



In light of the boom in development projects in Latin America, indigenous and tribal peoples have been particularly successful in enforcing their consultation rights by bringing emblematic cases before their national and regional human rights courts.

DEFENDING LATIN AMERICA'S INDIGENOUS AND TRIBAL PEOPLES' RIGHTS THROUGH LAWS AND THE COURTS

SUMMARY

Since the 1990s, and amidst the rise in large-scale development projects in Latin America, the right to consultation has emerged as a collective right used to defend indigenous and tribal peoples' rights to the full use and enjoyment of their land, territory and natural resources. An interesting feature of the Latin American story of consultation rights has been the key role played by legal and institutional frameworks, and in particular, the use of existing court systems. This Brief analyses the development and progress made in defining and enforcing indigenous consultation rights through key rulings by the Inter-American Court of Human Rights and countries' national courts. It also describes one particularly advanced national-level law in Peru that establishes the government's responsibility to conduct prior consultation before embarking on large-scale development initiatives and extractive industry activities. Latin America's advances, as well as ongoing difficulties, are presented with the aim of offering valuable lessons for other regions facing similar challenges in protecting the right to consultation.



INTRODUCTION TO CONSULTATION RIGHTS IN LATIN AMERICA

Land, territory and natural resources have a special importance for indigenous and tribal peoples,¹ who develop collective linkages with the land on which their material, political and cultural survival largely depends. For these reasons, international law has acknowledged indigenous and tribal peoples' rights to their land, defined as the physical and legal space in which they live; to their territory, a wider space defined in relation to the use that the population makes of it; and to the use, management and conservation of the natural resources within their land and territory.²

The struggle of Latin American indigenous peoples for control of their lands, territories and natural resources goes back to the 16th century, when European settlers first arrived on the American continent, resulting in the appropriation and use of indigenous and tribal peoples' property largely without their consent. It was not until the 1970s that indigenous peoples

¹The expansion of the definition to include tribal peoples along with indigenous groups is itself the product of a proactive ruling of the Inter-American Court of Human Rights, in the case *Saramaka People vs. Suriname* in 2007 (also discussed in detail later in this Brief). In this ruling, collective rights to property were extended to tribal peoples as they "share similar characteristics with indigenous peoples, such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions". Inter-American Court of Human Rights. 2007. *Case of the Saramaka People v. Suriname*. Judgment of November 28, 2007.

²Rodríguez, C. et al. 2010. *La Consulta Previa a Pueblos Indígenas: los Estándares del Derecho Internacional (Prior Consultation to Indigenous Peoples: The Standards of International Law)*. Universidad de los Andes, Bogotá.



started to position themselves as political actors in the region, bolstered by an indigenous mobilisation which itself originated in part as a response to the rise of investments in the Latin American region in the 1990s.³ Much of this investment came in the form of large-scale development and infrastructure projects such as dams, highways, and mining, oil and forest exploitation. These development projects, in many cases, had harmful effects on indigenous and tribal peoples' lands and territories, including limiting their access to and use of the natural resources within them.

Pressure from indigenous movements was one of the key factors leading to the creation of specific international legal instruments related to indigenous rights, in which a central part of the debate pitted the protection of indigenous rights against the implementation of development projects. These legal instruments include [Convention 169](#)⁴ on Indigenous and Tribal Peoples in Independent Countries, adopted by the International Labour Organization (ILO) in 1989, and the [Declaration on the Rights of Indigenous Peoples](#) adopted by the United Nations (UN) General Assembly in 2007.⁵

In particular, these documents acknowledge indigenous and tribal peoples' right to their land, territory and natural resources, in which states are obliged to legally acknowledge and protect indigenous lands and territories. Regarding natural resources, the UN Declaration establishes the same rights for natural resources as for lands and territories, though ILO Convention 169 makes a distinction in the case of resources within the subsoil that belong to the state, thus granting less power to indigenous peoples in terms of participating and making decisions about the use of these resources.⁶

One of the key outcomes of these legal agreements is that they establish indigenous and tribal peoples' right to be consulted,⁷ in particular establishing an obligation for countries to consult indigenous and tribal peoples over the exploration and exploitation of natural resources found within their lands. Thus consultation becomes an instrumental right enabling the protection of indigenous and tribal peoples' other rights, such as to land, territory and natural resources, becoming "one of the most important political tools for indigenous peoples".⁸

In Latin America, one of the main demands of indigenous movements is to regain their rights to self-determination regarding their ancestral lands and territories and control over their natural resources, which were often given away without their consent to state and private enterprises for exploitation in the name of development. To do so, Latin American indigenous peoples have resorted to the [Inter-American Human Rights System \(IAHRS\)](#) and to different national courts. This strategy has helped to deepen the conceptualisation of the right to consultation⁹ and its role as a mechanism to protect other collective rights of indigenous and tribal peoples.

Though the right to consultation has been promoted in various ways in the region, this Brief concentrates on legal strategies, in particular through bringing court cases before these national and regional courts. Through a review of emblematic cases of the national courts and of the [Inter-American Court of Human Rights \(Inter-American Court\)](#), as well as of specialised documents on the theme of the right to consultation, this Brief presents the region's main achievements in terms of promoting indigenous and tribal

³ Bengoa describes the beginning of an 'indigenous emergency' in the 1990s, starting with the uprising of indigenous peoples in Ecuador in 1990, and achieving its most critical expression with the uprising of the Zapatist Army in Chiapas, Mexico in 1994. See: Bengoa, J. 2007. *La Emergencia Indígena en América Latina (The Indigenous Emergency in Latin America)*. Fondo de Cultura Económica, Santiago de Chile.

⁴ For an extensive review by the ILO itself of how Convention 169 has been used in the region, see: ILO. 2009. [Application of Convention No. 169 by Domestic and International Courts in Latin America - A Casebook](#). ILO, Geneva. The publication is available in English and Spanish.

⁵ Palacín, M. 2011. [Consulta y Consentimiento Previo, Libre e Informado: Un Derecho Jus Cogens. Propuestas Para Superar los Obstáculos al Ejercicio de Derechos de los Pueblos Indígenas en la Región Andina \(Consultation and Free, Prior and Informed Consent: A Jus Cogens Right. Proposals for Overcoming the Challenges to the Exercise of the Rights of Indigenous Peoples in the Andean Region\)](#). Universidad Carlos III, Madrid.

⁶ Rodríguez, C. *et al.* 2010, above n 2.

⁷ The right to prior consultation "mandates states to undertake consultations with these [indigenous and tribal] peoples based on special reasons pertaining only to indigenous and tribal peoples and which is linked to the right to identity and cultural integrity, the right to keep their own institutions, customs and traditions, the right to territory and resources, the right to decide their development priorities, among others". Clavero, B. 2010. [Consulta y Consentimiento Previo, Libre e Informado a la Luz del Derecho Internacional de los Derechos Humanos \(Consultation and Prior, Free and Informed Consent in Light of Human Rights' International Law\)](#). Online publication.

⁸ Rodríguez, C. *et al.* 2010, above n 2, 6, p. 33 (author translation).

⁹ And of the procedure that should be followed to ensure fulfillment of consultation rights. The IAHRC and Latin American courts have also specified the criteria that international law has established for consultation, which are: 1) good faith, meaning the commitment to reach a common agreement; 2) populations provided with all relevant information on the projects to be developed; 3) consultation is adapted to the cultural and social characteristics of the populations consulted; 4) commitment to reach an agreement, meaning consultation is not a mere procedure and that the opinion of the population is truly taken into account; and 5) consultation occurs prior to making any decision that affects indigenous and tribal peoples. Rodríguez, C. *et al.* 2010, above n 2, 6, 8.



peoples right to consultation.¹⁰

Despite ongoing obstacles and challenges, the Latin American experience represents a learning opportunity to advance the right to consultation in other regions, where indigenous and tribal peoples face similar difficulties in defending their lands, territories and natural resources. In particular, Latin America's story demonstrates the potential for national and regional court systems to play a proactive role in establishing consultation rights. In this sense, it is important that indigenous and tribal peoples all over the world make use of national courts and international law for two reasons: first, to denounce violations of their right to consultation, as well as to land, territory and natural resources; and second, to strengthen the right to consultation by developing rulings that broaden and provide guidance on how these rights that are protected in international law should be enforced at the national level. At the same time, the Latin American experience shows that, in cases where national courts failed, the Inter-American Court played a central role in guaranteeing indigenous and tribal peoples rights.

The first section of this Brief discusses the status of states' upholding of consultation rights, in which countries' legal frameworks and practices have often been insufficient to guarantee consultation rights. Indigenous and tribal peoples therefore had to resort to their national courts, which they have done with some notable successes. When these have failed, though, the regional court - the focus of the second section of the Brief - has proven to offer an alternative for demanding consultation rights. The Brief concludes by describing ongoing challenges, key enabling factors of the Latin American context and lessons learned.

PROGRESS AT THE NATIONAL LEVEL

In the last decade, the right to consultation in Latin America has gained significance as a tool for defending the land, territory and natural resources of indigenous and tribal peoples. However, there are still challenges for its

institutionalisation as a systematic practice at the national level, such as in the planning of states' public policies and, more concretely, in decision making about specific development projects. In some countries, the judiciary branches have been able to set precedents regarding the obligation of states to guarantee the right to consultation in certain projects, making use of national and international law. Within the region, there are different levels of progress regarding this institutionalisation, with some experiences worthy of mention here.

Some countries have both ratified ILO Convention 169 and also specifically recognise the right to consultation in their constitutions, such as Bolivia, Colombia, Costa Rica, Chile, Guatemala and Mexico. However, these countries do not have domestic laws that provide legal grounds for this right, nor have they established concrete measures and mechanisms for exercising consultation rights.

Peru, though, has advanced greatly in this regard. The country not only ratified Convention 169 and included consultation rights in the Constitution, but in 2011, it became the only country in the region with a specific law requiring consultation processes. The Peruvian Congress approved [Law 29785](#) in 2011 as a direct response to the violent social conflict that occurred in 2009 between the government and indigenous people over the development of extractive industry activities in the province of Bagua, located in the Peruvian Amazon.

The law establishes a national legal framework for organising dialogue processes in cases of exploitation of natural resources in indigenous territories. However, approval of the law was polemic, as it did not have the support of the country's most important indigenous organisations, in part because it did not include the participation of indigenous peoples in the definition of the terms under which consultations should be undertaken.¹¹ In addition, for the implementation of the law to be effective, institutional strengthening, coordination and the allocation of sufficient resources are needed.¹²

¹⁰ For information about the right to consultation in the extractive industries, and in particular other mechanisms besides the courts via which indigenous people have demanded consultation rights, see the [ELLA Brief: Managing Conflict Through Consultation: Latin America's Experience](#).

¹¹ These perspectives on the law come from experts on the right to consultation who attended the VI Latin American Forum on Extractive Industries, held in Lima in November 2012. The recent approval of the law means so far there is little published research analysing the law's failures and successes, especially in English. One good assessment, though in Spanish, is: Diez, A. 2012. [Los Múltiples e Intrincados Caminos de la Consulta Previa en el Perú: Derroteros Cruzados Ante las Industrias Extractivas \(The Multiple and Intricate Pathways to Prior Consultation in Peru: Paths Crossed in the Face of Extractive Industry\)](#). Punta de Vista No. 3. Online publication.

¹² For more information, see: Aranda, M., Soriano, E., Carrasco, H. 2 September 2011. [Prior Consultation Law in Peru: a Good First Step](#). El Cristal Roto Blog, Blog of the Law Department of the Universidad de Pacífico. Online publication.



These deficiencies in the legal framework at the national level have meant that indigenous and tribal peoples' rights are still being systematically violated. In response, one of the key legal strategies indigenous and tribal peoples have used is bringing their complaints to their national courts. The following are some examples of key cases that were selected to highlight geographical diversity and because each of them show successes in halting - even if only temporarily - the projects in question, because they violated the consultation rights of the indigenous and tribal peoples affected by them.

Ecuador

In 1999 in Ecuador, the [Independent Federation of the Shuar Population](#) (*Federación Independiente del Pueblo Shuar del Ecuador* - FIPSE) opposed the oil company *Arco Oriente* entering their territories located in the Amazonian province of Morona Santiago. As a result of their resistance and of the legal actions that they pursued, they ultimately took their case to Ecuador's [Constitutional Court](#). In its ruling, the Court acknowledged that communal organisation should be respected, that it should not be divided, and therefore the extractive project could not be undertaken without consulting and obtaining the consent of the Shuar population.¹³ As a result of the ruling, in 2000, *Arco Oriente* stopped its activities, left the country, and transferred its rights to the company Burlington Resources Ecuador Limited. Though the ruling was a victory, unfortunately the struggle did not end there. Burlington has not acknowledged the judgment of the Constitutional Court, forcing the Shuar population to start a new legal battle to prevent oil activities from being developed on its territory.¹⁴

Argentina

In 2009, the [High Court of Neuquén](#) (STJ) in Argentina granted an injunction in favour of the Mapuche indigenous population, requiring the temporary halt of a mining project,

until the full judgment was made. The Court specifically used as a reference the right to consultation established in ILO Convention 169. This ruling came as a response to a trial initiated in 2008 by the Mapuche community Mellao Morales which sought to void a contract between the Neuquina Mining Corporation (CORMINE) – a provincial state corporation – and Mining Ventures, a Chinese company.¹⁵ The trial is still ongoing, with both sides still awaiting a final judgment regarding the annulment of the contract.¹⁶

Colombia

The Colombian [Constitutional Court](#) has become a great ally of the right to consultation. In one of its most recent cases, in 2011, the Court ordered the halting of the construction of a highway that would connect Colombia and Panama and the suspension of a mining concession. The Court ruled that both projects endangered the integrity and survival of the Indigenous Population of Embera Katío and Embera Dobida and that a consultation process had not been conducted.¹⁷ The ruling is significant because it acknowledged that consultation should be conducted prior to carrying out any project, and that obtaining the free, prior and informed consent of the Embera Katío and Embera Dobida population was mandatory before developing these projects.¹⁸

STRENGTHENING CONSULTATION THROUGH THE REGIONAL HUMAN RIGHTS COURT

When national policies, law, and courts have failed to guarantee their rights, indigenous and tribal peoples have resorted to the Inter-American Human Rights Court. This court has played a central role in creating jurisprudence that has set explicit obligations for Latin American states.

Starting in the 20th century, Latin American states adopted a series of international instruments relating to human rights protection that would become the basis of a regional human rights protection and promotion system known today as the [Inter-American Human Rights System \(IAHRS\)](#). The origins

¹³ Saavedra, L.A. 2011. [Consultation or Prior Consent?](#) In: *Prior Consultation: A Fundamental Right for Indigenous Peoples*. LP Special Report. Latinamerica Press, online publication.

¹⁴ For more information, see: Centro de Políticas Públicas. 2001. [2001. ECUADOR. Reclamación C169. Caso Shuar Bloque 24. GB.282/14/2](#). Online publication.

¹⁵ Scandizzo, H. 2011. [Court Stops Mining Projects in Indigenous Territories](#). In: *Prior Consultation: A Fundamental Right for Indigenous Peoples*. LP Special Report. Latinamerica Press, online publication.

¹⁶ NeuquénPost. 2012. [Habló el Abogado de la Comunidad Mapuche Mellao Morales \(The Lawyer for the Mapuche Community Mellao Morales Spoke\)](#). NeuquénPost, online publication.

¹⁷ Abad, S. 2011. [Political Will to Apply Consultation is Lacking](#). In: *Prior Consultation: A Fundamental Right for Indigenous Peoples*. LP Special Report. Latinamerica Press, online publication.

¹⁸ Mojica, A. 2011. [Tutela Protege Pueblo Indígena Embera Katío y Dobida del Choco \(Writ of Amparo Protects Indigenous Populations Embera Katío and Dobida of the Choco\)](#). Observatory of Mining Conflicts in Latin America, online publication.



of the IAHRs date back to 1948, the year the [Organization of American States](#) (OAS) was created and the [American Declaration of the Rights and Duties of Man](#) was adopted by many States, and to 1969 when the [American Convention on Human Rights](#) (San José Pact) was adopted. The system has two main agencies in charge of observing, protecting and promoting human rights: the [Inter American Commission on Human Rights](#) (Inter-American Commission) and the [Inter-American Court](#).¹⁹

The Inter-American Commission is the agency in charge of “promoting the observance and defence of human rights in the region and of serving as a consultative organ in this matter”. As such, it plays an important role in the defence of the rights of indigenous peoples in Latin America, and has often brought cases before the Inter-American Court.²⁰

The Inter-American Court is the court mandated to oversee the protection of human rights in the region. To do so, it has jurisdictional and dispute functions for states that have ratified the American Convention on Human Rights. As a result, its rulings have a special importance given their ability to guarantee accountability of states and enterprises for human rights violations that they might have committed.²¹ The work of the Inter-American Court has been key in establishing and expanding indigenous rights, in particular the right to consultation and the right to land, territory and natural resources, as well as the relationship between these two sets of rights.²²

The Inter-American Court has set important precedents requiring states to consult indigenous and tribal peoples before granting concessions for the exploitation of the natural resources within their traditional territories. In particular, the Inter-American Court established states’ obligation to obtain indigenous and tribal peoples’ free,

informed, and prior consent. Even though the Court limits the consultation requirement to large-scale projects that might entail the displacement of these populations,²³ it still shows the Court’s progressive nature with regards to guaranteeing indigenous peoples’ collective rights. This section describes the two key cases of this court that establish, deepen and uphold consultation rights.

Saramaka vs. Suriname (2007)²⁴ and (2008)²⁵

This case centres on permission the State of Suriname granted in the 1960s for the construction of a hydroelectric reserve in the traditional territories of the Saramaka tribal population, without engaging in a consultation process with them.²⁶ The hydroelectric project involved flooding of their territories, displacement of the population, destruction of their holy sites and reduction of their subsistence resources. To aggravate the situation, when the case came before the Inter-American Court, the State of Suriname had already granted additional mining and forest concessions and was planning to expand the hydroelectric reserve, all without having consulted the Saramaka.

In its original 2007 judgement, the Inter-American Court ruled that by not respecting the Saramaka peoples’ right to consultation, the government of Suriname had violated their rights to the use and enjoyment of the natural resources within their traditional territories, which are fundamental for the survival of this population. This led the Court to also rule that in the future, the Government of Suriname can only grant concessions to explore and exploit natural resources if it guarantees the population will participate in the granting of those licences and will benefit from the projects. The Court specifically argued that this participation had to be conducted through active

¹⁹ Other ELLA materials have also been developed that focus on the role of these regional human rights institutions. For additional background information about the Inter-American Court and the rest of the Inter-American Human Rights System (IAHRS), see the [ELLA Learning Material: The Role of the IAHRs in the Promotion of the Right to Information](#). To learn about other human rights cases brought before the Inter-American Court, see the [ELLA Guide to Human Rights in Latin America](#). And finally, for a case study of one particular ruling relating to indigenous and collective rights, see the [ELLA Brief: Victims’ Rights in Multicultural Contexts: The Case of Inés Fernández at the Inter-American Court of Human Rights](#).

²⁰ Rodríguez, C. *et al.* 2010, above n 2, 6, 8, 9, p. 18.

²¹ International Federation for Human Rights (IFHR). 2010. [Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms](#). IFHR, Paris.

²² For more information about the Inter-American System and indigenous rights, see: Inter-American Commission on Human Rights. 2010. [Indigenous and Tribal People’s Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System](#). OAS, Washington, DC.

²³ In fact, as Pasqualucci (2009) argues, the UN Declaration on the Rights of Indigenous Peoples goes further than the rulings of the Inter-American Court, requiring consent for all such types of projects, regardless of size. See pages 90-91: Pasqualucci, J.M. 2009. [International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in the Light of the United Nations Declaration on the Rights of Indigenous Peoples](#). *Wisconsin International Law Journal* 27(1) 51-98.

²⁴ Inter-American Court of Human Rights. 2007. [Case of the Saramaka People vs Suriname](#). Judgment of November 28, 2007.

²⁵ Inter-American Court of Human Rights. 2008. [Case of the Saramaka People vs Suriname](#). Judgment of August 12, 2008.

²⁶ For a longer account of the Saramaka people and the case, see: Price, R. 2011. [Rainforest Warriors: Human Rights on Trial](#). University of Pennsylvania Press, Philadelphia. For additional information about the legal significance of the case, see: Brunner, L. 2008. [The Rise of Peoples’ Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights](#). *Chinese Journal of International Law* 7(3) 699-711.



consultations among the Saramaka population.²⁷

One year later, the government of Suriname petitioned the Inter-American Court to interpret its 2007 ruling, which the Court issued in 2008. The relevance of this ruling lies in the fact that, for the first time, the Court adopted a standard on the right to consent by establishing that “regarding development or large scale investment projects that might affect the integrity of the land and natural resources of the Saramaka’s population, the State has the obligation not only to consult the Saramaka, but to get their free, prior and informed consent,²⁸ according to their traditions and customs”.²⁹ This judgment partially addresses the huge challenge that consultation represents in ensuring the protection of the collective rights of indigenous and tribal peoples: the non-legally binding nature of the consultation, meaning states must implement a consultation but not necessarily act on the results of that consultation. Of course, the ruling only partially addresses this challenge, because it only makes consultations legally binding on large-scale, megaprojects, while there are many smaller-scale projects that have implications on the collective rights of these populations and that, nonetheless, are developed even if the consultation reveals opposition.

Sarayaku vs. Ecuador (2012)³⁰

In this case, the Inter-American Court ruled on a concession granted by the Ecuadorian State in the 1990s to the private oil enterprise CGC to undertake oil exploration and exploitation activities within the territory of the Kichwa Indigenous Population of Sarayu. The case centred on the lack of previous consultation and consent by the Kichwa. The case was initially brought to the Inter-American Commission by the Association of the Kichwa Population of Sarayu ([Tayjasaruta](#)), the [Centre for Economic and Social Rights \(Centro de Derechos Económicos y Sociales - CDES\)](#) and the [Center for Justice and International Law \(CEJIL\)](#). After analysing the case, in 2010 the Inter-American Commission filed a lawsuit before the Inter-American

Court against the Ecuadorian State for violating the right to consultation, endangering Sarayaku peoples’ right to life and personal integrity, and not guaranteeing their right to communal property.

This judgment is especially relevant for indigenous peoples’ right to consultation for two reasons. First, it provides clarification about the role of consultation rights in protecting indigenous and tribal peoples’ collective rights and outlines specific characteristics a process should have to be considered ‘consultation’. For example, it establishes that consultation is fundamental to guarantee their participation in decisions related to measures that affect their other rights and in particular their right to communal property and to their own culture. In addition, the Inter-American Court outlined key characteristics of consultation, such that they should be undertaken in good faith, reflect the populations’ characteristics and circumstances, and should not be reduced to a mere formal, bureaucratic procedure. On the contrary, consultation should be undertaken in such a way that it becomes a truly participatory tool with the ultimate objective of establishing a dialogue between the actors involved.

Second, the ruling established specific obligations for the Ecuadorian State with regards to consultation rights. The first was to consult the Sarayaku population in an adequate, prior and effective way and in full accordance with the law in the event that the government plans to undertake activities that imply exploitation of the natural resources within Sarayaku territory, activities which may have negative impacts on the territory. In addition, the ruling also highlighted the State’s obligation to guarantee the right to consultation, that it cannot delegate this obligation to third parties, and that it should undertake oversight, control and effective actions to protect this right. Finally, the Inter-American Court ruled that the State should adopt - in the shortest period of time possible - legislative, administrative and other needed measures to guarantee indigenous and tribal peoples’ right to consultation.³¹

²⁷ Rodríguez, C. *et al.* 2010, above n 2, 6, 8, 9, 21, p. 33.

²⁸ Free, prior and informed consent (FPIC) refers to the idea that consent should be expressed in a free manner without any coercion; should be prior to the implementation of the development project and not while the process is open or has been finalised; and that the populations has accessible information in order to make decisions. Oxfam. 2010. [Guide to Free, Prior and Informed Consent](#). Oxfam, Victoria.

²⁹ Inter-American Court of Human Rights. 2008. [Case of the Saramaka People vs Suriname](#). Judgment of 12 August 2008. Page 6.

³⁰ Inter-American Court of Human Rights. 2012. [Case of Kichwa Indigenous People of Sarayaku vs Ecuador](#). Judgement of 27 June 2012.

³¹ Brunner, L., Quintana, K. 2012. [The Duty to Consult in the Inter-American System: Legal Standards after Sarayaku](#). American Society of International Law 16(35) 1-7.



STRONG PROGRESS, YET CHALLENGES REMAIN

Though the cases presented here highlight the progress achieved in the region, there are still numerous challenges to ensuring the guarantee of the right to consultation, and through it, the right to land, territory and natural resources. Though the challenges are many, here we present just two of the most significant.

First, it is important to acknowledge and celebrate the role of the IAHRs, the Inter-American Court and national courts in the conceptualisation and defence of indigenous and tribal peoples' collective rights. However, the fact that indigenous and tribal peoples have to resort to international and national courts reflects their own governments' failure to guarantee those rights from the beginning. This illustrates that Latin American states are generally not implementing effective public policies at the legal and administrative level to guarantee these rights, implying not only the harm caused by the violation of these rights, but also lengthy and costly legal battles for the affected populations.

Second, one of the main challenges with the right to consultation in Latin America - and in the rest of the world - has to do with the power and legal weight of the consultation itself. This is a question to which the Inter-American Court and national courts have been unable to give an adequate response. To be truly consultative, populations' decisions and consent must be legally binding on states.³² The main international legal declarations on the right to consultation, such as ILO Convention 169 and some judgements of the Inter-American Court, establish states' obligation to consult indigenous and tribal populations, but not their obligation to obtain their consent or approval. The Inter-American Court in the *Saramaka vs. Suriname* case, as was shown, only established this obligation in the case of large-scale development projects. In addition, even though ILO Convention 169 mandates obtaining consent in cases in which the relocation of the populations is needed, Article 16 of the Convention states that "where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations." This leaves open the possibility for governments to relocate populations in a forced manner, as long as they respect national legal procedures.

³²Rodríguez, C. *et al.* 2010, above n 2, 6, 8, 9, 21, 28.

CONTEXTUAL FACTORS

ENABLING LATIN AMERICA'S SUCCESSFUL APPROACHES



The mobilisation and social organisation of indigenous and tribal populations affected by large-scale development, infrastructure and extractive industry projects has been a fundamental factor in the advancement of the right to consultation in the region. This mobilisation itself came about in response to the rise in infrastructure and development projects implemented by states on indigenous lands. This rise in investments was a consequence of the economic liberalisation, privatisation and elimination of barriers to foreign investment that were implemented in the region.³³ Other decisive factors included the accumulation of years of violations of indigenous peoples' rights and their frustration at government policies towards indigenous peoples. Indigenous people have participated in the creation of various international treaties and national laws, and pushed for them to include the right to consultation. Likewise, their role has been decisive in ensuring that human rights violations do not go unpunished.

Indigenous and tribal peoples' movements have benefitted from the support of civil society organisations, lawyers and experts, and in particular from their linkages with indigenous movements from other regions of the world, and the support of international

donors. Support and knowledge exchange has been channelled through the various networks that have been formed, such as the [Latin American Environmental Conflicts Observatory](#), the [Mining Conflicts Latin American Observatory](#), the [Latin American Network on Extractive Industries](#), and the [Andean Network of Peace and Community Justice](#).

The ratification of ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples by many Latin American states provided indigenous people with an important legal tool to demand their collective rights. Likewise, the Inter-American System gave Latin American indigenous and tribal peoples affected by development projects a set of regional institutions to which they can appeal to enforce their rights when their national governments have been incapable or have lacked the will to do so.

In some countries, national courts have become key institutions defending the right to consultation and to land, territory, and natural resources of indigenous and tribal peoples. This has been possible thanks to these countries' adoption of international laws on indigenous and tribal peoples' rights, and in particular to the pressure exerted by affected people and their allies to demand the respect of these rights at the national level.

³³ Sánchez, F., Ortiz, G., Moussa, N. 1999. *Panorama Minero de América Latina a Fines de los Años Noventa (Latin American Mining Outlook at the End of the 1990s)*. UN, CEPAL, Santiago de Chile.

KEY LESSONS

- 1 The emergence and mobilisation of social and indigenous movements and organised civil society groups as actors capable of producing political change has been fundamental to the region's achievements in consultation rights.
- 2 Latin American experience shows that the right to consultation can be an instrument to ensure the fulfilment of the right to land, territory, and natural resources of indigenous and tribal peoples.
- 3 International law can be a fundamental pillar for the exercise of the right to consultation, and as in many cases in Latin America, this has been the legal ground that courts have used to make their judgments.
- 4 The Latin American experience shows that a strong regional human rights system and, in particular, a regional human rights court, can be effective mechanisms for strengthening indigenous peoples' right to consultation in the region, lending weight to calls for establishing and strengthening similar courts in other regions.
- 5 In spite of progress, there are ongoing challenges to guaranteeing the right to consultation, and to land, territory and natural resources. This means it is necessary to continue strengthening these rights, in particular beginning at the national level, and from there to the regional and international levels.

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