as a result of previous operations where the communities were not consulted and consequently had no control over the environmental and health standards.

74. See for example the case study addressing the Juruna experience with flawed consultations on Belo Monte and Belo Sun.

75. Xingu Protocol (supra fn 4); Kayapó-Menkragnoti Protocol (supra fn 71).

76. This is a common feature of Brazilian protocols.

77. Some protocols do not go into detail on these stages, such as the Asocasan Protocol (supra fn 87) and Mayorquín, Raposo y Anchicayá communites Protocol (supra fn 54) in Colombia.

78. For example, the Bethany Village Protocol (supra fn 40) in Guyana and the Suriname Protocols (supra fn 17) are addressed towards the project proponent, while the Colombian, Brazilian and Peruvian protocols are addressed to the State.

79. Kayapó-Menkragnoti Protocol (supra fn 71).

80. Taku River Tlingit First Nation Mining Policy, March 2007.

81. For example, all the existing Colombian protocols, bar one, address monitoring and oversight.

82. The Subanon Manifesto (supra fn 47) places emphasizes the need to ensure that the unseen spirits are not disturbed, and their permission had been requested for activities impacting on Subanon traditional lands. This is explained by the destruction of Mt Canatuan, one of the Subanon peoples sacred mountains, for gold mining.

83. For example, the Juruna Protocol (supra fn 37) has an initial section addressing the relevance of ILO Convention 169, the main body of the protocol then addresses specific articles related to provision of information, and includes an Annex with extracts from the Constitution, ILO Convention 169 and the UNDRIP.

84. Subanon Manifesto (supra fn 47).

85. Resguardo Protocol (supra fn 11).

86. This is explicit in many of the Colombian and Brazilian protocols. It tends to be elaborated on in more detail in the former, most probably because they are much longer, and in some regards, more detailed documents.

87. Murduruku protocol; Protocolo Comunitario Biocultural Para el Territorio del Consejo Comunitario Mayor del Alto San Juan Asocasan. Tado, Chocó. Colombia, Consejo Comunitario Mayor del Alto San Juan March 2012 (henceforth Asocasan Protocol)

88. For example, the role of women is a key theme in the Nasa FPIC protocol; Protocolo de Consulta Munduruku, (Munduruku Consultation protocol Prepared by the Munduruku, gathered at the village of Waro Apompu, Munduruku Indigenous Land, on the 24th and 25th of September 2014, and in the village of Praia do Mangue, on the 29th and 30th of September 2014) (henceforth Munduruku Protocol); Juruna Protocol (supra fn 37); Protocolo Montanha e Mangabal, Elaborada pelos beiradeiros do Projeto Agroextrativista Montanha e Mangabal, reunidos no Machado, em 26 e 27 de setembro de 2014 (henceforth Montanha and Mangabal Protocol).

89. Munduruku Protocol ibid.

90. Kayapó-Menkragnoti Protocol (supra fn 71).

91. For example, the Xingu Protocol (supra fn 4) states that "Relatives who live in the city cannot speak on behalf of the communities, nor represent or decide for them."; See the Pimental and São Francisco communities Protocol (supra fn 56) for a different perspective.

92. Munduruku Protocol (supra fn 88).

93. Munduruku Protocol (supra fn 88); Arhuaco Protocol (supra fn 45); Juruna Protocol (supra fn 37).

94. Most protocols refer to community decisions being based on consensus and some elaborate in detail on what this means for the communities.

95. Subanon Manifesto (supra fn 47).

96. Wajãpi kõ omõsãtamy wayvu oposikoa romõ ma'ẽ Protocolo de Consulta e Consentimento Wajãpi (2014) (henceforth Wajãpi Protocol)

97. Xingu Protocol (supra fn 4).

98. For example, the Arhuacos, Kogi, Wiwa and Kankuamo peoples who inhabit the Sierra Nevada de Santa Marta mountain range in Colombia, or the peoples who inhabit the Xingu river basin in Brazil.

99. Munduruku Protocol (supra fn 88).

100. Kitchenuhmaykoosib Inninuwug (KI) Protocol (supra fn 14).

101. Munduruku Protocol (supra fn 88).

102. Juruna Protocol (supra fn 37).

103. Cauca Communities Protocol (supra fn 52).

104. Carneiro Cristiane, Mantovanelli Thais, Rojas Garzón Biviany. Xingu, o rio que pulsa em nós: monitoramento independente para registro de impactos da UHE Belo Monte no território e no movo de vida do povo Juruna (Yudjá) da Volta Grande do Xingu. Sao Paulo: Instituto Socioambiental, 2018. (https://acervo.socioambiental.org/sites/default/files/publications/jnd00022.pdf)

105. Brazilian law recognizes the riberenhos, traditional communities who live by the rivers, as a type of forest people who, despite not being indigenous, maintain a traditional and sustainable way of life in the forest through a combination of small scale agro-extractive activities that ensure the quality of life of these communities and at the same time the conservation of the forest. (Law 9985/2000, Decree 6040/2007)

106. TIX stands for Territorio Indígena del Xingu, the Portuguese for Xingu Indigenous Land.

107. For more information on the Juruna people visit the webpage about the Juruna da Volta Grande do Xingu in the encyclopedia Povos Indígenas no Brasil: https://pib.socioambiental.org/pt/Povo:Yudjá/Juruna#Os_Juruna_da_Volta_Grande_do_Xingu

108. Governo planeja liberar mineração em terras indígenas, diz ministro de Minas e Energia" 05.03.2019. Congresso em Foco https://congressoemfoco.uol.com.br/economia/governo-planeja-liberar-mineracao-em-terras-indigenas-diz-ministro/

109. Carneiro Cristiane, Mantovanelli Thais, Rojas Garzón Biviany. Xingu, o rio que pulsa em nós: monitoramento independente para registro de impactos da UHE Belo Monte no território e no movo de vida do povo Juruna (Yudjá) da Volta Grande do Xingu. Sao Paulo: Instituto Socioambiental, 2018. (https://acervo.socioambiental.org/sites/default/files/publications/jnd00022.pdf)

110. Precautionary Measure PM 382/10 - Indigenous Communities of the Xingu River Basin, Pará, Brazil Inter-American Commission on Human Rights. April 2011/IACHR.

111. For more information on the impacts of the diversion of the Xingu river in the region of the Volta Grande do Xingu, watch the video made by the Juruna: https://www.youtube.com/watch?time_continue=2&v=fh1mwlwOzLw

112. See the full text of the public civil action at http://www.mpf.mp.br/pa/sala-de-imprensa/noticias-pa/mpf-denuncia-acao-etnocida-e-pede-intervencao-judicial-em-belo-monte

113. Rojas Garzón, Biviany. 2017. "Para quem a Belo Sun Mente". (https://diplomatique.org.br/para-quem-a-belo-sun-mente/)

114. EIA -RIMA Projeto Volta Grande. (https://xingumais.org.br/obra/mineracao-volta-grande-belo-sun)

115. Public Civil Action 2505-70.2013.4.01.3903/PA. Altamira Federal Court of Justice, Pará - 17.06.2014.

116. Apelação Cível N. 0002505-70.2013.4.01.3903/PA, Desembargador Federal Jirair Aram Meguerian. Sexta Turma do TRF da 1ª Região – 06.12.2017.

117. Munduruku Protocol, 2014 (https://rca.org.br/wp-content/uploads/2017/12/munduruku-final-2.pdf)

118. Rojas Garzón Bivianay, Erika M Yamada, Oliveira Rodrigo. Direito à consulta e consentimento de povos indígenas, quilombolas e comunidades tradicionais. Sao Paulo : Rede de Cooperação Amazônica (RCA); Washington, 2016 (http://www.dplf.org/sites/default/files/direito_a_consultaprevia_no_brasil_dplf-rca-3.pdf)

119. Public Civil Action No. 14123-48.2013.4.01.3600. Altamira Federal Court of Justice, Pará - 2013.

120. Juruna, Bel. Statement made at the 11th session of the UN Expert Mechanism on the Rights of Indigenous Peoples. Geneva, July 2018. (https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/bel_rca.pdf)

121. Xingu, 2018

122. Protocolo de Consulta Juruna (Yudjá) da Terra Indígena Paquiçamba da Volta Grande do rio Xingu. (RCA, ISA, Vitória do Xingu, 2017) available at https://rca.org.br/wp-content/uploads/2016/08/RCA-2017-Protocolo-Juruna-CAPA-e-MIOLO.pdf: pages 22-24 (henceforth Juruna Protocol)

123. Juruna Protocol (supra fn 19): page 33

124. Juruna Protocol (supra fn 19): page 25

125. Juruna Protocol (supra fn 19): page 25

126. Juruna Protocol (supra fn 19): page 21

127. Juruna Protocol (supra fn 19): page 30

128. Juruna Protocol (supra fn 19): page 24

129. Apelação Cível N. 0002505-70.2013.4.01.3903/PA, Desembargador Federal Jirair Aram Meguerian. Sexta Turma do TRF da 1ª Região – 06.12.2017.

130. These impacts are recounted in testimony made in June 2015 by the Resguardo's traditional healers submitted to the Constitutional Court in documents leading up to Decision T-530/16.

131. All citations and interviews with community members in this document were undertaken by the author, between 2009 and 2017. First while working as senior researcher, governance and natural resources, at The North-South Institute, Canada; and then as part of doctoral research, at the Centro de Investigación y Estudios Superiores en Antropología Social (CIESAS-CDMX), Mexico City.

132. In Colombian jurisprudence and law the term "ethnic peoples" and "ethnic groups" is used to encompass Indigenous peoples, Black and Roma communities. It does not in any way serve to limit the rights of Indigenous peoples as peoples under international law to self-determination.

133. For overviews on the status of consultation and consent in Colombia's normative framework and policies, see for example: Sandoval, German Cifuentes, Belinha Herrera Tapias, Luz Mantilla Grande, Paola Carvajal Munoz. 2018. La consulta previa en la jurisprudencia constitucional de Colombia: Analisis de linea entre 1997-2015. Justicia (33): 11-36; Rodríguez, Gloria Amparo. 2014. De la Consulta Previa al Consentimiento, Previo, Libre e Informado a Pueblos Indigenas en Colombia [From Prior Consultation to Free, Prior and Informed Consent of Indigenous Peoples in Colombia]. Bogota: Universidad del Rosario; Jimeno, Gladys. 2012. Colombia Synthesis Report: From Consultation to Consent. Ottawa: The North-South Institute; Rodríguez-Garavito, Cesar. 2011. Ethnicity.gov: Global governance, Indigenous Peoples, and the Rights to Prior Consultation in Social Minefields. Indiana Journal of Global Legal Studies 18 (1) Article 12. As well, Constitutional Court Decision Sentencia SU 123/18 synthesizes Constitutional Court Jurisprudence in this regard.

134. See for example, Duarte, Carlos. 2018. Vol. 2 Consulta Previa: un balance internacional y su relación con nuestro bloque de constucionalidad. https://lasillavacia.com/silla-llena/red-etnica/historia/vol-2-consulta-previa-un-balance-internacional-y-su-relacion-con

135. Herrera, Federico and Andres Felipe Garcia. 2012. Estrategias y Mecanismos de Protección de Pueblos Indígenas Frente a Proyectos Mineros y Energéticos: La Experiencia del Resguardo Indígena Cañamomo Lomaprieta [Strategies and Mechanisms for Protecting Indiegnous Peoples affected by Mining and Energy Projects: The Experience of the Resguardo Indígena Cañamomo Lomaprieta]. Riosucio and Supía, Caldas: Resguardo Indígena Cañamomo Lomaprieta: 225-253

136. Herrera and Garcia. Ibid: 226

137. Herrera and Garcia. Ibid: 233-234

138. Herrera and Garcia. Ibid: 234 (emphasis added)

139. Other reasons for calling off and invalidating a consultation process include when "se identifique que el proyecto o sus proponentes fomentan la division al interior de la comunidad del Resguardo (Article 34); or when "se identifique que el proyecto, sus proponentes, o terceros a favor del proyecto hagan uso de chantajes, sobornos o amenazas a la comunidad y sus lideres para presionar los resultados del proceso de Consulta y Consentimiento, y forzar la realización del proyecto." (Article 35: 243); or when during the process there is absence either of the Traditional Authorities, the guarantor agencies or the legal representative of the project with the power of decision-making (Article 36).

140. See Defensoria-SAT. 2014. "Informe de Riesgo No. 032-14A.I.", noviembre 19 and Defensoria-SAT. 2018. "Alerta Temprana No 084-18", diciembre 11 for detail on the threats that Resguardo leaders and communities are facing.

141. For in-depth coverage of these issues, see the special issue on corruption edited by the magazine Semana (issued January 29, 2017).

142. In 2011, just two years after the flyover in the Resguardo, Canadian companies comprised some 52% of all companies with mining interests in Colombia (See: Weitzner, Viviane. 2012. Holding Extractive Companies to Account in Colombia: An evaluation of CSR instruments through the lens of Indigenous and Afro-Descendent Rights, Ottawa, Resguardo Indígena Cañamomo Lomaprieta, Proceso de Comunidades Negras, The North-South Institute).

143. See, for example, McSheffrey, Elizabeth. 2018. After years of pressure, Trudeau government to introduce new human rights watchdog. National Observer, January 16. https://www.nationalobserver.com/2018/01/16/news/after-years-pressure-trudeau-government-introduce-new-human-rights-watchdog; Oved, Marco Chown. 2018. Ottawa office to investigate human rights abuses linked to Canadian companies abroad. The Star, Jan. 17. https://www.thestar.com/news/canada/2018/01/17/ottawa-creates-office-to-investigate-human-rights-abuses-linked-to-canadian-companies-abroad.html; Council of Canadians. 2019. One year after the announcement…where is the ombudsperson. January 17. https://canadians.org/blog/one-year-after-announcementwhere-ombudsperson

144. See Tasker, Paul. 2017. Liberal government backs bill that demands full implementation of UN Indigenous rights declaration. CBC News, Nov 21. https://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037

145. Palenke Alto Cauca. 2017a. Protocolo para la Consulta y Consentimiento, Previos, Libres e Informados del Pueblo Negro Norte-Caucano. Palenke Alto Cauca-PCN.

146. Machado, Marilyn, David López Matta, Maria Mercedes Campo, Arturo Escobar and Viviane Weitzner. 2017. Weaving hope in ancestral black territories in Colombia: the reach and limitations of free, prior, and informed consultation and consent. Third World Quarterly 38 (5): 1075-1091.

147. Palenke Alto Cauca. 2017a. Protocolo para la Consulta y Consentimiento, Previos, Libres e Informados del Pueblo Negro Norte-Caucano. Palenke Alto Cauca-PCN: 10

148. Palenke Alto Cauca. 2017a. Ibid: 15-16

149. Palenke Alto Cauca. 2017a. Ibid: 15-16

150. "Además del derecho y el sistema de gobeirno propio representado en el Reglamento Interno, el Plan de Uso y manejo y el Plan de Buen Vivir, el pueblo afro norte caucano se acoge y reconoce como marco de relacionamiento el Convenio 169 de la OIT adoptado mediante la Ley 21 de 1991, la Ley 70 de 1993 para el pueblo afro norte caucano, la ley 99 de 1989, el AUTO 005 de 2009 y otras normas, y sobre todo Sentencias de la Corte Constitucional colombiana y de la Corte Interamericana de Derechos Humanos que han reconocido parte de los derechos demandados." (Palenke Alto Cauca. 2017a. Protocolo para la Consulta y Consentimiento, Previos, Libres e Informados del Pueblo Negro Norte-Caucano. Palenke Alto Cauca-PCN: p. 7) Interestingly the protocol also refers to the ethical and political framework that is provided by the World Conference against Racism and Durban Action Plan.

151. Palenke Alto Cauca. 2017b. Internal narrative report (unpublished)

152. Palenke Alto Cauca. 2017b. Ibid.

153. Palenke Alto Cauca. 2017b. Ibid.

154. Palenke Alto Cauca. 2017b. Ibid.

155. Palenke Alto Cauca. 2017b. Ibid.

156. Palenke Alto Cauca. 2017b. Ibid.

157. Cited in Palenke Alto Cauca. 2017b. Ibid.

158. See ABC Colombia. 2019. Colombian Human Rights Defenders continue to be killed at an alarming rate. 28 February. https://www.abcolombia.org.uk/colombian-human-rights-defenders-continue-to-be-killed-at-an-alarming-rate/; Frontline Defenders. 2019. Front Line Defenders Global Analysis 2018. Dublin, Ireland.

159. Peter Larsen 'The significance of the Convention for the Wampis in Peru: Interview with Wrays Perez Ramirez'

160. Noningo, Shapiom (2017) 'Gobierno Territorial Autónomo de la Nación Wampis. Historia, construcción y retos'. Ponencia en el Conversatorio Público entre GTANW, Pontificia Universidad Católica del Perú, Universidad Nacional Mayor de San Marcos, Lima, Peru. Author's translation.

161. Zúñiga, Mario & Okamoto, Tami (2018) Sin derechos, no hay consulta. Pueblos indígenas, petróleo y consulta previa en la Amazonía peruana. Lima: Oxfam.

162. For more detail on these deficiencies see Zúñiga and Okamoto (2019) ibid.

163. Raynal, Delphine (2015). Oil Exploitation in the Peruvian Amazon, Violations of Human Rights and Access to Remedy. In C. Doyle (Ed.) Business and Human Rights: Indigenous Peoples' Experiences with Access to Remedy. Case studies from Africa, Asia and Latin America. Chiang Mai, Madrid, Copenhagen: AIPP, Almáciga, IWGIA. 97-141

164. Note that all citation of the Wampis Statute are either the authors translations from Spanish made or are from the partial translation available on the United Nations DESA website https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/01/Statute-Of-The-Autonomous-Territorial-Government-Of-The-Wampis-Nation-English-Abridged-1.pdf.

165. The Wampis core governing principles - all of which are related to the indivisibility of their territory - are self-determination, democratic self-governance, respect for ancestral knowledge and wisdom, a holistic approach to environmental conservation, the pursuit of collective wellbeing, intergenerational justice, interculturality, gender equity and transparency.

166. In the Morona river basin Communal Reserves regime.

167. More information on the territorial relations among Wampis can be found in the anthropological report attached to their 2017 Statute.

168. This in contrast to translator being appointed and recognised only by the State, through its official database.

169. Author's translation of intervention at the Columbia Center for Sustainable Investment (CCSI) and Middlesex University London Workshop on "The politics and practice of FPIC: Understanding power, interests and what they mean for inclusive and effective investment-related decision-making" April 25, 2019 Ford Foundation New York

170. Ibid.

171. Wajápi kõ omõsãtamy wayvu oposikoa romõ ma'ẽ Protocolo de Consulta e Consentimento Wajápi (2014)

172. A national level FPIC protocol was developed by indigenous peoples in Paraguay see https://www.servindi.org/actualidad-noticias/14/01/2019/se-aprueba-protocolo-para-el-proceso-de-consulta-y-consentimiento-con

173. Doyle C. and J. Cariño (2013) Making Free, Prior & Informed Consent a Reality, Indigenous Peoples and the Extractive Sector (PIPLinks, ECCR, Middlesex University London)

Initial experiences with autonomous free prior and informed consent (FPIC) protocols demonstrate their potential contribution to tackling critical shortcomings in existing law, as well as State and corporate practice, around consultation and consent. Case studies contained in this book - from the Wampis (Peru), the Juruna (Brazil) and the Embera Chami (Colombia) - show that FPIC protocols can act as tools for resistance, challenging inadequate or absent consultation processes and establishing standards and procedures with which future consultation processes must comply.

Through reviewing global experiences with protocol development, and reflecting on the lessons from the three case studies, this book concludes that the autonomous development of such protocols can open spaces for reflection and dialogue among and between indigenous peoples. These spaces can be highly empowering and contribute to the creation and maintenance of unity and self-governance among indigenous peoples. They facilitate the development of tools and strategies that allow indigenous peoples to challenge structural discrimination and pursue the implementation of international standards in their lived experiences.

The book also highlights the many challenges facing indigenous peoples in both the development and continued use of such protocols. It points to the legal, political and social conditions that can facilitate their emergence and highlights the need for States, corporations and international organizations to respect their contents and support their implementation.

"What we want is that they leave us our own model of development and our autonomy to protect and realize this"

Luz Gladis Vila Pihue,
Founder and former President of the Founding Congress of the National Organization of Andean and Amazonian Indigenous Women of Peru (ONAMIAP)

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