

# The Right of Indigenous Peoples to Prior Consultation

The Situation in Bolivia, Colombia, Ecuador, and Peru



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# Executive Summary

## Introduction

In the context of their work in Latin America, the Extractive Industries Program of the international confederation Oxfam and the Due Process of Law Foundation (DPLF) have observed a substantial increase in the number and intensity of social conflicts, which threaten democratic governance and stability in several countries. While the causes of these conflicts vary, a significant proportion of them—and probably the most prominent—are associated with natural resources management and with resource exploitation and infrastructure projects. These conflicts, which are a reflection of latent tensions between the stakeholders, pit two divergent views of development against one another. On the one hand, States seek to encourage private investment with a view to promoting development in accordance with the relevant constitutional norms. On the other hand, indigenous peoples are asserting their rights to use and enjoy their lands and to protect and manage them according to their own worldview, safeguarded by the constitution. These types of social conflicts are increasingly common and become particularly heated when natural resource extraction and infrastructure projects are undertaken without adequate prior consultation with the indigenous or tribal communities that could be affected, or without the free, prior, and informed consent of those communities where required. At the heart of disputes over land and natural resources, then, is the debate over the content and scope of the right to prior consultation and to free, prior, and informed consent.

In this context, Oxfam and DPLF have undertaken to disseminate information about the relevant international legal framework and related developments in international legal systems such as the United Nations, the International Labour Organization (ILO), and the inter-American system for the promotion and protection of human rights. State and governmental bodies, civil society organizations, and the communities themselves must take these international rules and decisions into account in framing discussion of these issues. Given the extent to which social protest relies on institutional mechanisms, including legal mechanisms, Oxfam and DPLF would like to encourage their use in addressing these types of conflicts in the domestic and international arenas. Toward this end, both organizations are concerned with reducing the practical obstacles to enjoyment of the right to prior consultation and to free, prior, and informed consent that have been encountered in different countries in the region.

The Andean region has both abundant natural wealth and a large number of indigenous, tribal, and peasant communities or nationalities. Actions to date have largely proven

ineffective in resolving the resource-related social conflicts that have threatened, and continue to threaten, democratic governance in the region. There is a clear need to explore other means of ensuring that extractive and infrastructure projects are compatible with effective protection of the rights of indigenous and tribal peoples and their surrounding environment. Approached from this standpoint, natural resource extraction on lands inhabited by indigenous peoples could play a pivotal role in the socioeconomic development of these territories and populations, who suffer persistent poverty, marginalization, and social exclusion despite the progress made with respect to constitutional and legal recognition of their rights.

More often than not, however, indigenous peoples in the Andean region come up against projects that are either already underway or about to be implemented on their lands, with no prior notice or consultation whatsoever. They frequently are stymied in their attempts to obtain information about a particular project and its possible consequences, or about the company involved. These difficulties are compounded by language barriers and by unfamiliarity with the legal remedies that could protect their rights, leaving them unable to take a meaningful role in decision-making processes affecting their lands. To make matters worse, longstanding delays in the legal recognition, titling, and demarcation of their lands has left many indigenous peoples extremely vulnerable and impotent in dealing with their own governments, as well as with transnational companies that enter their territories with government-backed concession contracts in hand.

In view of these circumstances, Oxfam requested that DPLF prepare a report on the current situation with respect to the right to prior consultation under international human rights law in four Andean countries: Bolivia, Colombia, Ecuador, and Peru. The study illustrates the normative and practical barriers to exercising the right to prior consultation and consent in each of these four countries. It is intended to encourage broad debate over the content, scope, and current situation of this right. The report stresses the urgent need to develop mechanisms to ensure that indigenous and tribal peoples, rather than being mere recipients of decisions affecting their rights, can act as architects of their own advancement as the true—and in many cases, ancestral—owners of the lands they inhabit.

Part One of the report summarizes the main international regulations derived from the relevant international instruments and identifies the international bodies with jurisdiction to take up and rule on these types of issues. That these same rules come out of several different legal systems only reinforces their national and international validity. Part Two offers a normative and factual analysis of the right to prior consultation in four Andean countries, describing progress made at the constitutional, legislative, and judicial levels, as well as the barriers or setbacks observed. The discussion is illustrated with cases chosen for their domestic and international relevance. Part Three sets forth a series of specific recommendations for each of the stakeholders: States, corporations, indigenous peoples, civil society, and international organizations and donors.

## Part One: International Regulations

**W**ith regard to the binding nature of international rules, **Bolivia, Colombia, Ecuador, and Peru have comparable relationships to international human rights law.** For example, all four of these Andean countries have ratified the following three regional instruments: (a) the Charter of the Organization of American States, giving rise to the jurisdiction of the Inter-American Commission on Human Rights (IACHR) over those countries with respect to recommendations of a general nature and pertaining to individual cases; (b) the American Declaration of the Rights and Duties of Man; and (c) the American Convention on Human Rights. They have also accepted the contentious jurisdiction of the Inter-American Court of Human Rights to take up cases of noncompliance with the obligations enshrined in the American Convention. On the international level, all four countries have approved the United Nations Declaration on the Rights of Indigenous Peoples adopted by the U.N. General Assembly on September 13, 2007. They have ratified the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Economic, Social and Cultural Rights. All four countries have also ratified ILO Convention 169 on Indigenous and Tribal Peoples, which envisages the right to prior consultation, and they have been the subject of a number of observations issued by the ILO's Committee of Experts on the Application of Conventions and Recommendations.

With respect to *the jurisprudence of the Inter-American Court, which is binding on all four countries*, its rulings in several cases constitute a legal framework applicable to conflicts between States and indigenous or tribal communities concerning concessions for the extraction and exploitation of natural resources on indigenous lands that unduly restrict the right to community property. The IACHR also has taken up the rights of indigenous peoples through (a) reports on the admissibility and merits of individual cases of violations of these rights, (b) precautionary measures in which it has ordered the State to suspend projects already in progress, (c) thematic reports, (d) country-specific reports, (e) public hearings, and (f) in loco visits. In addition, the inter-American system for the protection of human rights is currently debating a draft American Declaration on the Rights of Indigenous Peoples.

As far as domestic legal systems, Bolivia, Colombia, and Peru assign constitutional rank to international human rights treaties, while Ecuador accords them the same rank as statutory law. The Constitutional Courts in all four countries have handed down rulings that—over and above the decision in the specific matter at hand—recognize the United

Nations Declaration on the Rights of Indigenous Peoples as a source for the interpretation of State obligations. The Declaration has the rank of statutory law in Bolivia.

The international legal framework applicable to the four countries includes regulations on the right to prior consultation and to free, prior, and informed consent. When States ratify an international treaty they are making a sovereign pledge to abide by its provisions and to accept the jurisdiction of international supervisory bodies. As a result, **States are bound to put those regulations into effect before granting concessions for extractive or infrastructure projects.**

The report compiles and explains some of these international regulations. It begins by recalling that the **concept of indigenous peoples is broad and inclusive** and, in practice, extends to Afro-descendent communities and rural and peasant minorities in addition to indigenous and tribal peoples. Despite the breadth of this concept, however, actually determining who is protected under international and domestic instruments continues to be a complex matter, and one that is far from being fully resolved in the four countries.

A second area of regulation has to do with **the right to community ownership of lands and territories**. This gives rise to obligations on the part of States, such as recognizing that traditional possession of land is equivalent to a property title and that ancestral landholdings must be recognized, registered, titled, delimited, demarcated, or restituted as applicable.

Third, under international law, **indigenous peoples have rights over renewable and nonrenewable natural resources found in their territories** and especially over resources having traditional uses and links to their culture. Indigenous peoples, then, must take part in the use, administration, and conservation of those resources. By the same token, when planning for the exploration or exploitation of such natural resources, States must first consult with these peoples, seek their consent, and grant them all due benefits as the owners of the lands.

**Disregard for the right to prior consultation** and other rights of indigenous peoples, such as the rights to territory, participation, self-determination, and cultural identity—whether through outright omission or an inadequate process—**gives rise to the obligation to make reparations** to the victims. This is actionable domestically as well as internationally. Because violations of the rights of indigenous peoples can give rise to both corporate and executive liability, States must regulate this matter with respect to the projects undertaken by these private persons or entities in indigenous or tribal territories and must ensure they are aware of the terms of their liability prior to entering into contracts.

Other international regulations entail possible limitations on the right to communal ownership; these limitations must be legitimate and subject to prior consultation with the indigenous peoples. In order to be valid, restrictions on communal property must be (a) previously established under the law, (b) necessary, (c) proportionate, (d) enacted for the purpose of achieving a legitimate aim in a democratic society, and (e) not such that they will imperil the subsistence of the group and its members. **The legitimate restriction of this right** entails (a) consultation processes that genuinely seek the free, prior, and informed consent of the communities; (b) previous social and environmental impact studies; and (c) the requirement that the benefits derived from development, investment, and natural resource exploration and extraction projects are shared by the corporations and the indigenous peoples.

The obligation to seek the consent of the affected communities often triggers heated controversy. For indigenous peoples, obtaining free, prior, and informed consent is an indispensable part of the consultation process and an expression of their right to self-determination, applicable to all of the projects that affect them. In their view, the right to consultation also implies the right to veto. States, on the other hand, wish to ensure that norms governing the right to consultation explicitly provide that communities have no right to veto the decisions made by the authorities. Under existing international law, the consent of the affected communities should be the ultimate goal of any consultation that is respectful of indigenous peoples and of the applicable international standards. It follows then, that consultation processes would not be valid unless their real objective is to obtain consent. In line with the position of the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, the report asserts that **the absence of a veto right for indigenous peoples does not mean that the State is free to make decisions affecting their rights**; moreover, the State's powers in relation to prior consultation cannot be addressed properly if the focus is on whether or not indigenous peoples have veto power. The crux of the matter lies, then, in the limits on State power when it comes to making decisions that could affect indigenous peoples.

In order to prevent the State from wielding absolute power and relegating prior consultation to a mere formality, the international community has identified certain **scenarios in which consent is not only the objective of the consultation but also a right in and of itself** and an essential prerequisite for implementation of the proposed measure. In other words, lack of consent constitutes grounds for suspension of the project. These situations occur when the project involves any one of the following: (a) relocation of indigenous populations from their traditional lands; (b) storage or disposal of hazardous materials on their lands; (c) large-scale development or investment plans that could have a major impact on indigenous territories; or (d) natural resource extraction projects that have significant social, cultural, and environmental impacts.





# Part Two:

## Normative and Factual Analysis of the Four Countries

### Bolivia

Bolivia legally recognized the right to prior consultation in its Political Constitution of 2009 (which defines the State as plurinational), as well as through the incorporation of international law into domestic law and the adoption of regulations, decrees, and enforcement standards, especially for hydrocarbon exploration and extraction. Despite the progress made, regulations governing the mining, metallurgical, forestry, and other extractive industries are still either nonexistent or inadequate and fragmented, as are regulations on broader environmental issues.

**Factors favoring observance of the right to prior consultation in Bolivia** include, first, the legal recognition of territorial organizations. This has enabled groups such as the Confederation of Indigenous Peoples of Bolivia (CIDOB), the National Council of Ayllus and Markas of Qullasuyu (CONAMAQ), the Unique Confederation of Rural Laborers of Bolivia (CSUTCB), and the Bartolina Sisa National Federation of Peasant Women to represent indigenous peasant communities. The first three organizations also act as agents in prior consultation processes relating to indigenous territories. A second positive factor is the adoption of a cross-cutting approach, meaning that indigenous issues are included on the public policy agenda at all levels of government. An example of progress was the adequate consultation process conducted in the indigenous territory of Charagua Norte and Isoso, which produced the desired outcomes at all stages using the mechanisms and institutions of the Guaraní indigenous people.

There are also a number of **obstacles to full enjoyment of the right to prior consultation in Bolivia**. First is the extreme poverty and social exclusion of most of the population. Second, registration of indigenous lands is directly linked to the Community Lands of Origin (Tierras Comunitarias de Origen, TCO), a specific form of territorial ownership that is imprescriptible, unattachable, and inalienable. This means that certain indigenous peoples who do not live on TCOs or who are nomadic still require recognition in order to exercise their rights. A third obstacle is the enormous concentration of property in a few hands: 7 percent of the population owns 70 percent of the land. This is the case even though land reforms over the past 50 years have regularized land titles on almost a third of the national territory, and 28.4 million hectares have been titled as TCOs over the past four years. Fourth is the prevailing notion in some State entities that prior consultation is a waste of time and detrimental to projects. As a result, explorations are undertaken and

concession agreements signed without prior consultation. Fifth, there is a lack of attention to the social and environmental impacts already produced by projects under way. Finally, a Constitutional Court ruling declared the unconstitutionality of the requirement to obtain the consent of the communities set out in the Hydrocarbons Law and held that the purpose of consultation is to quantify the damage rather than to obtain consent.

The result of these negative factors is frequently a **failure to pursue consultation and to conduct environmental and social impact studies** prior to exploration and exploitation of hydrocarbons, minerals, water, and renewable natural resources, as well as infrastructure projects. Among hydrocarbon exploitation activities, the construction of the Bolivia-Brazil gas pipeline has had severe social, environmental, and cultural impacts. In addition, construction of another gas pipeline between the two countries, the San Miguel-Cuaibá pipeline, has destroyed vast swaths of the Chiquitano Dry Forest. Meanwhile, the Repsol YPF petroleum company has failed to comply with the measures set out in environmental impact studies or to consult with the indigenous communities affected by its activities.

Similarly, **mining activities have had extremely severe environmental, social, and cultural impacts in Bolivia** that have yet to be addressed. Frequently carried out without environmental licenses, mining operations, and particularly open-pit mining, have caused tremendous environmental contamination. Cases with the most severe impacts include the mining megaproject in Colcha K municipality that affected 428 families and 700 hectares of farmland, distorting community production patterns and social organization. Elsewhere, the pollution of the Pilcomayo River by mining caused production losses of 80 percent in agriculture, 60 percent in livestock, and 90 percent in fishing, affecting 100 indigenous communities, while the pollution of the Beni River left 923 local indigenous people with mercury levels four times higher than the threshold established by the World Health Organization. The State also has proven incapable of reining in the extensive contamination caused by logging.

**The normative challenge for Bolivia, therefore, is to adopt a legal procedure for the enforcement and exercise of the right to prior consultation that fills in the gaps, harmonizes disparate regulations, and puts an end to the current procedural fragmentation. At the practical level, its challenge is to address contemporary problems by means of consultation processes conceived as opportunities for sincere dialogue and consensus building, in which members of indigenous communities become the architects of their own future rather than mere observers.**

## Colombia

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 the rights of indigenous peoples and Afro-descendent communities to cultural identity, collective ownership of traditional lands, and their own forms of government.

The constitutional jurisprudence, moreover, has extensively developed the content and scope of the individual and collective rights of these peoples and has established that **prior consultation is a fundamental right with constitutional rank**. The Constitutional Court has issued several rulings ordering the suspension of projects or declaring the unconstitutionality of norms such as the General Forestry Law and the Rural Development Statute on the basis of lack of prior consultation. Projects suspended by Court order until such time as prior consultation has taken place include the filling of a reservoir located in indigenous territory, aerial fumigations of illicit crops, logging by a lumber company in the territory of an Afro-descendent community, oil exploration, and gold and copper exploration and exploitation. In its extensive jurisprudence, the Court has established, among other rules, that consultation must precede the granting of an environmental license; that simply providing information or notification to an indigenous community about a natural resource exploration or exploitation project does not constitute prior consultation; and that prior consultation must include communication and understanding characterized by mutual respect and good faith between communities and the government authorities.

**Barriers to enjoyment of the right to consultation in Colombia** relate to (a) lack of political will; (b) lack of an adequate, consensus-based regulatory framework; (c) lack of genuine participation by ethnic groups in the regulation of prior consultation; (d) lack of a specific law on prior consultation; (e) difficulties reaching agreements in consultation processes; (f) consultations held with parties that are not the legitimate representatives of the affected peoples; and (g) the design and implementation of infrastructure, development, and mining megaprojects without a free, prior, and informed consultation process aimed at obtaining the consent of the affected ethnic groups. Other factors stem from the critical human rights situation in the country, which also contributes to a general lack of awareness concerning the right to prior consultation. This situation is marked by (a) forced displacement; (b) murders and massacres of indigenous and Afro-descendent people and their leaders, and ongoing threats to their lives and personal safety; (c) military

presence on indigenous reservations without prior consultation, and antipersonnel mines placed in indigenous territories; (d) the use of indigenous territories for activities linked to the armed conflict and drug trafficking; and (e) the precarious land titling situation, which is exacerbated by factors associated with the armed conflict. Several indigenous peoples are considered at risk of extermination due to displacement, murders, and massacres.

The institutional resources and mechanisms that have been established in Colombia to foster dialogue between the State and indigenous and Afro-descendent peoples include the Prior Consultation Group of the Ministry of Interior and Justice, the Permanent Roundtable for Consensus with Indigenous Peoples and Organizations established 1996, and the Amazonic Indigenous Regional Roundtable. Unfortunately, **these forums for dialogue are not sufficiently consolidated or equipped to resolve tensions and conflicts** between the government and civil society organizations working to defend the rights of indigenous and Afro-descendent peoples. As a result, they have failed to ensure ongoing dialogue or the genuine application of the right to prior consultation.

**Full enjoyment of the right to prior consultation remains unfinished business in Colombia. The country faces the challenge of translating the progress made in terms of normative and jurisprudential development, and the institutional resources in place, into a reality in which prior consultation is the centerpiece of the State's relations with indigenous and Afro-descendent peoples. Similarly, Colombia faces the challenge of enacting a law—drafted in conjunction with indigenous peoples—to regulate consultation procedures and establish a legal and practical framework for them. To this end, it must set in motion a legislative process that ensures a genuinely intercultural and participatory process.**

### Ecuador

The situation of prior consultation in **Ecuador** also reflects a disconnect between constitutional guarantees and reality. The new Political Constitution adopted in 1998 provides for an intercultural and plurinational State; recognizes the primacy of international treaties over domestic law; includes a separate chapter on the collective rights of indigenous communities, peoples, and nationalities; and specifically envisages the right to free, prior, and informed consultation on administrative and legislative measures and government decisions that could affect the environment.

Despite these guarantees, however, **the right to prior consultation has yet to be applied in practice in Ecuador.** Among the key reasons: (a) the legislature has not provided for the exercise of this right by establishing clear procedures for conducting consultations; (b) appropriate government structures are not in place; and (c) the necessary public allocations have not been made. As a result, natural resource exploration and exploitation

projects proceed without prior consultation and without having first obtained the consent of the affected peoples. Furthermore, the legislature has enacted far-reaching laws affecting peoples and nations, such as the Mining Law of 2009, with no prior consultation and without involving these peoples in the debates. In the absence of adequate dialogue and effective communication channels between the main representatives of indigenous peoples and the State, disputes over State actions that affect indigenous peoples—such as the approval of a water law and the granting of concessions to mining companies—have triggered mobilizations, stoppages, blockages, and uprisings.

That said, as it moves forward to ensure respect for the right to prior consultation and the protection of indigenous rights in general, Ecuador has a valuable asset in **the longstanding organizing and political tradition of the Confederation of Indigenous Nationalities of Ecuador (CONAIE) and the Pachakutik Plurinational Unity Movement**. CONAIE, an umbrella group for indigenous organizations and communities, was instrumental in the ratification of ILO Convention 169 in 1989. This indigenous movement also galvanized the process for the return of approximately 4 million hectares of ancestral lands to Amazonian and coastal peoples and for recognition of the constitutional right to the inalienable, imprescriptible, unattachable, and indefeasible ownership of community lands, exempt from taxes and assessments. The titling of indigenous lands as collective property has also led to negotiations on the management of natural resources located in those lands.

At the institutional level, a recent restructuring created the Secretariat of Peoples, Social Movements and Citizen Participation and set up the Afro-Ecuadorian Development Corporation (CODAE), the Council for the Development of the Nationalities and Peoples of Ecuador (CODENPE), and the Council for the Development of the Montubio People of the Ecuadorian Coast and Subtropical Zones of the Coastal Region (CODEPMOC). As yet there have been no evaluations of just how effective these reforms may have been.

As far as the role of the **constitutional justice system** in upholding the rights of indigenous peoples and nationalities, the report describes a contradictory Constitutional Court decision. After ruling that the Mining Law—enacted without prior consultation—was constitutional, the Court criticized the lack of consultation, affirming consultation to be a necessary step in the legislative process. It conditioned the constitutionality of certain articles of the Mining Law by prohibiting their future application to the territories of indigenous, Afro-Ecuadorian, and Montubio peoples and nationalities.

In Ecuador, the failure to conduct prior consultation and prior studies on environmental impact, along with the general lack of respect for the cultural rights of indigenous peoples

and nationalities, has triggered **conflicts between the Ecuadorian State, private corporations, and local communities**. Extractive activities conducted without consultation and impact studies have also caused **harm to human health and the environment**. In the mining industry, two of the most prominent conflicts involve (a) large-scale gold and copper exploration and exploitation by Canadian companies in territories of the Shuar indigenous people in the Cordillera del Cóndor, and (b) open-pit copper mining by the Bishimetals company, a subsidiary of Mitsubishi, in territory belonging to Junín communities in the Cordillera de Toisán, which has affected the Cotacachi-Cayapas Ecological Reserve and pre-Incan archeological sites.

Conflicts involving hydrocarbons have erupted over oil exploitation in territory belonging to the Shuar people, based on a contract signed by the government and the Atlantic Richfield Company without the Shuars' knowledge, as well as oil exploitation in territory belonging to the Sarayaku people after the government granted a concession to an Argentine company in 1996. The latter case is currently before the Inter-American Court of Human Rights because of reports of threats against the lives and safety of members of the Sarayaku people, the military occupation of their territory, the presence of explosives laid by the company, forced displacement, and the rending of the social fabric. A third dispute involves oil exploitation in the territory of the isolated Tagaeri and Taromenane indigenous peoples and the deforestation of their traditional lands, a recognized world biosphere reserve.

The "Mining Mandate" adopted by the Constituent Assembly in 2008 revoked the concessions of mining companies that failed to submit environmental impact studies or whose operations infringed on natural areas, protected forests, or vulnerable water resources. In practice, however, these concessions remain in force. The subsequent nationalization of numerous mining concessions restored 2.6 million hectares of land to the State; 45 percent of those concessions had been controlled by just 25 people.

**In order to ensure the enjoyment of the right to prior consultation, Ecuador must put its constitutionally mandated principle of plurinationality into practice. Up to now, this mandate has been superseded by an economic development model that is incompatible with the environment and with the territorial and community property rights of indigenous peoples. The result has been the exploitation of natural resources without prior consultation with the affected peoples and a history of projects that produce high levels of environmental pollution. The State must also establish a dialogue with representatives of indigenous nationalities and peoples over sensitive issues to prevent an escalation of latent social conflicts. Finally, the government should enact a comprehensive law regulating prior consultation and strengthen the national authorities responsible for enforcing international safeguards for this right.**

## Peru

In Peru, a clash between indigenous peoples and police in Bagua left 33 dead in 2009. The indigenous communities were protesting regulations on matters that directly affected them, imposed by executive decrees about which they were never consulted. **The Bagua incident, unfortunately, illustrates the consequences of making decisions that affect indigenous peoples without prior consultation.** In Peru, 44 percent of social conflicts stem from the lack of a prior consultation process.

Peruvian laws governing indigenous peoples and prior consultation are not as advanced as those of neighboring countries. Bolivia and Ecuador, for example, have recent constitutions that broadly incorporate the rights of these peoples, and Colombia has developed extensive jurisprudence on the subject. Nonetheless, Peru does have certain normative resources. For example, it confers constitutional rank on international human rights treaties and the judgments of international tribunals, and the rank of statutory law to ILO Convention 169. It also has developed some recent jurisprudence, albeit sparse and contradictory, on the content of the right to prior consultation. The country has made very little progress, however, in adapting its domestic laws and practice to make them consistent with international standards. **Legal and regulatory provisions are fragmented, inadequate, and insufficient.** The country has not regulated all of the activities that could affect indigenous peoples. In some cases—mining laws, for example—prior consultation is confused with participatory processes that are merely informative.

Some of the **barriers to application of the right to prior consultation in Peru** are (a) the poverty and illiteracy of indigenous and peasant communities; (b) lack of legal recognition of these communities and the slow, costly, and redundant bureaucratic procedures for titling indigenous lands; (c) lack of demarcation of indigenous and peasant lands; (d) lack of political will on the part of the executive branch to ensure the right to prior consultation; (e) the government policy of vigorously promoting private investment; (f) the passage of legislative decrees regulating issues that affect peasant and indigenous communities without prior consultation; (g) the arrest and criminal prosecution of indigenous leaders; (h) the failure to enforce ILO Convention 169, justified by the lack implementing legislation; (i) the absence of a uniform official definition of the concept of indigenous peoples, establishing who exactly is subject to protection under ILO Convention 169; (j) the disconnect between the government's domestic discourse and its statements before international bodies; and (k) confusion over powers and duties and overlapping jurisdictions among different State entities when it comes to matters concerning indigenous peoples. The government has signed concession agreements for major infrastructure projects and for mining, timber, and hydrocarbon exploitation in Andean and Amazonian zones that are home to much of the indigenous and peasant population, without prior consultation with the affected communities and with clear disregard for the rights of indigenous peoples.

Despite these barriers, **Peru offers certain conditions conducive to the practical application of prior consultation.** Some examples of this include the forums for State-community dialogue created as a result of the Bagua incidents, which led to the drafting of a consensus framework law to regulate the right to prior consultation. Unfortunately, the executive refused to sign the bill approved by the Congress. This curtailed the dialogue process and blocked the enactment of a law that had been viewed as credible, having been hammered out in a protracted consensus-building process.

**The Constitutional Court has played an ambivalent role** in Peru. On the one hand, the Court has rejected the government's attempts to justify its failure to engage in prior consultation processes based on the lack of a consultation law. The Court also blocked the final phase of exploration in the Cordillera Escalera regional conservation area, an essential water reserve for four native communities, and it has established rules for application of the right to prior consultation. On the other hand, the Court established— in a judgment aimed at clarification rather than constitutional review—that the right to prior consultation has only been binding in Peru since June 2010, the date of publication of the judgment setting out the rules for consultation processes.

Cases illustrating the lack of prior consultation include mining on the Ichigkat Muja National Reserve in the Cordillera del Cóndor, a traditional territory of the Awajún and Wampis peoples. Another case concerns illegal logging in the territories of the Mashco Piro, Yora, and Amahuaca indigenous peoples living in voluntary isolation in the Madre de Dios Department, which has placed them at risk of extinction.

**In light of the social conflicts triggered by the lack of prior consultation, Peru must not wait for a recurrence of violence such as the incidents that occurred in Bagua. It must act now to pass a consensus law regulating the right to prior consultation for all activities that could affect indigenous and peasant communities as a fundamental prerequisite for making any administrative or legal decisions affecting them. Peru likewise faces the challenge of restoring the dialogue between the State and indigenous peoples that was cut off by the executive's decision to reject the law that had been approved by Congress.**



## Part Three: Recommendations

In light of the international standards described in this report, and based on the normative and factual examination of the right to prior consultation in Bolivia, Colombia, Ecuador, and Peru, DPLF has developed a series of general and specific recommendations directed toward States, corporations, indigenous peoples and their representatives, civil society, and international organizations and donors.

### Recommendations for States

The recommendations for States refer to the **general situation of indigenous and tribal peoples**, the right to ancestral lands, the right to prior consultation, and special circumstances.

With regard to the general situation of indigenous and tribal peoples, States should (a) thoroughly revise their laws, public policies, programs, and projects related to indigenous rights; (b) create permanent mechanisms that address the situation of indigenous peoples by providing optimal forums for dialogue and consensus-based decision making on urgent problems; (c) provide information on the rights of indigenous and tribal peoples and the protection mechanisms available to them; (d) adopt an expansive definition of indigenous and tribal peoples; (e) ensure that domestic discourse is consistent with the positions expressed before international bodies; (f) working with indigenous peoples, establish, improve, and strengthen methods to systematize information about them and their situation; (g) include members of indigenous peoples in national censuses, based on the principle of self-identification; and (h) ensure access to basic services for the indigenous population, particularly in rural areas with elevated poverty rates.

Regarding the **right to ancestral lands**, States should (a) respect and uphold the rights to community property of members of indigenous and tribal communities; toward this end, they should, in consultation with the communities, grant official titles to ancestral lands, physically demarcate or delimit such properties, designate ownership of ancestral lands as a legally protected interest, proceed with the restitution of ancestral lands to communities where necessary, and, when restitution is not possible, grant alternative titles to lands of comparable quality to those lost; (b) adopt adequate, transparent, and simple technical mechanisms to surmount delays in the regularization of land holdings and to ensure full compliance with the obligations set out in the preceding point; (c) working with the communities involved, strengthen the appropriate institutional framework for land titling, demarcation, delimitation, and restitution to ensure that the State has the

necessary and adequate human and financial resources available for these tasks; and (d) ensure the right to due process within a reasonable time period.

With respect to the **right to prior consultation**, States should (a) proceed immediately with consultation processes conducted in keeping with the requirements established under international law and jurisprudence, without waiting for the enactment of a specific domestic law on prior consultation; (b) trigger legislative processes, or pursue existing initiatives, to regulate prior consultation, with the effective participation of indigenous communities and in such a way as to ensure that these communities have clear influence over the final language; (c) refrain from vetoing legislation drafted by consensus; (d) revise or adopt legal regimes to ensure that restrictions on the right to indigenous and tribal ownership are consistent with international standards; (e) ensure that the State's economic development policy is compatible with the development priorities of indigenous peoples; (f) refrain from planning and implementing natural resource extraction or public works projects in indigenous or tribal territories without a prior, broad, and legitimate consultation process with the affected peoples that is genuinely aimed at obtaining their free, prior, and informed consent at every stage of the process; (g) ensure that social and environmental impact studies are conducted, with State supervision, by technically qualified, independent, and impartial entities prior to launching any development plan in indigenous territory or granting any concession for natural resource exploitation; (h) establish or strengthen existing forums for dialogue between the State, the communities, and private corporations, and ensure that these forums are stable, continuing, and funded; develop consensus-based methodologies and recognize the representativity of indigenous organizations; (i) respect and implement the agreements made in the framework of these forums for dialogue; (j) enact or implement legislation on corporate liability for violations of the rights of indigenous or tribal peoples arising from their project activities; (k) conduct continuous supervision of the activities of corporations holding State contracts to implement projects in indigenous or tribal territories; (l) provide prompt and effective legal protection when the State, corporations, or others fail to comply with their duties concerning the rights of peoples living in project sites, with a view toward preventing irreparable harm; (m) enforce legal decisions that protect the right to collective ownership and order the suspension of project implementation; (n) investigate, prosecute, and, where appropriate, impose criminal, disciplinary, civil, or administrative sanctions on public officials and private parties that engage in irregular conducts in violation of the right to prior consultation; (o) conduct a comprehensive evaluation of projects about to begin—as well as those under way or already completed—without prior consultation of the affected indigenous and tribal peoples, in order to identify existing or potential future environmental damage as well as alterations to their ways of life and subsistence; once this damage or these alterations have been identified, adopt the necessary measures for mitigation, reparation, compensation, prevention, and punishment, in consultation with

the affected communities; (p) suspend any projects that will exacerbate damage already inflicted or will have an irreparable impact on the way of life of indigenous or tribal peoples; (q) develop a comprehensive reparations plan to be implemented on a priority basis; (r) implement measures for international cooperation regarding projects with transnational effects; (s) comply with the decisions and recommendations of international bodies; (t) use existing international mechanisms for technical assistance in assessing whether the measures developed are compatible with international standards and obligations, before they are approved or put into practice.

With regard to **special circumstances**, States should (a) provide effective protection to indigenous leaders who come under threat and to peoples threatened with physical extermination, in consultation with them; (b) in cases of forced displacement of indigenous or tribal peoples, protect and prevent usurpation of their territories and guarantee the safe, voluntary, and dignified return of displaced communities; in cases where return is not possible, provide them with dignified living conditions and access to basic social services; if displacement becomes permanent, provide them with alternative lands of the same quality and size as those from which they were displaced; (c) in cases where members of indigenous or tribal communities are subjected to servitude or forced labor, adopt all necessary measures to put an end to such situations and assign special priority to the identification of areas where they occur, the immediate titling of their lands, and absolute compliance with decisions issued by international bodies; (d) suspend or refrain from carrying out military activities in the territories of indigenous or tribal peoples, except in cases where they are justified by a serious public interest, where such activities have been previously and freely agreed to by the interested indigenous peoples through their representative institutions, or where the latter have requested them; (e) conduct serious investigations of human rights abuses against indigenous peoples and, where warranted, punish those responsible; (f) adopt comprehensive measures to make reparations and to prevent a recurrence of acts that constitute human rights violations against indigenous peoples.

## Recommendations for companies

The report also includes recommendations for corporations in view of their extremely important role in ensuring effective respect for the right to prior consultation. Companies should (a) comply with the duty to respect the human rights of indigenous and tribal peoples; (b) make sure that their institutional structure includes the necessary technical expertise on the domestic and international rights of protected indigenous and tribal peoples to ensure that those rights are respected and protected in the course of corporate activities, with particular emphasis on the right to prior consultation at all stages of a project; (c) provide the population with complete information about each project, including, at minimum, the characteristics of the corporation and its expectations concerning the project, the project's design and implementation plan, its potential social,

economic, and environmental impacts, its environmental characteristics, and any agreements made; (d) create mechanisms for receiving and addressing the community's concerns, complaints, and opinions about the projects, and for resolving disputes; set and adhere to reasonable deadlines for responding to and resolving any issues; (e) acknowledge the fact that violations of the rights of peoples residing in the territories where projects are carried out give rise to the liability of the corporation and its executives, as well as to the international liability of the State; (f) participate in all forums for dialogue with the State and the communities and respect the agreements achieved in these venues; (g) respect the outcomes of consultation processes; (h) provide a continuous flow of information throughout project implementation, rather than only during the initial project phase and approval of environmental impact studies; (i) take seriously the role that corporations play in local development by consulting with communities and ensuring the sustainability of corporate activities; (j) refrain from taking advantage of their role in society to legitimize activities that are detrimental to the environment or to the social and cultural fabric of the communities.

## Recommendations for indigenous organizations and their representatives

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Indigenous organizations and their representatives have obligations as well. They should (a) deepen their knowledge about the regulatory framework applicable to projects implemented in their communities; (b) disseminate information about the economic, social, cultural, and political organization of indigenous communities to prevent or overcome public ignorance of these issues; (c) explain their representative structures in order to reach an understanding with the State and corporations and ensure respect for agreements made with the appropriate indigenous representatives; (d) clearly, transparently, and responsibly convey to the communities they represent the benefits conveyed by agreements reached with the State and with corporations, so that mechanisms to apply and distribute these benefits can be developed in conjunction with the community; (e) maintain an ongoing dialogue with the State and corporations and seek mechanisms to restore dialogue in cases where it breaks down; (f) strengthen their own capacity for decision making and representation; (g) take advantage of the relevant national and international mechanisms and forums to raise the profile of their situation and condemn the failure to respect their rights in the international arena; and (h) cooperate with leaders of other indigenous and tribal communities nationally and internationally to deepen their knowledge about the protection of rights in comparable situations and to identify measures that have succeeded or failed in other places.

## Recommendations for civil society

Civil society has a significant role to play in safeguarding the rights of indigenous peoples and contributing to a more thorough understanding of their situation and of the proper use of domestic and international mechanisms for the defense of these rights. The following recommendations are geared toward strengthening its role: (a) use all available legal mechanisms and remedies to help reduce the imbalance between the State and corporations on one side, and indigenous or tribal communities on the other; this includes the dissemination of systematized information throughout civil society about the domestic and international legal framework for the protection of the rights of indigenous and tribal peoples, the provision of free legal and technical assistance to indigenous groups in cases pertaining to the right to land and territory, and the identification of best practices among all stakeholders that could contribute to the optimal structuring and full enjoyment of the right to prior consultation; (b) advise the communities and their representatives on the use of domestic and international mechanisms for the protection of their rights; (c) raise the profile of indigenous issues nationally and internationally; (d) promote existing forums for dialogue, create new ones, and foster the restoration of dialogue when it breaks down; (e) prepare working documents on the legal and institutional framework applicable to a particular project that would help local communities understand the relevant law in their situation and the steps they must take to defend their rights; and (f) develop proposals for appropriate measures to ensure due respect for the right to consultation.

## Recommendations for international organizations and donors

Finally, the following recommendations apply to international organizations and donors involved in these issues: (a) pay close attention to the situation of indigenous and tribal peoples; (b) conduct continuous monitoring of the situation of indigenous peoples, including the work accomplished, the recommendations and decisions adopted, and State compliance or noncompliance with these recommendations and decisions; (c) participate in dissemination of information and training on the rights of indigenous and tribal peoples, the available international mechanisms, and how they can be used; (d) support indigenous and tribal peoples in obtaining adequate legal representation for the defense of their rights at the domestic and international levels; and (e) establish strategic alliances with indigenous communities for the protection of their rights.