



Prior consultation:

A fundamental right for indigenous peoples



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Why is prior consultation a fundamental right for indigenous peoples?

In Latin America, social conflicts related to the exploitation of natural resources on indigenous lands are becoming more frequent.

The revenue from natural resource exportation is an important factor in Latin American countries' economic growth. In light of this "national interest", states grant concessions on indigenous lands to extractive firms without taking into account how those activities affect their way of life.

States argue that investments in mining, petroleum, hydrocarbons, and timber bring development to the country, but this isn't necessarily true, since the majority of the time development does not benefit the indigenous communities living on lands where the extractive activities are happening.

Not only do they not benefit, but their habitat is destroyed, the land that they consider their pharmacy, their market, their hardware store, their space to connect with their beliefs, spirituality and culture. Is it that national interest takes precedence over the right to existence of a human collective, an indigenous people? Or is it perhaps not the obligation of states to protect the existence of all of its inhabitants?

When extractive activities alter the way of life for indigenous peoples, it endangers their very existence, to the point that they feel it necessary to take dramatic measures in order to be heard and respected. Unfortunately, those measures sometimes turn into clashes with law enforcement and result in deaths or injuries.

In this context, free and informed prior consultation with indigenous communities, before taking any decision that would affect them directly, would avoid the proliferation of these conflicts, as well as so much death and resentment.

Prior consultation is one of the fundamental rights included in the international legal framework, such as the International Labor Organization's Convention 169 concerning indigenous and tribal peoples — which has constitutional status in the countries that have ratified it — and the United Nations Declaration on the Rights of Indigenous Peoples.

And prior consultation is fundamental in that it recognizes the right of a people to make decisions that could affect its existence. The communities have the power to say "we don't want this activity that is going to affect our way of life and our basic rights, that is going to produce toxic waste, that is going to contaminate the water, that is going to flood our land." No community is obligated to commit suicide in the name of "national interest."

Likewise, a state does not have the authority to conduct an activity that will be at the expense of a community's basic rights.

Recognizing the importance of the application of prior consultation with indigenous communities, Comunicaciones Aliadas, with the support of the American Jewish World Service, or AJWS, has prepared this special report that addresses the status of this right in nine countries in Latin America.

“The living conditions of a people cannot be modified without their consent”

Peruvian lawyer **Raquel Yrigoyen Fajardo**, vice president of the International Institute on Law and Society, has extensive experience on issues like access to justice and indigenous rights, legal pluralism, and indigenous law and justice. She has worked as a consultant for the International Labor Organization, or ILO, in the program to promote and apply Convention 169 on indigenous and tribal peoples.

In the following interview with COMUNICACIONES ALIADAS director **Elsa Chanduvi Jaña**, Yrigoyen explains when a state is required to use the consultation process with indigenous peoples, and when a people’s prior consent is necessary before making a decision that affects them.

The concept of indigenous peoples varies from one country to another. What is the basic definition according to the main international regulations that promote respect for the rights of indigenous peoples?

There is not an international norm that defines who is indigenous, but there are criteria for identifying to which groups indigenous rights apply.

Article 1 of the ILO’s Convention 169 on indigenous and tribal peoples states that awareness of their identity should be considered a fundamental criterion for determining to which groups this agreement’s provisions apply. It lays out two defining criteria for indigenous peoples: one is that they be descendants of peoples that existed before the Conquista, colonization or the establishment of current borders; the other is that they conserve part or all of their social, cultural, economic, and political institutions, whatever their legal status.

Whether they are recognized or not, or whether the law considers them native or campesino communities, a ronda



Raquel Yrigoyen Fajardo/NIEVES VARGAS

“In international law, it is not necessary that they have deeds to their lands in order for their rights to property and possession to be recognized.”

(campesino community patrol), or an agrarian group, it doesn’t matter. It also doesn’t matter whether they are labeled at all. The important thing is that they themselves are conscious of the fact that

they are descendants from a population that existed before the [present] state did and that they have their own institution.

Those criteria are sufficient for the state to be obligated to apply the rights of Convention 169 as well as [the rights] that international law grants to indigenous peoples.

When should the right to prior consultation be applied?

The right to prior consultation is set forth in Articles 6 and 7, and in other parts of Convention 169, and refers to any legislative or administrative action the state could take that would affect them directly. It can be any type of law, rule, regulation, decree, signed treaty, the consultation law itself, or regulations for consultation. It can be an educational or health project, a concession, a tender, a mining petition, or any administrative measure that the state takes on any matter.

Is it possible to adequately apply prior consultation, if the territories have not yet been demarcated and if they have not yet been validated?

In international law, it is not necessary that they have deeds to their lands in order for their rights to property and possession to be recognized. In Convention 169, from Article 13 on are all of the rights related to territories; it is established that the rights to the land they live on or use should be respected, whether they are titleholders or not.

In the case of the Saramaka People vs. Suriname, in a 2007 ruling the Inter-American Court of Human Rights said that ancestral occupation is enough for property rights to be recognized; therefore, land deeds are not necessary to have consultations with respect to indigenous peoples’ lands, or to take into account

the indigenous peoples' right to ancestral lands.

Suriname did not even have laws to demarcate communal lands, its laws only allowed for individual properties; but the Saramaka people collectively possessed territorial expanses. So the Saramaka people decided to sue Suriname [domestically], but there was no way to do it because there was no law that provided for the recognition of collective ownership, nor were there procedural mechanisms to do it. They ended up at the [Inter-American] Commission [on Human Rights] and then at the Inter-American Court. The Court ordered Suriname to develop legislation to be able to recognize collective lands and mechanisms for collective defense of the land.

Each people has its way of making decisions, and for a consultation to be suitable it needs to respect those ways. Wouldn't it be necessary then that indigenous peoples' decision-making processes be legally recognized?

What needs to be recognized is the right of the people and the state's obligation to conduct prior consultation on any legislative or administrative measure. The law will not and cannot regulate every form of decision-making.

For example, the Mayans have — as part of their worldview— the concept of a calendar; they are governed by the solar and lunar calendars, and make decisions on certain days of the lunar calendar. So there couldn't be a law that says the Mayans will make decisions on such and such calendar days. What the state is obligated to do, according to the Convention, is to use appropriate procedures.

Let's say the state proposes something to an indigenous community, gives them all of the relevant information in their languages in a way they can understand; maybe the community won't decide then and there, they leave, they have their assemblies and ceremonies, they use their decision-making mechanisms, they come back to the state, negotiate, and return to see if it suits them or not.

What needs to be regulated is the establishment of a procedure, not one day, one audience, one consultative workshop, and it's done. For example, today the regulation [for energy mining activities consultation] in Peru supports information sessions, which is absurd, because that does not guar-

antee the right to consultation. We have to think about the right to consultation as a process, one that allows that community to develop its internal mechanisms with its own members and its decision-making mechanisms in way that is both informed and appropriate for each case. One thing is consulting if we are going to build a school, another is if we are going to accept a mining project; each consultation will depend on the issue at hand.

In which cases is free and informed prior consent from indigenous peoples necessary for an activity or measure that affects them?

International law establishes specific circumstances under which the state requires prior consent to make a decision.

First, consent is required for the state to take a decision in cases of population relocation. For example, in the case of dams, they generally require population relocations, so it is impossible for the state to take a decision on population relocation without the consent of that community or the communities that will be affected.

“Wherever there is going to be mining activity the state must have the consent of a community before giving the mining concession.”

Second, when there are going to be megaprojects that impact a community's subsistence or way of life. So says the Inter-American Court in the case of the Saramaka People vs. Suriname. The case was about a community that was going to be affected by mining activity. In mining, water is generally drained from the subsoil, which of course has an impact on the way of life because people who live off of farming and livestock already will see an impact in their living conditions or way of life, and has to change their way of

life. This is why the living conditions of a community cannot be modified without their consent.

Third, when there is going to be storage of toxic substances, for example, as stated in the United Nations Declaration on the Rights of Indigenous Peoples. For example, mining activities leave fields of tailings where toxic substances are stored; toxic substances cannot be stored without the consent of an indigenous community. So, in practicality, we'd have to say that wherever there is going to be mining activity the state must have the consent of a community before giving the mining concession.

The Declaration also includes other examples, such as military activities, for example if a military base or a shooting range will be built. Under normal circumstances (not in wartime), the state cannot perform military activities without consent.

Article 4 of Convention 169 states that when special measures are necessary to safeguard persons, institutions, property, jobs, culture or the environment, such special measures shall not be contrary to the freely expressed wishes of the communities. Any safeguarding measure — that is to say, if the communities must be relocated because there was an earthquake — the conditions under which they are relocated cannot go against their will, it must always be with their consent.

In addition to the five specific cases already explicitly determined, in other circumstances where fundamental rights are impacted, the state is obligated to (get) consent. We could say there is a general principle — that the state must protect a people's life, integrity, and existence; thus viewed the other way around, the state cannot take any decision that could eventually jeopardize that integrity, that life, that people. The state cannot commit genocide.

How would you respond to people who say that when there are resources, like oil, gas, wood, and fish, among others, on an indigenous people's lands, the exploitation of the resources should be allowed because it can provide work to many people, and doing otherwise would put the brakes on the country's development?

In principle we have to see if we're facing cases of consent, because no state has the right to exterminate a people just because there is apparently a majority inter-

est that would be more important, quote unquote, than those of the minority.

On the other hand, there is an obligation of the state contained in Article 7, paragraph 2 of Convention 169, which says that the improvement in living conditions, work, health, and education of the affected communities, with their participation and cooperation, should be a priority in plans for overall economic development in the areas they inhabit; that is, in any case where there is a development plan the first improvements that the state needs to look at are with the indigenous people who live there.

So it can't be said: "since this petroleum or gas activity is going to better the work of others, then I have to choose this over the betterment of the lives in this community." It's the other way around: in any comprehensive regional development plan the state is obligated to see that this will improve the lives of that people. If petroleum activity apparently is going to give work, or taxes will favor more people quantitatively but will worsen the living conditions of that people, the state would not be entitled to undertake this activity.

Now, it's worth it to note that the state is in charge of administrating the natural resources that belong to the country, like in the case of minerals or subsurface oil. But if we're talking about resources like wood or fish, according to Convention 169 the state has no power to make use [of them]. Natural resources cannot be detached from the land. Natural resources like forests, fish, fauna and flora, are part of an indigenous community's property; therefore the state cannot cede resources on an indigenous community's territory or give them as a concession.

What is needed for the right to consultation to be respected in Latin America?

First of all, political will. If a government, a state, does not take that political decision, it will violate it all of the time. That implies that governments, the Executive branch, instruct their officials and provide handbooks and regulations for all its public policies.

In order for the state to observe the right to consultation, we need to look at the responsibilities of each agency, each branch of government. The Executive branch must implement the right to consultation; every time the Legislature

is going to take action it has to consult the indigenous peoples, but in turn must develop the right to consultation, to participation, to consent, etc. So, a juridical culture of consultation and participation must be created.

For example, the Judiciary in Peru now is interested in developing a law for the right of coordination between indigenous jurisdictions and general jurisdiction; the Judiciary and the state must implement a process of consultation and participation of indigenous peoples for the development of this legislative initiative. That is the duty of all state actors. So while there is no law on consultation, the Executive is nevertheless required to implement consultation when it is going to take an administrative measure that will affect an indigenous community.

I would like to clarify something. Although we are focusing on the right to consultation, this is not the only relevant right, because Convention 169 also discusses the right to participation not only when there is a measure at hand, but throughout the policy cycle.

Article 7 of the Convention says that the communities have the right to participate in the formulation, application, and evaluation of national and regional development plans and programs that may directly affect them. That means that when it comes time to make petroleum policy, mining policy, hydroelectric policy, or of communications, of where highways will pass through, the communities have the right to participate from the formulation stage (where the oil blocks will be, what the zoning will be, where farming will be done, where the livestock will be raised). They also participate when the development plan is applied, and when it is evaluated. So it is a more comprehensive right that the right to consultation, because this right is for plans, development programs, and development policy, and if the communities participate in every stage of formulation, application and evaluation, then it makes sense that they could then be consulted specifically about a concrete measure.

The communities participate in petroleum policy, but it is all of the communities and in a general way, but when it comes time to dig a well, a block, in a specific place, that's where the communities that will be specifically affected will participate; therefore the consultation is

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for that specific measure, but the participation is for the entire policy.

Throughout the state's administrative apparatus wherever there will be decisions made about policies that affect them, there should be an indigenous presence or mechanisms to check with them, when a plan for bilingual education, for example, is going to be adopted. The same goes for elective institutions, in Congress — the indigenous communities should be represented. In some countries they have established this with an indigenous quota, for example. Colombia, Venezuela, and Bolivia all have an indigenous quota that is achieved directly, rather than through political parties. They are elected from indigenous organizations or indigenous authorities and have to speak their indigenous language. They come (into office) through a vote specific to the indigenous quota. In Venezuela it is guaranteed by the 1999 Constitution. It's the same thing in Colombia, where it is guaranteed by the 1991 Constitution and there is a law to regulate it.

Finally, among the challenges to the implementation of these rights is firstly that the communities know their rights, secondly that they not only use direct measures (mobilization, protests) but also use mechanisms like amparo [a form of constitutional protection], habeas corpus, and constitutional procedures to protect their rights. But there also is a need for change in the mindsets of judges, prosecutors, and public servants — that they be conscious that they must enforce and respect indigenous rights. □

Consultation or prior consent?

Faced with ambiguous policies, indigenous peoples rely on international law and their own initiatives.

In Ecuador, the right to informed and prior consultation before the implementation of governmental or private programs in communal lands is a source of constant protests, some of which achieve their goals; but most end up embroiled in complex legal processes which benefited the state, or companies acting with the state's consent.

Already in 1998, the indigenous peoples' right to be consulted before any interventions by government programs in their territories was incorporated into the Constitution. That same year the International Labour Organization's Convention 169 on Indigenous and Tribal Peoples was ratified, incorporating into Ecuadorian jurisprudence the rights of indigenous peoples as specified in this convention.

While the 1998 constitutional declaration on prior consultation was also embodied in the 2008 Constitution, it did not signal a real effect on policy. On the contrary, the statement itself was a source of conflicts within the Constituent Assembly, causing the first fissures among factions that in 2006 supported the election of President Rafael Correa.

The indigenous leader Mónica Chuji, who chaired the Natural Resources Board in the Constituent Assembly that drafted the 2008 Constitution, remembers the first confrontation that occurred within the ruling party's assembly members.

"Those of us who were linked to the indigenous population demanded that the Constitution establish the requirement that indigenous peoples give their consent before implementing government programs in their territories, and not merely be consulted," said Chuji.



Community of Rukullacta will decide on allowing in oil companies following internal consultations/ANDREA CUJI

The confrontation of concepts, at first glance, was a response to what had been happening with the 1998 Constitution, which provided for prior consultation as the only requirement before intervention in indigenous territories. But little to nothing of value resulted from these consultations, since community decisions were not taken into account.

Governments and companies interested in extracting resources from indigenous lands essentially resorted to a number of ruses to ensure that they complied with the requirement within prior consultation.

One of the most used was to call community assemblies in which they were informed about the upcoming plans, but at no time were they asked if they accepted — or not — the proposed plans.

"To convene a meeting of the community, or to call together certain leaders, to inform them about government plans is not a consultation, since there was no opportunity for the community to express their agreement or disagreement with the proposal; thus we demand that

"We demand that the Constitution speak of prior consent."

— MÓNICA CHUJI

the Constitution speak of prior consent," said Chuji.

Prior informed consent implies that the community agrees with the intervention in its lands. This in turn requires that the outcome of the prior consultation be binding. Neither consent nor the requirement to comply with the outcome of any prior consultation was incorporated into the 2008 Constitution.

Constitutional ambiguities

The ambiguity of the Constitution led to social organizations and government

representatives to go head to head in court and press for the development of secondary legislation that define the nature and procedures needed to legitimize prior consultation.

The government won the approval of two legal instruments that, in practice, destroyed the achievements won by the social movements in the constitutions of 1998 and 2008, such as Decree 3401 in 2002, and Decree 1040 in 2008.

According to David Cordero, a lawyer for the Regional Foundation for Human Rights Consulting, or INREDH, Decree 3401, which established regulations for the implementation of prior consultation, in addition to trying to regulate a law that did not exist — and even now does not exist — violated the right to participation of the communities that should be consulted, as it did not mandate the presence of all the people in the community but only of certain representatives that could act on their behalf.

“Companies interested in entering indigenous territories could convince three or four people and get them recognized as representatives of communities, and avoid having to confront the entire community,” said Cordero.

Moreover, under this regulation, community input was not taken into account, because it stated that in the case of “dissent or not reaching resolutions, whoever coordinated the consultation should take note of these disagreements and continue with the process.”

“Under this law what was important was that there should be a meeting; if there was no agreement, or if there were no resolutions, this was not of the slightest importance, since the important thing was that it complied with the act,” says Cordero.

Meanwhile, Decree 1040 incorporates an element so that the community input can be considered: it must be “technically and economically viable.”

“If a community is opposed to extractive activity, this opposition may be considered as long as is technically and economically feasible, that is to say, if it can economically offset the earning that a company would lose out on by not exploiting a territory’s resources. How can a community financially compensate the earnings of a company?” inquires Cordero.

A history of resistance and legal struggle

With rigged legislation, the only possibility that the views of indigenous people will be considered when designing plans to intervene in their territories have been with mobilization and implementation of innovative legal remedies that appeal to international agreements and treaties.

Most of these battles have been against the involvement of the extractive industries such as oil and mining. Within these struggles, significant gains have been made by the Independent Federation of Shuar People, or FIPSE, in 1999, by opposing the entry of US-based oil company Arco Oriente in their lands in the Amazonian province of Morona Santiago; they were able to get the Constitutional Court to recognize that community organization should be respected, and not splintered.

Another significant victory was achieved by the Waorani nation in the province of Orellana against the Italian oil company AGIP Oil Ecuador. The Confederation of Indigenous Nationalities of Ecuador, or CONAIE, showed how a company deceived a nation by passing a pseudo-agreement for compensation as prior consultation. AGIP got the Waoranis to allow oil drilling in exchange for three quintals of rice, three pounds of sugar, six buckets of lard, three bags of salt, two footballs, a referee’s whistle and a stopwatch.

Emblematic cases like the Kichwa community of Sarayaku, in Pastaza, which also last year was able to protect its territory against the onslaught of oil firm CGS Argentina, when it took its case before the Inter American Commission on Human Rights by arguing that in Ecuador the outcome of prior consultation was not mandatory, have led other communities to follow the same course; indeed, an example of how a true prior consultation should be is the case of the village of Rukullacta in the province of Napo.

Proactive internal consultation

Rukullacta is planning to perform an “internal consultation” to determine whether to allow oil companies to enter its territory.

“Rukullacta has decided to initiate an information process on oil exploration; to that end, it has invited government representatives, oil company officials [Ivanhoe Energy of Canada and its

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— RODRIGO VARELA

national partner company Transsep] and environmentalists to participate in meetings in each of the communities. During these, the leaders will also explain the plan de vida, or life plan designed for Rukullacta, based on conservation, human development and investment in ecotourism,” said Rodrigo Varela, another INREDH lawyer.

As put forth, this process would conclude with a secret ballot by every inhabitant of Rukullacta, and with the presence of international observers, government officials and indigenous leaders.

“Detailed information, participation of all actors involved and, above all, support from indigenous leaders, will allow for the realization of a genuine consultation where, if the indigenous side loses, it would be lost fair and square, and not through misleading or deceptive processes. And if they win, the people of Rukullacta will stand their ground on the victory attained during the consultation,” says Varela.

“Rukullacta’s internal consultation will be an example of how the state should handle prior consultation, with binding results and total respect for the rights of indigenous peoples, and not as it is now, a consultation where the outcome does not matter, but rather what the president decides does,” says Varela. □

Political will to apply consultation is lacking

Regulations for prior consultation violate other rights of indigenous peoples.

Twenty years after prior consultation came to exist in Colombia, this fundamental right of indigenous peoples is not properly upheld in the country.

In 1991, Law 21 ratified at the national level in Colombia the International Labour Organization's, or ILO, Indigenous and Tribal Peoples Convention 169, which contains a clause regarding prior consultation; this is in turn supported by articles 1, 2, 7, 70, 329, and 330 of the Colombia constitution.

"The report reveals a paradoxical situation in Colombia, where a highly developed normative and jurisprudential foundation stands in stark contrast to the reality of disregard for the right to prior consultation. The normative and jurisprudential context in Colombia is clearly conducive to enjoyment of this right. In addition to providing for the incorporation of international law into domestic law, the Political Constitution of 1991 is forward-looking in the protections it affords [to] the rights of indigenous peoples and Afro-descendent communities to cultural identity, collective ownership of traditional lands, and their own forms of government," says the international humanitarian organization Oxfam, in its report, "The Right of Indigenous Peoples to Prior Consultation," published last March.

"Unfortunately, prior consultation has struggled since its inception. Currently there are many concerns about its implementation, its benefits and the fulfillment of its objective of protecting the social, cultural and economic integrity



Consultation isn't enough; free and informed prior consent is necessary/UNHCR

of indigenous peoples," Gloria Amparo Rodríguez, director of Environmental Law Research at Universidad del Rosario, told *Latinamerica Press*.

"It is startling that in Colombia [since 1993] until February of this year, 2,142 environmental permits were given and only 141 prior consultations were conducted. That is a very small number when one considers that the lands of ethnic communities make up 28% of the country," highlights the researcher, who is considered one of the country's top scholars on this topic.

Rodríguez emphasizes that of these consultations, "just five have been made for the mining sector," this activity being one of the so-called "engines of national development" proposed by President Juan Manuel Santos' administration in its recent Development Plan.

Unconstitutional regulation

"The most complex issue within prior consultation is procedure. The indigenous

people feel that with the regulation as it stands now, their rights are being violated," Diana Carrillo, of the National Indigenous Organization of Colombia, or ONIC, explained to *Latinamerica Press*.

Carrillo argues that Decree 1320 from July 13, 1998, which is used to regulate prior consultation with indigenous peoples and communities of African descent on projects to exploit natural resources within their territories, "is unconstitutional, first because the communities were not consulted, and second because it limits the consultation to deeded parcels without recognizing ancestral lands, and because it establishes a very hurried process — it allows a 20-day period for the companies to impart on the communities a draft of the project — during which the communities do not have time to express their concerns."

Nevertheless, for Vice Minister of Interior and Justice Aurelio Irragorri, "with the existing regulations, it is possible to guarantee the communities their rights.

What we have done is to sensitize the companies to the fact, as well as requiring, that in the areas where consultation is obligatory, they will not be able to invest without it.”

Iragorri told Latinamerica Press that the “delay in the process or the lack of awareness among companies led to the lack of consultation.” He adds that “when we arrived [the government that came to power in 2010] there were more than 500 pending applications for certification [the opinion of the Ministry of Interior and Justice if a consultation was needed in the area where a project would be carried out]. Subsequent to an emergency plan implemented in January of this year, we can confirm that to date we only have 25 pending cases.”

The certification and backing that the State should do in these cases has also been deficient, the ONIC added.

“The government has an Office of Ethnic, Minority and Roma [Gypsies] Affairs in the Ministry of Interior and Justice, a kind of advisory board where six people carry out all processes of prior consultation at the national level, from a law to a megaproject. The government provides simple oversight, without protecting the rights of indigenous peoples.”

This assertion is contradicted by Iragorri, who says that “in practice we operate as a kind of notary. We orient the community so their rights are not violated, guide businesses so that they know what their obligations are, and we accompany the process from the beginning.”

“We have a preliminary meeting at which we explain what the process will involve. We do training workshops, impact workshops, and the designation of preliminary agreements, agreements, protocol, closing and monitoring compliance that go with these agreements.”

Guarantees of the Constitutional Court

Given the ignorance or indifference to indigenous rights, the Constitutional Court has become the authority to protect the right to consultation, and according to Rodríguez, “in each of their sentences it has been progressing on what to do, whether ordering to suspend projects until a referendum takes place, or until an agreement is reached.”

That is how the Forestry Act of 2008 and the Rural Statute of 2009 were declared invalid by the Court, because

“Consultation served to manipulation; in many cases it served to make believe that businesses can come and replace the State.”

— DIANA CARRILLO

during the processing of the projects in Congress, the participation of indigenous communities and those of African descent were not taken into account.

In one case, in the U’wa communities, a Constitutional Court ruling in 1997 not only stopped drilling for oil on indigenous lands in the eastern department of Norte de Santander by the US company Occidental (OXY) because it lacked prior consultation, but it also reaffirms that the procedure must be made in good faith. This latter is based on a complaint by the U’wa where OXY is accused of presenting as an approval the attendance signatures collected at a meeting.

Another advance was the so-called sentence for Careperro in 2009 that suspended mining on 16,000 hectares, for which access had been given to US company Muriel Mining Corporation in late 2004 in the northwestern departments of Antioquia and Choco.

“Here the Constitutional Court has stopped just talking about popular consultation and starts talking about prior, free and informed consent. This means that the decision of the people is binding and must be respected, and thus incorporates consent into case law,” explains the ONIC representative.

The progress made by the Court was reaffirmed March 3 with the T-129 sentence, which ordered a stop to the construction of a highway, the bi-national electrical connection between Colombia and Panama, and a mining concession in

the indigenous communities of Chidima Tolo and Pescadito, in the department of Chocó, until the corresponding consultations with the indigenous community of Embera Katío were carried out “keeping in mind the pursuit of the community’s free and informed prior consent.”

From consultation to consent

And it is precisely consent and the right to veto that are missing from prior consultation in Colombia.

“It is necessary to regulate prior consultation with some procedures, with the burden of proof, a responsible party. The regulation has to be through a statutory law, but it must go through Congress, and communities fear that the project submitted by indigenous organizations will be changed in Congress,” said Carrillo.

“In addition, Colombia should ascribe to the whole of the United Nations Declaration on the Rights of Indigenous Peoples, and the government does not want to hear about the free, prior and informed consent.”

“What is at stake is the life and survival of indigenous peoples. Consultation served to manipulation; in many cases it served to make believe that businesses can come and replace the State. I think the most important thing now is that national and international standards are met regarding prior consultation and that free, prior and informed consent is reached. This would be the most suitable way to real and effective participation of indigenous peoples.”

“In a consultation process, concerns should be heard, comments or observations should be taken into account, yet there is no right to veto,” said Iragorri. “Colombia signed the UN Declaration but made exceptions: for example, regarding to authorization needed for the troops of the Republic of Colombia to enter areas where there are indigenous communities, we believe that that authority can be exercised in the entire country, as well as that in which permission would be needed to exploit indigenous lands, being that our Constitution clearly states that the State owns the subsoil.”

He believes that it is not possible to have “a project under which, given the conflict we have in Colombia, we would need a separate authorization apart from that of the President of the Republic for the free movement of troops.” □

Decree limits prior consultation

Indigenous movement calls for repeal of decree that violates the right to consultation, and rejects the government proposal.

The application in Chile of the prior consultation mechanism established by the International Labor Organization's Convention 169 concerning Indigenous and Tribal Peoples is limited and reduced.

The primary restriction on this right of indigenous communities is through the Supreme Decree 124, a regulation issued by former president Michelle Bachelet's administration (2006-2010), the same day that Convention 169 went into force in September 2009.

The decree dictates that consultation is "the process through which concerned indigenous peoples, through the systems this regulation lays out, can express their views about how, when, and why certain legislative or administrative measures, originated in any of the state's agencies, may affect them directly."

"This decree goes against the essence of consultation, which is the effective participation of indigenous peoples in the adoption of legislative and administrative measures that concern them," said Marcela Lincoleo, president of the Lakutun group, referring to Article 6 of ILO Convention 169, which establishes consultation through appropriate mechanisms and representative institutions, not state-defined procedures. "The prior consultation provided for in Convention 169 is supplanted and misrepresented by Decree 124," remarked Lincoleo.

José Valeria Quilapan, professor at the Academy of Christian Humanism University and an expert in indigenous affairs, explains that there is a great lack of understanding in Chilean society and

even in the indigenous communities about what prior consultation and participation of the native population are, "when this should be a national debate."

"In the Chilean state's relationship with indigenous peoples there is an institutional framework that wants to keep indigenous peoples controlled, when the point is their self-determination," he explains.

Rejection of major government consultation

In September 2009, James Anaya, UN Special Rapporteur on the Rights of Indigenous Peoples, highlighted in the Recommendations to Chile report the usefulness of conducting a "consultation on the consultation," emphasizing the need to "consider the essential requirements of the consultation set out in the special regulations".

Thus, the government announced in early 2011 the implementation of the "Consultation on Indigenous Institutionality," known as the "great consultation", which began in May and will finish in September; it addresses the proposed constitutional reform that recognizes indigenous peoples, the content of bills to create the National Indigenous Development Agency and the Council of Indigenous Peoples. Only in the latter part of this consultation is the process of consultation and participation brought up.

"In the great consultation, the government puts last the issue of how people want to be consulted and the methodologies used. How is it possible that this is at the end of what we are going to comment on institutional recognition and institutionality, if we as a people have not yet discussed what mechanisms we find appropriate for us to be consulted?" says Sandra Huentemilla, president of the Association of Mapuche Professionals.



Little is known about the consultation that the government is conducting in indigenous communities/Paulina Veloso

The strategy for the government's consultation indicates that during the process, a high level of participation from indigenous organizations was taken into account, with the means of communication and resources to carry out prior meetings with communities. However, indigenous representatives surveyed say their communities have not been consulted.

For Huentemilla, this consultation is defining the native population's future as political and legal subjects, which is why the way in which the consultation is done is key — so it can be participatory and in good faith. Huentemilla rejects the proposal on the grounds that it was developed by the government alone, and the indigenous communities were absent from its design.

At a meeting last May in Santiago, more than a hundred representatives of native peoples from around the country gathered to discuss and decide on “consultation, constitutional recognition, institutionality and governance,” according to the principles set out in ILO Convention 169.

Representatives of indigenous communities that participated in the meeting indicated their rejection of Supreme Decree 124 and made a call to stop the consultation process that is being carried out by President Sebastián Piñera’s government, demanding a consultation procedure that includes the full participation of indigenous peoples as established by international standards.

This rejection is also supported by indigenous communities in the Southern part of the country. So explains werkén (spokesperson) of the mapuche huilliche Pepiukelen community, Francisco Vera Millaquén, who said that the government is leading a process that goes against ILO Convention 169.

“The UN rapporteur was clear in saying that there should be a consultation to establish the mechanism by which the consultation would happen, that is to say, first defining the procedure and the matters to address. That should be the first step, and after it should be decided what will happen with the constitutional recognition of native populations, and finally addressing indigenous policies and institutionality,” said Vera Millaquén.

Organizations that monitor the situation of indigenous peoples in Chile have also expressed their apprehensions toward the government proposal, questioning the process undertaken. This is what the Observatorio Ciudadano said in a public statement, indicating that “It is not appropriate that the government decided to consult on a mechanism that formalizes and develops those procedures, and at the same time, is already consulting on important issues regarding the situation of indigenous communities.”

These consultation mechanisms should have quality standards to ensure the effective participation of indigenous communities, says Juan Valeria Quilapán, academic and expert on indigenous issues.

“Since 2009, all of the laws and public policies made in Chile that affect indigenous people must be consulted.

“Above all we have to work as a people and discuss how we want such consultations to be carried out.”

— JUAN ANTONIO CORREA CALFIN

Therefore, the first thing to consult is the methodology, and that decision must have certain requirements for quality that are transparent, informed, culturally relevant, massive, with resources, and that cannot be consulted in an arbitrary or clientelistic way because otherwise the information collected will be distorted,” he says.

Thus, the great government consultation is not being done in line with the mechanisms established by ILO Convention 169, which provides that such consultations be made in advance and seeking to establish a consensus.

New reports

Last year the government gave the ILO its first report on the implementation of Convention 169, which must be drafted again due to gaps in its content, and should be submitted in September.

Huentemilla explained that the government report was not supported by the indigenous population since they did not know the contents of the document.

“That report was returned and must be submitted again, and that’s why the government is conducting this consultation, but the indigenous peoples do not know if the State is meeting the goals set out in Convention 169,” she says.

According to indigenous leaders, the government’s lack of progress on indigenous peoples’ affairs is the reason why the great consultation was touted this year.

In February, the ILO’s Committee of Experts on the Application of Conventions and Recommendations sent to the government a “direct request”, a mechanism used to communicate concerns to authorities, and made public its first comments on the implementation of Convention 169 in Chile.

In the “direct request,” the ILO Committee asked the government to respond

about the implementation of mechanisms for indigenous peoples’ consultation and participation. Among the observations is mentioned that the Decree 124 did not meet international standards and that “it limits consultation, aims at the arbitrariness of the administration to determine when it applies it and in what cases it is appropriate to consult.” Thus, the Committee of Experts requested the government inform it “about the process of consulting the indigenous peoples regarding a new regulation, which must incorporate its observations.”

As explained Guillermo Miranda, director of the ILO’s Subregional Office for the South Cone of Latin America, based in Santiago, “Chile’s government, according to established procedures, must respond and give further information about this request as part of its next report, to be submitted to the ILO Committee of Experts about the implementation of this Convention. At the request of the Commission of Experts, the Government shall give its next report this year so that the Commission can review it at its next meeting to be held in November and December this year.”

While waiting for the government to respond to those reports, indigenous peoples’ organizations must submit new reports including the weaknesses and limitations to prior consultation in Decree 124.

As stated by Juan Antonio Correa Calfin, who helped coordinate the meeting between indigenous organizations, from now on “come a series of efforts to repeal Decree 124 with actions in Parliament, the Constitutional Court — probably — and the government. Paralyzing the government’s consultation is one of the first steps. We must continue working with the ILO, but above all we have to work as a people and discuss how we want such consultations to be carried out.”

“We are demanding the repeal of Decree 124. We are asking the government to be consistent because the current Minister of Development and Planning said decree is not going to be used, and even Concertación [ruling party when the decree was issued] assumed that this measure was a mistake. So we’re telling them to repeal it. That would be a gesture to start a serious dialogue with the Chilean government,” declared Vera Millaquén. □

CONSULTATION AN INDIGENOUS A STATE

Indigenous and Tribal Peoples 169 Convention, ILO

Article 6

1. In applying the provisions of this Convention, governments shall: (a) **consult** the peoples concerned, through **appropriate procedures** and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

2. The consultations carried out in application of this Convention shall be undertaken, **in good faith and in a form appropriate** to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to **exercise control**, to the extent possible, over **their own economic, social and cultural development**.

In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

Article 16

2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their **free and informed consent**. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

<http://www.ilo.org/ilolex/cgi-lex/single.pl?query=011989169@ref&chspec=01>

Ratifications for ILO Convention

Country	Ratification date
Argentina	2000, July 3
Bolivia	1991, Dec. 11
Brazil	2002, July 25
Chile	2008, Sept. 15
Colombia	1991, Aug. 7
Costa Rica	1993, April 2
Ecuador	1998, May 15
Guatemala	1996, June 5
Honduras	1995, March 28
Mexico	1990, Sept. 5
Nicaragua	2010, Aug. 25
Paraguay	1993, Aug. 10
Peru	1994, Feb. 2
Venezuela	2002, May 22

Source: ILO.

*An international
convention has the
force of law for
states that ratify it.*

Conditions for an

- ☑ It should occur when there will be projects, works, or there will be projects, works, or
- ☑ It should be carried out by the
- ☑ It should be performed **before**
- ☑ It is a **process**, not just an action
- ☑ Its objective is to reach either a
- ☑ and informed prior **consent**
- ☑ The absence of an agreement
- ☑ the absence of **indigenous**
- ☑ It should be done in **good**
- ☑ there should be an atmosphere
- ☑ clarity in the process.
- ☑ **Appropriate procedures**
- ☑ keep in mind the ways, cus
- ☑ the communities being con
- ☑ It should be carried out th
- ☑ **representative instituti**
- ☑ ties, without omitting a
- ☑ communities themselves.

When is consent

In situations that could endanger the
or large-scale investments, with act



Saramaka people meeting/WILL PARINEL
ENVIRONMENTAL PRIZE

AND CONSENT: PEOPLE'S RIGHT, STATE'S DUTY

Free, prior and effective consultation

... legislative or administrative measures that will **directly** affect them or when... activities on their lands.

... **state**, not by individuals or private firms.

... any decisions are taken on matters that would affect them directly.

... or an informa-

... agreement or free... from the communi-

... does not generate... **people's right**.

... **faith**, that is to say, ... of confidence and

... should be used that... customs and language of... consulted.

... through the **traditional**... **practices** in said communi-... consultation with the



Indigenous peoples meet in Guatemala/THIRD CONTINENTAL INDIGENOUS SUMMIT ABYA YALA

Free, prior and effective consultation required for the state to make a decision?

... the integrity of a community, such as in the cases of population transfers, megaprojects, ... activities like natural resource exploration or exploitation on the lands occupied or used ... by communities, which could affect their way of life or means of subsistence.

The case of the Saramaka people vs. Suriname

The Inter-American Court of Human Rights ruled in 2007 in favor of the Saramaka afro-descendent tribal people that live in the forests of Suriname, with regard to the fact that the timber and mining concessions granted by the state on that community's ancestral lands effectively impacted the existence, value, use or enjoyment of the territory to which the Saramaka people are entitled and which is necessary for their subsistence.

The court declared that in cases like this and in order to preserve the livelihood of a people, the state is required to obtain free and informed prior consent from said community.



LO-GOLDMAN

United Nations Declaration on the Rights of Indigenous Peoples

Article 10

Indigenous peoples **shall not be forcibly removed from their lands or territories**. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 19

States shall **consult** and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed **consent** before adopting and implementing legislative or administrative measures that may affect them.

Article 32

1. Indigenous peoples have the right to determine and develop **priorities and strategies for the development** or use of their lands or territories and other resources.

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

3. States shall provide effective mechanisms for **just and fair redress** for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf

Communities reject initiative to regulate ILO Convention 169

Colom administration uses a legal ruse to limit indigenous people's right to be consulted on mining and hydroelectric projects.

On Feb. 18 Mayan Mam municipality of San Juan Ostuncalco, in the highland department of Quetzaltenango, voted overwhelmingly against seven mining exploration licenses granted by the Ministry of Energy and Mining to Canadian mining company Gold Corp, which started producing gold in December 2005.

Of 6,758 people, including children, who took part, all but 30 rejected the mining projects authorized by Álvaro Colom's government.

The San Juan Ostuncalco plebiscite was held in solidarity with two other Mam communities in Quetzaltenango — Cabricán and Huitán — which rejected mining licenses in two other referenda held in November last year.

It was the 48th plebiscite that has been held in Guatemala since the country ratified International Labor Organization's Convention 169 on the Rights of Indigenous and Tribal People, in 1996.

In the February vote, the plebiscite was organized by the municipal authorities using ballot papers, on which the question "do you agree with mining projects in San Juan Ostuncalco?" was printed in the Mayan Mam language and voters had to mark the "yes" or "no" box with an X.

Other communities prefer to use more traditional forms of voting such as a show of hands, due to high illiteracy rates in many rural areas.

Mash Mash, one of the leaders of the Mayan Mam Council, explains that the people of San Juan Ostuncalco, Cabricán

and Huitán fear that mining projects might jeopardize the communities' water sources, as well as local forests and wildlife.

The pollution of local rivers with cyanide, explosions that have left huge cracks in villagers' dwellings and the systematic repression of local activists opposed to mining projects have become a regular feature of daily life in the communities of Sipakapa and San Miguel Ixtahuacán, in the northern department of San Marcos, where Montana Exploradora de Guatemala, a subsidiary of Gold Corp, runs the controversial Marlin mine.

Fearing that mining projects will bring similar disasters to their communities, indigenous people have repeatedly expressed opposition to projects that are clearly environmentally hazardous and show scant regard for the welfare of the local population.

However, none of the plebiscites held to date in accordance with Convention 169 have been legally binding. The government has argued that for the convention to take effect, a legal instrument known as a "relamento" that weaves it into the Constitution must be approved first.

A legal maneuver to curtail indigenous rights

The government's refusal to comply with ILO Convention 169 has been the focal point of indigenous protests against the Colom administration and has led to a number of rebukes from the Inter-American Commission on Human Rights.

In response, the government put forward a "relamento" that would allow



Guatemala's government does not consider the plebiscites to be legally-binding/LOUISA REYNOLDS

ILO Convention 169 to come into effect past February.

But so far indigenous organizations have voiced serious objections, mainly that they were not even consulted on the initiative. The government drafted the document without taking indigenous leaders into account and then posted the document — in Spanish — on the Labor Ministry's website with a 30-day window for citizens to read it and state any disagreements.

As Mayan anthropologist Irmalicia Velásquez Nimatuj points out, it is unrealistic and culturally inappropriate to expect remote Mayan villages — many of which do not speak Spanish and do not have Internet access — to download the lengthy document and present their objections in writing with such short notice.

"The regulation was never discussed with indigenous people or with the poor ladino [mestizo] population living in the areas where mining and hydroelectric companies operate," said the Guatemalan Campesino Unity Committee in a statement on Feb. 23. "For this reason we ignore and reject the government's initiative."

Secondly, the content of the document itself has been controversial.

Lawyer Carlos Loarca, of the non-governmental Guatemalan Office for Strategic Litigation on Human Rights, who has waged a long legal battle in the Guatemalan courts on behalf of the people of Sipakapa and San Miguel Ixtahuacán, explains that ILO Convention 169 is an international treaty, which means that it should have come into effect automatically when Guatemala signed it in 1996 with no need for a “reglamento,” as this only applies for laws approved by Guatemala’s Congress.

“If a ‘reglamento’ was necessary for a treaty to come into effect, why was this not required in the case of other international instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide?” he asked.

Loarca adds that different government institutions have issued contradictory and confusing statements about the application of ILO Convention 169.

In fact, a letter sent by the Presidential Commission on Human Rights to the IACHR in response to the latter’s concern with regards to the violation of indigenous rights in Sipakapa and San Miguel Ixtahuacán, in November last year, states: “ILO Convention 169 became a national law since it was ratified”.

If that is the case, argues Loarca, why has the Ministry of Energy and Mines repeatedly refused to acknowledge indigenous plebiscites as legally binding arguing that a “reglamento” needs to be approved?

The Constitutional Court has also issued contradictory rulings. In July 2009, it ruled that environmental impact studies carried out by the Ministry for the Environment and Natural Resources must include the consultation of indigenous communities in compliance with ILO Convention 169.

However, in a later ruling in December 2009, with regards to a plebiscite carried out by the municipality of San Juan Sa-

catepéquez in which the Mayan Kaqchikel population voted overwhelmingly against the construction of a cement production plant in the area, the court ruled that consultations can play “an accessory role” when environmental impact studies are drawn up.

When questioned on the controversial issue, President Álvaro Colom recently stated that “random plebiscites cannot be held without a proper order,” meaning that ILO Convention 169 would be applied on the government’s terms, not those of indigenous communities.

For indigenous leaders this is clearly unacceptable.

“The imposition of this ‘reglamento’ not only violates the collective rights of indigenous people, it also violates and misinterprets international conventions in favor of the government and corporations whose only aim is to exploit our natural resources,” said the Guatemalan Campesino Unity Committee. □

MEXICO

Karen Trejo in Mexico City

Indigenous communities without the right to consultation

Government imposes infrastructure projects without taking into account opinion of affected communities.

The violation of the right to consultation, which is constitutionally established, is systematic in Mexico, as is the right to participation in public affairs.

One of the primary reasons, according to reports from civil society organizations, has to do with a governmental strategy to illegally impose infrastructural megaprojects in indigenous and rural areas, as well as in nature reserves.

This problem has been aggravating social and agrarian conflicts in various regions of the country; this in turn has increased the vulnerability of indigenous communities that, not having been informed or consulted, are seriously threatened with the dispossession of their lands, environmental degradation and forced displacement.

Priscila Rodríguez, a lawyer with the Mexican Center for Environmental Law, or CEMDA, explains that among the factors that prevent the indigenous communities from fully securing the right to consultation is the failure to apply Article 2 of the Mexican Constitution, which requires authorities to carry out consultation processes when it comes to planning and implementing legislation, development programs, and infrastruc-

tural construction projects that impact the communities’ territories and natural resources.

In March 2010, a debate began in the House of Representatives over a bill called the Consultation with Indigenous Peoples and Communities to regulate that article; from December to May, a consultation process was conducted with indigenous peoples and communities in several states across the country to discuss the project. The result was not encouraging.

While this initiative, promoted by the center-right Partido Revolucionario Institucional, or PRI, envisages the obligation of federal and state governments, as well as the legislature, to ensure the right to prior consultation with the indigenous communities on issues relating mainly to the establishment of legislative measures, the

care and enjoyment of natural resources in their territories, and the implementation of operating rules and regulations in social programs at all three levels of government, it also maintains that neither public budget allocation nor the appointment of leaders in charge of the specialized agencies that deal with indigenous peoples, except the delegates of the National Commission for the Development of Indigenous Peoples, or CDI, may be the subject of consultation. Nor can it be considered binding law because it does not impose penalties on officials and/or private companies for breach of agreements or if the consultations are not performed properly.

Against this backdrop, social activists for the rights of indigenous peoples in Mexico have formally requested the Inter-American Commission on Human Rights, IACHR, to chair a working group with the Mexican state and civil society to bring this bill in line with standards for the protection of human rights established by international treaties that Mexico has ratified. This proposal has not yet materialized.

Struggles of resistance

In the middle of streams and mountains in the western Sierra Madre, on land considered a natural and cultural heritage site by the United Nations Educational, Scientific and Cultural Organization, or UNESCO, live the Huicholes (Wixárika), an indigenous community. Since 2005, they have been involved in a social and legal battle to defend their ancestral territories and the region's biodiversity, which are threatened by the government's insistence on supposed development projects that include the construction of a highway called Bolaños-Huejuquilla in the highlands of the western state of Jalisco.

Humberto Fernández Borja, president of the civil organization Conservación Humana, which since 1995 has worked for the rights of these indigenous communities, legally represents the affected population and denounces that "since 2005, they tried to start construction on a highway without the permission of the owners of the land that would be affected.

In fall 2007, the invasion and dispossession of the Huicholes' communal lands in Tuapurie started; for four months, at the beginning of the works, sacred sites and houses were destroyed, springs and streams were affected, and hundreds of the community's trees were felled and stolen.

In the southern state of Guerrero the situation is also complicated.

The campesino population of the rural area in the municipality of Acapulco,



Campesino community of Guerrero sees its land threatened by La Parota hydroelectric plant/KAREN TREJO

dedicated to fishing and farming, sees its territory is threatened by the attempt to impose a government project to build a hydroelectric dam called La Parota, which would mean flooding 17,300 hectares (43,250 acres) and displacing 25,000 people, with another 75,000 affected.

Rodolfo Chávez Galindo, community representative and member of CECOP, a board of ejidos (communal lands) and communities opposed to the La Parota dam, states that "in January 2003, the state-run Comisión Federal de Electricidad, or CFE, broke into our territory, destroyed trees and fields, dynamited hills to divert a river and brought in machinery without the consent of the people."

Both Fernández Borja and Chávez Galindo have reported to national and international bodies like the IACHR that the Mexican government has flagrantly violated the rights to consultation and participation in public affairs of those indigenous and campesino communities.

Together with other civil organizations, the two activists joined a campaign

to denounce these and other cases in communities such as San Juan Copala, Oaxaca, southern Mexico, and Real de Catorce, San Luis Potosí, in the center of the country, among others.

Illegal mechanisms

Through public forums, diffusion through social networks, and the production and promotion of documentary films, civil society organizations have highlighted the Mexican government's strategy to impose the construction of infrastructural megaprojects, supposedly designed as a public service for all: the extortion of leaders, the falsification of signatures on alleged proceedings at communities assemblies, as well as acts of political repression, armed harassment, fabrication of crimes and the murder of community leaders.

The documentary "And the River Flows On" by director Carlos Pérez Rojas, winner of international awards, narrates the resistance of the campesino communities of Guerrero that oppose the construction of the La Parota dam.

For León Olivé, professor at the National Autonomous University of Mexico, or UNAM, and author of the book *Interculturalism and Social Justice*, this scenario confirms that "until now, we have been incapable of establishing the political, economic and legal structures and institutions that guarantee the rights of the different communities in our country to survive and develop in an autonomous way, as decided by their members, to choose how to maintain or change their ways of life, to participate effectively in decisions about the use and future of the material resources in the territories where they live, and to participate actively in the construction of the Mexican nation."

Mexico, a country with vast inequalities, faces the huge challenge of turning itself into a multicultural country where the right to consultation and decision-making for the indigenous peoples on the matters that affect their lives is guaranteed. □

Big projects, big threat

Government gives the green light to ventures that affect indigenous territories.

Although the Brazilian Constitution guarantees indigenous peoples the right to prior consultation regarding projects and programs that potentially impact their land, large projects pushed by the government in recent years are not taking into account the indigenous communities' full rights.

Article 231 of the 1988 Brazilian Constitution recognizes the right of indigenous populations to "their social organization, customs, languages, beliefs and traditions, and the original rights to the lands they traditionally inhabited; it is the Union's duty to demarcate them, and protect and ensure respect for all their properties".

The same article indicates that the lands traditionally occupied by indigenous communities "are intended for their permanent ownership, taking into account the exclusive use of the riches of the soil, rivers and lakes existing therein". Also, the use of water resources, including as potential energy, and the exploration and extraction of minerals on indigenous land "can only be carried out with the authorization of the National Congress, after listening to the affected communities, guaranteeing their participation in the results of extraction, in accordance with the law."

However, there are sectors of Brazilian society, like the National Conference of Brazilian Bishops,

or CNBB, who are concerned about "the advancement of more than 400 ventures that will affect 182 [already demarcated indigenous] territories."

"Of the more than 250 indigenous peoples of Brazil, about 90 remain voluntarily isolated. They live in the woods, but their lives are threatened by big government projects, many of them part of the National Program for Accelerated

Growth, or PAC, which are encroaching on their traditional territories. This situation of vulnerability exposes them to a constant risk of extinction as a result of the severe damage caused by many of these projects, which also prove highly harmful to the environment." So read an official statement by the CNBB at the end of its 49th General Assembly, held in the city of Aparecida, São Paulo, from May 4-13, 2011.



Leader Sonia Bone Guajajara with Chief Raoni Kayapó in a demonstration in Brasília/COIAB PRESS OFFICE

The CNBB is concerned about "the advancement of more than 400 ventures that will affect 182 [already demarcated indigenous] territories."

Projects do not benefit indigenous peoples

One of the ventures that constitutes a threat to indigenous peoples is a project to divert water from the São Francisco River, one of the country's longest, which spans five Brazilian states, starting in Minas Gerais and emptying into the Atlantic Ocean after traveling over 2,800 km. The diversion project seeks to export the waters of the São Francisco to the states of Ceará, Rio Grande do Norte, Paraíba and Pernambuco, areas that are part of the so-called semi-arid Northeast, which is marked by severe droughts.

Nevertheless, environmental organizations and social movements have been very critical of the diversion project, which would not particularly benefit the communities, like the indigenous peoples living in the São Francisco River basin. This is the case of the communities of Truká, Xukuru, Pipipá (Pernambuco), Tuxá and Tumbalalá (Bahia), Xukuru-Kariri and Geripankó (Alagoas) and Xokó (Sergipe). Many of these communities with land in the São Francisco basin, known as Opará by the indigenous people, do not yet have fully delineated territories;

therefore the recognition of ancient rights of indigenous communities is considered a relevant ethical issue when looking at a project of this scale.

It is estimated that at least 18 indigenous communities in the Northeast and in Minas Gerais could be affected in some way by the diversion project.

“There were meetings in the water diversion case but they were in sophisticated environments, and also the buses of many indigenous people who were to participate in them were stopped halfway there, preventing them from participating in an appropriate manner,” says Bishop Emeritus Tomás Balduino, former president and a founder of the Indigenous Missionary Council, or CIMI, an agency linked to the CNNB.

Another highly controversial project with government support is the construction of the hydroelectric plant of Belo Monte, in the Brazilian Amazon’s Xingú River basin. It will be one of the largest hydroelectric dams in the world and is considered by the federal government as a strategic project to ensure power to a country that grows at least 4 percent in economic terms annually. It should generate about 11,000 megawatts.

However, from the outset the project has been in question regarding its environmental and social impacts, such as those related to indigenous peoples in the region. In the Xingú River basin there are 28 ethnicities — 12 in the state of Mato Grosso and 16 in Pará — in 29 indigenous territories, totaling about 20,000 indigenous people. There are three indigenous territories directly affected by the Belo Monte project, two by reducing the flow of the Xingú (Arara de Volta Grande and Paquiçamba) and one for the expected increase in road traffic across the region (Juruna Indigenous Area). There are about 230 inhabitants total in all three areas.

Seven other indigenous territories would be indirectly affected by the Belo Monte project, totaling 2,000 people. All of this information is reflected in the environmental impact study prepared by Eletrobras, the state company responsible for the project. The federal government has said it will guarantee all rights of indigenous peoples.

However, the indigenous people themselves are very concerned. On Janu-

“The consultation should take into consideration the language, customs and traditions of indigenous peoples.”

— MONS. TOMÁS BALDUINO

ary 28, 2011, just days after taking office, President Dilma Rousseff received a letter from the Coordination of Indigenous Organizations of the Brazilian Amazon, or COIAB, which expressed its opposition to the construction of the Belo Monte Hydroelectric Complex.

Indigenous people demand to be heard

COIAB leaders say that “the Brazilian government has taken a negligent and disrespectful stance against indigenous peoples that not only fully violates the rights of indigenous communities as guaranteed in the existing Federal Constitution and international law [the International Labor Organization’s Convention 169] and the United Nations Declaration [on the Rights of Indigenous Peoples], which requires the free and informed prior consent of indigenous peoples in the case of projects that affect their lives, but the government has also allowed Eletronorte [principal shareholder of Consorcio Norte Energia, which will build the complex] try to co-opt the indigenous communities.”

COIAB asks of President Rousseff, in short, that the indigenous peoples be heard: “Rivers feed our culture. So that the Xingú does not drown in this valley of tears, so that the cemeteries of the Xingú families do not become construction sites,

and so that these sites do not become other cemeteries, we ask once again that our voice be heard”.

The vice-coordinator of the COIAB, Sonia Bone Guajajara, notes that in addition to prior consultation, “it is also necessary to have consent, because it is very easy to consult and then, without the consent of indigenous peoples, continue with a project by ignoring them.” She adds that the Brazilian government’s position, in the case of Belo Monte project, has been questioned recently by the Organization of American States, or OAS.

In late March 2011, the OAS Inter-American Commission on Human Rights, or IACHR, asked the Brazilian government to suspend the licensing and construction of the Xingú Hydroelectric Complex. Among other reasons, the Commission defended the need for the Brazilian government to advocate for a consultation process that is “prior, free, informed, in good faith and culturally appropriate” for all communities affected by the project. Brazilian president Dilma Rousseff decided to cut all relation with the IACHR.

“The consultation should take into consideration the language, customs and traditions of indigenous peoples,” Archbishop Balduino maintained.

“The government is going above us. It is difficult for communities, but we are mobilized,” said the vice-coordinator of the COIAB, citing a public meeting in Brasília to criticize the Belo Monte project.

The project, which will be inaugurated in 2015, received approval on June 1 from the Brazilian Institute of Environment and Renewable Natural Resources.

For Bishop Emeritus Pedro Casaldáliga of São Félix do Araguaia, Mato Grosso, indigenous peoples have yet to be heard on major projects because, in his opinion, they “are projects identified with agribusiness projects, which turn a quick profit, whereas Indians are identified with communal living, in communion with the earth, with giving things time.”

For Bishop Casaldáliga, the right to prior consultation will only be fully observed in Brazil and throughout Latin America after “the ever-growing alliance and strengthening of indigenous peoples as well as of the blacks, migrants, people affected by large dams, in prophetic movements that can really change things.” □

The right to determine their development



Anti-mining march by the Regional Federation of Campesino and Native Communities of Pasco/KARIN ANCHELÍA JESUSI

Prior consultation: a right that ensures other indigenous rights.

The right to consultation for indigenous peoples in Peru has existed for the last 17 years, since the ratification of the International Labor Organization's Convention 169 concerning Indigenous and Tribal Peoples; nevertheless, timber, petroleum, and mining concessions on indigenous lands are still granted without prior consultation in the communities, causing an increase in the number of social conflicts.

Until March, the Defensoría del Pueblo, or national Ombudsman, registered 227 social conflicts, of which 51.5% were started because of socio-environmental conflicts, primarily in the regions of Amazonas, Ancash, Apurímac, Ayacucho, Cajamarca, Cusco, Junín, Lima, Piura

and Puno, all of which have indigenous populations.

The Peruvian government has turned blocks over to the extractive industries that approach 75% of the Amazonian jungle. Moreover, it issued a series of legislative decrees that favored concessions for extractive projects on indigenous lands, which caused indigenous uprisings for four months in 2009 — a struggle that ended with a face-off in the Amazonian city of Bagua on June 5 of that year, which left 33 police officers and indigenous Awa-jun people dead.

The application of prior consultation, established by Convention 169, would be an effective tool to put an end to this social unrest. At least it seems that is how Congress understood it when on May 19, 2010, it approved legislation for the Right to Prior Consultation for Indigenous or Native Peoples recognized in the ILO's Convention 169, and which had the consensus, support, and backing of indigenous organizations and civil society institutions.

Government without good faith

With this law, Peru took the lead by being the first Latin American country to approve a law for consultation — other nations have enacted only regulations — which merited a nod from various indigenous and human rights organizations, the national Ombudsman, the ILO Committee of Experts on the Application of Conventions and Recommendations, and United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, for being compatible with Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples.

However, one month later the executive branch made eight observations on the law and prevented its enactment.

Among the executive branch's observations is to specify that the state has the final decision on legislative or administrative measures to take, and that consultation should proceed only in areas of assigned ownership of the native communities of the Amazon. It goes so far as to say that it does not consider that the obligation to consult impacted communities every time legislative or administrative measures that could affect them are foreseen stems from Convention 169.

For Hernán Coronado, of the Amazonian Center for Anthropology and Practical Application, or CAAAP, "the observations that the Executive branch made on the Consultation Law are quite dangerous, because they end up distorting the right to consultation and not only [that], but also other rights."

"In our opinion, the observations [made by the Executive branch] are based on political arguments, not legal ones. The Peruvian government can no longer doubt or question, as it did before, whether or not it will comply with the right to consultation. It knows that it must comply, and what it is looking for is to minimize

the conditions of that right so that it is not effective,” he added.

Meanwhile, Alicia Abanto, head of the national Ombudsman’s Program for Indigenous Peoples, said: “There are two main points on which we express our opposition publicly: first, in our country there are Amazonian as well as Andean communities. We have diverse Quechua and Aymara ethnicities; therefore it is incorrect to say that there are indigenous people only in the Amazon, as suggested by the executive branch.”

“The other point is that the right to consultation applies to indigenous peoples independent of the issue of land deeds; the right is not based on whether a community has land deeds or not, because a law cannot restrict the right,” Abanto added.

Consultations for every taste

“For some time we the [indigenous] communities have asked that the Framework Law for Indigenous Peoples be approved, on the grounds of the ILO’s Convention 169, but unfortunately the government does not want to, because according to them: ‘How is it possible to consult with campesino and native communities, who are ignorant?’ That is the logic of this government,” states Benito Calixto, leader of the National Confederation of Peruvian Communities Affected by Mining, or CONACAMI.

Congress currently has two bills in line for debate and adoption. One was proposed July 6, 2010, by the Commission of Andean, Amazonian and Afro-Peruvian Peoples, Environment and Ecology, which seeks to uphold the original text of the law approved on May 19, 2010. The other one is from the Constitutional Commission, proposed one week after the first one, in which the Executive branch’s observations are accepted.

“The right to consultation is in effect, and although we don’t have a law, that is not a sufficient enough excuse for the Executive branch not to consult, nor does it exempt it from responsibility in the failure of the right to consultation,” said Coronado. “That is why we now have a proliferation of consultation methodologies; everyone and every sector are interpreting consultation in their own way.”

In October 2010, the Legislature began its first try at consultation with indigenous peoples. The Agrarian Com-

“Consultation is not an abstract right, it is always linked to other rights, and that’s because one consults to secure other rights.”

— HERNÁN CORONADO

mission promoted the consultation with national indigenous organizations about the Forestry and Wildlife Law, which with much difficulty progressed onward from the informational stage through decentralized national and regional workshops. But in the last national workshop, from May 12 to 14, 2011, the dialogue fell short when no agreement could be reached on 24 articles in that law; moreover, the indigenous leaders asserted that there was no guarantee that their contributions would be taken into account in the bill, since the final draft and regulations of the law would be in Congress’s hands and would ultimately be approved in a plenary session without adequately consulting the indigenous peoples.

And so it transpired. On June 15, Congress approved the Forestry and Wildlife Law without an adequate consultation process with the indigenous communities that had lived in the Amazonian forests since ancestral times.

On May 12, the Ministry of Energy and Mines approved the Rules of Procedure for the Application of the Right to Consultation of Indigenous Peoples for Energy Mining Activities, fulfilling a 2009 Constitutional Tribunal ruling. But the indigenous people have not been consulted on that regulation, thus since

its enactment there exists a violation of Convention 169.

This regulation has been observed and rejected by various institutions and indigenous organizations for a variety of reasons.

The rule disregards the principle of flexibility in consultation since it sets a deadline. The rule of 20 days to complete the process and 10 more days to assess the measure, and assuming that all indigenous people make their decisions the same way and in short time, does not conform to reality.

Similarly, it equates the right of consultation with that of “citizen participation” and makes informational workshops out to be consultations, confusing people more. The regulation also specifies that consultations will be done regarding temporary hydroelectric concessions, but not for the final concessions, denying the possibility for indigenous populations to evaluate environmental impact assessments.

“The state turned the discussion on the right to consultation into a procedural issue; with that, it’s looking to exhaust the debate on consultation, but consultation is not an abstract right, it is always linked to other rights, and that’s because one consults to secure other rights”, asserts Coronado.

“What is at stake are the indigenous people’s fundamental rights, like autonomy, the right to development, land, and the right to life, issues that have always been under state authority; since the ILO’s Convention 169, [the state] sees its sovereignty limited and can no longer decide for the indigenous peoples, but rather the communities can decide for themselves”, explained the CAAAP representative.

“With regard to indigenous peoples,” Coronado explains, “there exists a special characteristic that makes all rights interconnected, that is to say, the violation of one right implies the violation of other rights. Therefore, consultation is not limited to agreement or consent, since these are end goals of the process, but beyond the procedural goal there is a substantive goal, which keeps the right alive and is the bottom line: the possibility that indigenous peoples decide what their development priorities are, that these influence the state’s decisions, and that in some cases projects will be halted because they put [the people’s] fundamental rights, like the right to life, at risk.” □

Dilemmas and conflicts of prior consultation

Indigenous communities demand that the government respect their right to be consulted on any extractive activities on their land.

Indigenous and campesino organizations from different regions throughout the country still claim that prior consultation is not applied with regard to the exploitation of natural resources, and that their land rights are being violated; speaking for the government, however, President Evo Morales has alleged that some leaders used this mechanism to “blackmail” the private and public companies that develop oil and mineral prospecting projects.

In this atmosphere of discordance, the debate in Bolivia today is over the implementation of the legislation, which for some analysts has as a backdrop the state’s inability to propose an alternative development model to that based on the extractive industry.

Prior consultation was included in the 2009 Constitution and is mentioned in articles 30, 352 and 403. Therein the right of indigenous and campesino peoples to consultation before any extractive activity begins on their land is recognized. It also establishes that consultation should be applied before any agreement, contract or authorization is signed to start projects involving the use of natural resources.

“Bolivia was one of the first [countries] in the world to incorporate into its laws the 2007 United Nations Declaration on the Rights of Indigenous Peoples, which establishes that the goal of the consultations is to obtain free and informed consent (articles 32-2). [Bolivia] also ascribed to the International Labor Organization’s



Indigenous Guaraní of the Charagua Norte community managed to get the state to consult on their terms and in accordance with their customs/CEJIS

Convention 169 [concerning Indigenous and Tribal Peoples], leaving no doubt about the state’s recognition of the rights of indigenous peoples to make decisions about their territory,” explained Iván Bascopé, of the Centre for Legal Studies and Social Research (CEJIS).

Social conflicts

Nevertheless, the Confederation of Indigenous Peoples of Bolivia (CIDOB) and the Confederation of Ayllus and Markas (indigenous communities) of Qullasuyu (CONAMAQ) maintain that the law has stayed on paper, and that foreign and domestic firms do not respect indigenous and campesino lands and intrude on them, causing serious damage to the ecosystem.

That was one of the reasons for the massive protest that organizations grouped into the CIDOB embarked on in mid-2010 from Trinidad, capital of the eastern department of Beni, en route to La Paz, and the alternative agenda proposed by CONAMAQ in the controversial Table 18 of the Peoples’ World Conference on Climate Change backed by the government in Cochabamba in April last year.

Copper mining at Corocoro, which is in the Jach’a Suyu Pakajaqui community, in La Paz’s Pacajes province, is one of the most concerning cases to CONAMAQ. The hydrometallurgical project, run by the State Mining Corporation of Bolivia (COMIBOL) and the Korean company Kores, anticipates a US\$200 million investment, was started without an environmental license, diverted a river, and has a record of contamination. The organization has appealed to the Inter American Commission on Human Rights (IACHR) seeking solutions given the lack of government attention to their claims.

Another case of infringement on the right to prior consultation is claimed by representatives of the Yuracaré, Mojeño, and Chiman people who live in the Indigenous Territory of the Isiboro-Secure National Park, through which a 360 kilometers (230 miles) paved road will pass linking the departments of Cochabamba and Beni. There are fears that the infrastructure, on which construction began on June 4, will not only destroy an ecosystem high in biodiversity, but will encourage coca cultivation and illegal logging of tropical timber.

Socio-environmental conflicts in Bolivia have increased in recent years, and

the indigenous peoples and campesinos from Chaco, which includes portions of the departments of Tarija, Chuquisaca, and Santa Cruz, have seen the most tension because that region contains most of the country's oil and gas activity.

The Guaraní People's Assembly (APG), which is the most representative organization of the Guaraní people in Bolivia, led protests last year and even staged roadblocks in opposition to the pollution generated by oil field exploration in the Agüaragüe Park aquifers.

"We have discovered oil spills in streams and creeks where people collect water, and we had to set up roadblocks so that the government would listen to us and we could lodge our complaints about this and other problems, like the lack of environmental monitoring, pollution and compensation for the hydrocarbon activity on Guaraní territory. We are not against the country's development or against state policy, as Hydrocarbons Minister Carlos Villegas insinuated last year, but we see that the agreements remain on paper but are not put into practice. We only ask to be respected," says Celso Padilla, president of APG.

Inadequate consultations

For his part, Director of Social and Environmental Management at the Ministry of Hydrocarbons Omar Quiroga said that the processes of consultation and participation with indigenous communities have been conducted since 2007, and that by the end of 2011 they will total more than 20. Consultations are conducted in four stages within two months, during which an agreement is established between the involved parties.

"That type of consultation has no legal value, because the entity that should carry out the project is the same one that does the prior consultation. It's a very serious case of [being] the judge and jury that is also seen in the environmental impact assessments, because they are performed by the same companies or entities that are interested in the mining being done," challenges Pablo Villegas, an analyst with the Bolivian Documentation and Information Centre (CEDIB).

"The consultations made by the Ministry of Hydrocarbons have many shortcomings, because they are done with the leadership of the indigenous and campesino organizations and fail to

"We are not against the country's development or against state policy".

— CELSO PADILLA

speak with the authorities of each community. Moreover, in the four evaluation sessions, only informational workshops are conducted, and the last meeting is to get the OK. In practice there is no consistent methodology for consultation as required by law, nor the political will to adapt these procedures to the reality of indigenous peoples and campesinos, because national policy still favors extractive industry," maintains Bascopé. He added that if such is the case with hydrocarbons and mining, in forestry it is much more chaotic, because there is no law regulating the concessions, the type of companies that can log, or under what conditions it should be done.

Government criticism of these claims has been harsh. Minister Villegas blamed indigenous groups for the postponement of investment plans, and in September of last year accused them of demanding excessive compensation. On April 27 of this year, while announcing the discovery of gas reserves in the Aquío X-1001 well, in the Caraparicito region in the eastern department of Santa Cruz, President Morales said the purpose of the consultations has been twisted, because some indigenous people do not do it order to preserve the environment, but rather to "blackmail" companies and the state.

"If the president has proof of blackmail, he should show it, but until now he hasn't," said Padilla. "All we are demanding are our rights. The government's fear must be to lose the already-established contracts that it made with foreign firms without consulting with us."

A model to follow

It would seem that prior consultation in Bolivia is stuck on a dead-end street,

but the case of the Native Community Territory (TCO) of Charagua Norte is an example that could serve as a model to resolve similar conflicts. In this region of Chaco Boliviano, the indigenous guaraní succeeded in setting their demands and requirements through a process of consultation and participation, which established that the state develop seismic exploration of oil fields in Tacobo and Tajibo according to their requirements.

"We told them: we don't want workshops, we don't want theoretical explanations in Power Point, we want explanations in our language, we want it done in line with our customs and in accordance with the technical criteria given by the Guaraní socio-environmental monitors who live in the area," said Ronald Gómez, leader of the Charagua Norte TCO.

Gómez said that in the past, companies and the authorities held meetings with leadership, consent was given, and the agreements for the execution of the project were determined, but the community was not directly consulted. This time it was demanded that the consensus of the communities come first, and later that of the leadership. Not just that changed; the workshops were replaced with assemblies during which it was established that the affected communities could exercise self-determination in deciding how they want consultations to be done, and could have a say in decision-making and in implementation of their own justice system — not in the sense of punishment, but to manage their territory.

It was decided that if in one of the stages of planning or decision-making, there was no consensus, the next step could not be reached — without having to abide by the two months required by the Ministry of Hydrocarbons as the duration of the consultation process.

In this process, the socio-environmental monitors that Guaraní people began using more than three years ago for the permanent surveying, recording, reporting, and control of the state of natural resources and extractive activities in the entirety of Guaraní land in Chaco Boliviano were key. The local monitors' reports from Charagua Norte were crucial to decision making. "They provide technical aid and with their experience, they avoid other decisions being made in the communities when there is a change in authority," explains Gómez. □

Court stops mining projects in indigenous territories

Tribunal guarantees right to consultation for Mapuche communities.

So far this year two Argentine court decisions reinforced the requirement of consultation prior to any legislative or administrative action affecting indigenous peoples.

The decisions by the Court of First Instance and the Superior Court of Justice, or STJ, in the southern province of Neuquén, regarding the Mapuche communities of Huenctru Trawel Leufú and Mellao Morales, are important in Argentina, where very few rulings address these issues, and where consultation is not instituted as a State practice. The verdicts halt the development of two mining projects, one for hydrocarbons and another for metal mining.

In February, Judge Mario Tommasi of the Court of First Instance No. 2 in the city of Cutral Co, Neuquén, rejected an appeal filed in 2007 by Petrolera Piedra del Águila, a domestically-funded firm. The appeal sought to ensure the company's entry into the fields of Los Leones, Umbral and Ramos Mexia, which were blocked by the Mapuche community of Huenctru Trawel Leufú, since these are on their territory.

Despite the provincial government's decrees (1271/97, 4716/99 and 0278/07) that supported the company, the magistrate denied the activity because it sought to enter indigenous territory without having "demonstrated full and proper compliance with the procedures for consultation and participation" as prescribed by Article 75 of the Constitution (with the specifications contained in Articles 6, 7 and 15 of the International Labor Organization's Convention 169

on the Rights of Indigenous and Tribal People, which was ratified by Law 24 071) as well as by Article 53 of the Provincial Constitution, and Articles 10, 19, 29 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples.

"It is the first time that the full extent of ILO Convention 169 has been recognized, and that the United Nations Declaration is cited; it is a ruling that totally complies with the rights of indigenous communities," said Juan Manuel Salgado, the lawyer for the Huenctru Trawel Leufú community and director of the Observatory of Human Rights for Indigenous Peoples. He stressed that "at first glance, [the verdict] justifies that the community not allow in the oil company."

The decision to "protect the territory" cost the villagers — not only there were several criminal cases lodged against them, but they were also subjected to arson attacks and for four years suffered harassment by security forces and civilians.

Court backs the Mapuche community

The community of Mellao Morales filed a case in 2008 to annul the contract between the Corporación Minera

"Supporting this is the backing of indigenous peoples, who no longer accept that mega-projects saunter into our territories."

— JORGE NAHUEL

Neuquina, or Cormine — which belongs to the provincial government — and the Chinese firm *Emprendimientos Mineros*. The lawsuit alleged that the agreement gave the Asian company control of a disseminated copper deposit in indigenous territory, in violation of indigenous and environmental legislation. The community also filed an injunction to halt the project until the substantive issues were resolved.

Trial judge Paula Stanislavski, of Neuquén's Court No. 1, declined jurisdiction and referred the case to the STJ. On September 28, 2009, the province's highest court returned the case to the lower court, but before that ruled in favor of the Mapuche regarding the injunction, based on the ILO Convention 169 that protects the right to "collective existence, cultural identity, to their own institutions and the right to participation. In particular, as support for the injunction, we refer to the text of Articles 6.1, 6.2 and 15 — the right of consultation."

The Public Prosecutor for the State of Neuquén and Cormine appealed. On March 29, the Superior Court of Justice rejected the appeal and upheld the arguments of the earlier decision. Meanwhile, the trial to annul the contract is ongoing.

"These rulings are rare. I think judges have moved a little outside of the judiciary's logic and the letter of the law. So now maybe that will have a contagious effect, or maybe they will just be isolated incidents. Obviously supporting this is the backing of indigenous peoples, who no longer accept that mega-projects saunter into our territories," said Jorge Nahuel, *werken* [spokesman] for the Neuquén Mapuche Confederation, or CMN, and *lonko* [political authority] for the Neuquén Mapu community.

"It took 10 years before the judiciary could understand that it is urgent and fair



Huenctru Trawel Leufu community members celebrate judicial ruling in their favor/
HERNÁN SCANDIZZO

to apply the principle of right to consultation!" he stressed, highlighting the decade since Argentina's ratification of the ILO Convention 169 in July 2000.

For her part, Silvina Ramírez, president of the Argentine Association for Indigenous Rights, emphasized that in addition to its legal value, both rulings have particular relevance for having been issued by courts in Neuquén, "where the tension between the State and indigenous peoples is evident and the relationship has always been very traumatic."

Meanwhile, Elena Picasso, a lawyer for the Morales Mellao community and member of the Catholic Church's National Pastoral Aboriginal Team, or Endepa, said: "We are at a level where there is a greater recognition of indigenous rights through the Superior Court, which marks a different perspective."

Salgado, however, expressed objections to that statement and noted that recent STJ rulings undermined indigenous legislation. He pointed out that in

November 2010 the provincial high court rejected the request to declare unconstitutional the 2004 establishment of the municipality of Villa Pehuena, which took place on three Mapuche communities' territory without consulting them.

Disputed oil concessions

In 2007 the province's executive government gave the concessions of Laguna Blanca and Zapala to oil companies Pluspetrol and Enarsa, a decision that affected the territory of 14 Mapuche communities. Pluspetrol and CMN are currently negotiating how both parties can implement consultation.

To that end, werken Relmu Ñanku explained that "it would be something basic that could become a consultation within a legal framework, that is, with the State."

Nahuel noted that "the current framework says that the State, before approving or studying a possible project that would affect indigenous lands, must conduct a consultation process. Here we see the

"It took 10 years before the judiciary could understand that it is urgent and fair to apply the principle of right to consultation!"

— JORGE NAHUEL

converse — the concession is given, and then the company is forced to negotiate with the community, and the responsible party for this situation, which is the State, often offers to mediate."

Just like Neuquén, the province of Rio Negro, as part of its 2006-2007 provincial hydrocarbon exploration plan, invited tenders for 14 areas in Mapuche territory without implementing consultation mechanisms.

In July 2008 the Union of Education Workers of Rio Negro — along with the Indigenous Advisory Council of that province, an organization of the Mapuche people — reported the situation to the ILO Committee of Experts on the Application of Conventions and Recommendations, or CEACR.

CEACR's 2009 report lamented not having received the required information from the Argentine government with regards to the case, and urged that province ensure consultation and participation procedures. □

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for indigenous peoples

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