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Governments must stop imposing development projects on Indigenous peoples' territories

Governments across the Americas continue to discriminate against Indigenous peoples by denying their right to have a say on decisions which may have devastating consequences for their cultural survival. Motorways, pipelines, hydroelectric dams and open-cast mines are some of the development projects which governments continue to carry out on or near Indigenous territories without obtaining their free, prior and informed consent.

The right to consultation, as established in various international human rights standards, is key for Indigenous peoples. They have a special relationship with their territory and environment and their cultural survival depends on it. As Eriberto Gualinga from the Sarayaku Indigenous community in Ecuador has put it "for us, the rainforest is life. It gives us our identity as an Indigenous people. Our life as a people depends on our natural environment." The following is a summary of some of the serious challenges that Indigenous peoples face on a daily basis as they claim the right to consultation and free, prior and informed consent.

The critical need for robust forms of consultation and consent

Consultation is a process of substantive dialogue between Indigenous peoples and governments on any measures which may affect them. Governments should address the concerns that Indigenous peoples have and take pro-active steps to ensure that their human rights are fully respected and protected. Timely disclosure of all relevant information about a project and its possible human rights impact is key to a genuine consultation, which has to respect the following principles: - free: all dialogue and decision-making structures must be fair and without coercion, manipulation threat, fear of reprisal, corruption or unequal bargaining power; - prior: all dialogue and agreements must take place before any potentially detrimental measures are taken and the communities must be given sufficient time to give their consent in accordance with their values and traditions; - informed: communities must be provided with full and objective information in a clear manner that is disclosed in a culturally appropriate way; they also must have the possibility of obtaining independent advice. This will ensure that measures that could lead to a significant impact upon Indigenous peoples' human rights will not move forward without their free, prior and informed consent, as specified in international human rights standards. Potential impact should be determined, first and foremost, by Indigenous peoples themselves and taking into account their vulnerable situation and the history of discrimination against them.

It is essential that states and other powerful players engage with Indigenous peoples in robust forms of consultation at all times in relation to any activities carried out on or

affecting Indigenous peoples' territories. There are many examples across the Americas where consultation simply does not take place or where the process is carried out in an ad-hoc and inconsistent manner, violating international human rights standards.

In **Mexico**, for example, the Indigenous Wixárika people are asking the government to cancel mining concessions for exploration and exploitation activities in Wirikuta, a region in San Luís Potosí state that is central to the Wixárika's cultural heritage, traditions and ways of life. The Wixárika conduct pilgrimages and traditional ceremonies each year in Wirikuta, activities which the community believe are placed at risk by mining projects in their territories. The Wixárika people claim that they have not been consulted about these projects. Although the government has recently announced the cancellation of some mining concessions in a small part of Wirikuta, many concessions remain in force and the majority of the territory remains open to extractive activities.

In **Ecuador**, the government has launched a campaign to inform Indigenous peoples about its plans for further oil exploration in the Amazon. Local Indigenous communities have already responded to the authorities by highlighting their key concerns. "The government has announced that they will share information with us and that the process of information-sharing will amount to consultation. But the right to consultation and free, prior and informed consent is something different according to international standards. To begin with, consultation will only be a reality if the authorities demonstrate that they take us seriously, they respect our rights and they proceed with good faith and transparency. In the last few weeks the government has invited us to information-sharing workshops, but given the circumstances, it is not sensible for us to attend those workshops. In their view, mere information-sharing is consultation" said Patricia Gualinga, one of the Sarayaku leaders, to Amnesty International.

Freedom from harassment, insecurity and violence

Indigenous people should be able to participate and make decisions without any pressure from external actors. They should be able to organize themselves, seek independent advice and challenge authorities and other powerful actors without fear for reprisals such as judicial harassment, threats or any forms of violence.

The experience of the Indigenous Wiwa communities who are currently living in the Sierra de Santa Marta in **Colombia** is a case in point. The limited consultation that they had access to in relation to the construction of the El Cercado dam took place in a context of serious human rights abuses committed by paramilitaries operating with the support and acquiescence of the armed forces, security forces and guerrillas. A series of meetings between Indigenous groups and the regional environmental agency took place in 2005. However, from as early as 2002 to 2007 the Wiwa communities suffered a consistent pattern of intimidation, destruction of homes, attacks against places of cultural significance and threats and killings of spiritual and community leaders. As a result, many Wiwa communities were forcibly displaced from the area that would be affected by the dam. The El Cercado dam in La Guajira Department began functioning in November 2010 but the Wiwa people are still campaigning to receive redress for the adverse impact that this has had on their lives.

Also in **Colombia**, members of the Afro-descendant community of La Toma in Cauca Department were threatened with death in May 2010. They were campaigning to make their views heard on proposed mining projects in their area. Paramilitary groups threatened them with death before and after they submitted a writ of protection (tutela) to the courts demanding adequate consultation and consent regarding those projects. The La Toma community practices artisanal mining as part of their livelihood. They

claim that large-scale mining projects will have a detrimental effect on their lives. The leaders of the nearby Indigenous communities of Cerro Tijeras and Honduras have also experienced repeated death threats in recent years in the context of opposing the development of large-scale gold mining by national and multinational companies on the lands they claim.

Indigenous and campesino communities have taken to the streets in **Ecuador** to protest the lack of consultation around government proposed laws and policies on issues that directly affect them. Instead of engaging in constructive dialogue and properly consulting with the communities whose livelihoods will be affected, the authorities have used criminal proceedings against Indigenous and campesino leaders to discourage them from voicing their disapproval. Amnesty International has recently launched a report that analyzes the case of 24 leaders who have faced unfounded judicial proceedings, one of which is Indigenous leader Marco Guatemal.ⁱ He told Amnesty International that these cases of criminalization “discourage and limit us, creating fear among young people who would be emerging now as leaders”. In May 2010 Marco Guatemal was accused of sabotage and terrorism along with two other Indigenous leaders, but due to lack of evidence this investigation was closed. He then faced accusations of blocking roads – a crime that carries up to three years in prison. He had to present himself to authorities every 15 days. In October 2011, Marco Guatemal was finally acquitted, after spending 21 days detained.

In **Argentina**, the Indigenous Toba Qom community of La Primavera has been campaigning against the government’s proposal to build a university campus on part of their traditional lands. Community leader Félix Díaz and some of his relatives have suffered intimidation and death threats, even after a May 2011 agreement with the government to implement protection measures for the community. The project is currently suspended following a judicial order. Community members claim that the project will have a detrimental impact on their lives.

Consultation should take place before decisions are made

States have an obligation to engage with Indigenous peoples at the earliest stage of any decision-making processes affecting them. However, governments often launch consultation processes after important decisions have been taken. This prevents Indigenous people from having a real chance to affect the outcome of the decision-making process. It also creates a climate of bad faith, distrust and polarisation which can lead to social unrest.

A case in point is that of the Isiboro Sécore Indigenous Territory and National Park (Territorio Indígena y Parque Nacional Isiboro Sécore, TIPNIS) in **Bolivia**. Since 2003 the authorities have adopted key decisions on the construction of a motorway across the TIPNIS, including a call for tender and the allocation of the project to a company. However, many communities from the TIPNIS have argued lack of prior consultation and, in August 2011, marched to La Paz to express their concerns. The result was a law that cancelled the construction of the road. Some other communities of the TIPNIS, who are in favour of the road, took to the streets in December 2011 and, as a result of the pressure, the government passed another law to implement a consultation process. This brought about another march in April 2012 by those arguing that the consultation was untimely, lacking good faith and that the government was bypassing legitimate community authorities in order to win the support of some communities. The government has already cancelled the contract for the construction of the road and the consultation was due to start at the end of July 2012. There was no clarity on how many communities would actually engage with it. It appears that much of the social unrest of

the last couple of years could have been avoided if the government had refrained from making decisions before consulting with those who will be affected.

Solid understanding of Indigenous peoples' circumstances

An essential element for robust consultation between states and Indigenous peoples is the adequate understanding of Indigenous peoples' identities, values and choices. By demonstrating a clear grasp of the way of life of Indigenous groups and their views on key social, economic, political, cultural and environmental issues, government officials would make inter-cultural dialogue and mutual understanding more likely to happen. Practical steps include open discussions about the way in which Indigenous peoples would like to engage with the state, including the format, timeframe and language of the consultation process itself. Authorities should give Indigenous people the opportunity to be adequately represented in terms of gender, geography and cultural identity. Information about the issues at stake should be provided in a complete and accessible way and Indigenous peoples should be allowed to seek independent advice.

Representation is an area, among many others, in which governments often fail to understand Indigenous peoples' cultural arrangements. For example, in the case of the Wiwa Indigenous communities of **Colombia**, mentioned above, the authorities scheduled and held only one meeting with the Wiwa delegates on 13 May 2005. The Wiwa delegates stated that they were not empowered to make decisions on behalf of the communities and stressed that any decisions would be taken by the Council of Traditional Authorities (Consejo Territorial de Cabildos, CTC). The CTC is the body which represents the peoples of the Sierra Nevada at national and international level. However, the authorities did not convene any further meetings to discuss the El Cercado dam project. They issued the environmental licence for the project three months later.

Corporations compound abuses

Governments have a duty to protect against human rights abuses by non-state actors – including when these rights are threatened by business operations. But government failure to protect human rights does not absolve companies of responsibility for the impact of their operations on human rights. According to the UN Principles on Business and Human Rights and other international standards, all companies have the responsibility to respect human rights, including the rights to consultation and consent. Fulfilling the UN Principles requires that companies apply the highest human rights standards in their activities.

Canada-based Goldcorp Inc. is one of the many companies carrying out extractive projects on or near Indigenous land in the Americas. One of its projects, the Marlin mine, which has been in operation since 2003, is located in the San Marcos department, **Guatemala**. According to the Inter-American Commission on Human Rights, at least 18 Indigenous Maya communities live in the area which has been directly or indirectly affected by the mine. Residents have highlighted the intra-community divisions that the lack of any meaningful consultation has resulted in. According to Carmen Mejía, an Indigenous woman from San Miguel Ixtahuacán, “the company began to operate here, in our territory, in an illegal manner, lying to us. Because they never consulted with us, they never told us (...) that this was going to have (...) so much negative impact, (...) that it was going to cause so much conflict.” Goldcorp has argued that it has fulfilled with its obligations under national law, but Guatemalan law and practice, as the UN Special Rapporteur on the Human Rights of Indigenous Peoples has noted, is below international standards regarding the right of Indigenous peoples to

consultation and consent. In March 2012 Goldcorp submitted a new environmental impact study in order to close one phase of its mine and open another. Despite previous national and international criticism of the company and the government around the lack of consultation, local activists again complained that no meaningful consultation took place.

Effective accountability and redress

When Indigenous organizations challenge state agencies or companies for failing to respect their rights, they frequently get nowhere. Courts may be reluctant to apply international standards if they have not been incorporated into domestic legislation. They may also suffer from intense political pressure not to delay the execution of development projects. When judicial or non-judicial bodies uphold the right to consultation and consent, and there have been important examples in the last couple of years, governments and companies usually drag their feet to comply with their demands.

The Hul'qumi'num Treaty Group (HTG) in British Columbia, **Canada**, have been in negotiations over land with the federal and provincial governments for almost two decades. Meanwhile, corporations continue to buy and sell traditional HTG territories and carry out logging and other development projects without HTG's consent. The HTG have taken their case to the Inter-American Commission on Human Rights which has found that the available mechanisms to provide redress for land rights violations in Canada fall short of international standards of justice. They are too slow and place too heavy a burden on Indigenous peoples to prove their rights. HTG negotiator Robert Morales has said that "[w]e are not asking the Commission to turn back the clock and investigate historic wrongs. We're urging effective protection of our land rights so that we can address the on-going deforestation and other development activities happening on our lands today."

In **Ecuador**, the Sarayaku community has taken its case to the Inter-American Court of Human Rights after years of litigation during which the state failed to adopt any adequate measures to redress the violations that they suffered. According to Sarayaku member Eriberto Gualinga, "in 2002 an oil company came onto our lands. The government had given it a licence to look for oil. We were never consulted by the government over this oil exploration. We were never given information. They never explained what they were doing and they never asked us what we thought of it all." Finally, the Court ruled in their favour in July 2012.ⁱⁱ Now the government must fully comply with this judgement.

Sometimes governments refuse to comply with international accountability mechanisms. For example, in 2011 **Brazil** recalled its ambassador to the Organization of American States in reprisal for the Inter-American Commission's recommendation that it suspend work on the Belo Monte dam until the affected Indigenous communities had been adequately consulted. Subsequently, the Inter-American Commission modified its recommendations in this case, no longer requiring Brazil to suspend the project pending consultation. The construction work is currently underway. Many Indigenous communities argue that they have not been adequately consulted and that the government has failed to put in place previously agreed mitigation measures.

In other occasions, although it may take a very long time, governments take steps to comply with international decisions, such as the case of **Paraguay** in relation to the Yakye Axa Indigenous community. In 2005, the Inter-American Court of Human Rights ordered Paraguay to restore the Yakye Axa's ancestral lands. For almost two decades, they had fought a legal battle to return to their ancestral lands while around 90 families

were forced to live in destitute conditions alongside a nearby highway. In early 2012, the government and the community reached an agreement over alternative lands although the community is still waiting to move on to those lands. The Sawhoyamaya Indigenous community, which has also reached a favourable ruling from the Inter-American Court, is still waiting for restitution of their ancestral lands.

Strong and comprehensive legal frameworks

A positive development across the Americas over the last few decades is the legislative and constitutional recognition of Indigenous rights. More recently, some governments have also taken steps to adopt specific legislation or policies in order to regulate the right to consultation and consent at the national level. However, these laws and policies have been limited in terms of process and substance. In the future, they should be adequately consulted and agreed with Indigenous peoples and developed across all relevant government departments, including the mining, environmental protection and energy sectors. They should include monitoring, enforcement and dispute resolution procedures.

A recent example is the approval of national guidelines (reglamento) on the right to consultation in **Peru**. In 2011, and following intense campaigning by Indigenous organizations, the government passed a law on the right to consultation. However, subsequent negotiations with Indigenous peoples in order to elaborate the guidelines for that law broke down. The guidelines were approved by the government with the agreement of only one out of six national Indigenous organizations. The process and the content of the guidelines fail to uphold important aspects of the right to consultation as recognised in international standards.

Recommendations

The following are some of the urgent and concrete steps that governments across the Americas should take in order to make the right to consultation and free, prior and informed consent a reality for Indigenous peoples. Economic development is a legitimate goal and can be instrumental in advancing human rights. But economic development should not be pursued at the expense of the human rights of Indigenous peoples.

1. Governments must ensure that any potential laws, policies and measures that may affect Indigenous peoples undergo a process of consultation with them before a decision has been made.
2. In relation to development projects such as hydro-electric dams, motorways, pipelines and mining and oil activities, or to any other project that may have a significant impact on Indigenous communities, governments must engage in robust consultations with them and obtain their free, prior and informed consent before making any decisions on such projects.
3. Governments must establish clear and fair mechanisms and procedures, in collaboration with Indigenous peoples, to guarantee the right to consultation and free, prior and informed consent. Consultation should be done in good faith and in accordance with the decision-making processes of affected communities, their values and traditions. They must include mechanisms for monitoring enforcement and reporting grievances. Communities should be involved in any decision-making process at an early stage and must be provided with full and objective information. This should be communicated and shared with affected communities in a

transparent and accessible manner.

4. Governments must allocate sufficient resources to effectively carry out consultations and to ensure that members of the community are not precluded from taking part in the process due to distance, literacy in a language, or any other circumstances.
5. Companies should commit publicly to respect all international human rights standards and voluntary pledges in the context of their activities.
6. Companies must not carry out projects which may affect Indigenous peoples if governments have failed to respect the right to consultation and free, prior and informed consent as established in international standards.

Background information

Governments must show their political will to respect, protect and fulfil all the human rights of Indigenous peoples. The list of countries and Indigenous peoples mentioned in this document is not exhaustive. They are illustrative of state action and inaction in relation to Indigenous Peoples' rights.

The right of Indigenous peoples to consultation and free, prior and informed consent is contained in the UN Declaration on the Rights of Indigenous Peoples. The Declaration is the result of the more than 20 years of negotiation between states and Indigenous peoples. All states of the Americas have endorsed it. These rights are also set out in the International Labour Organization's Convention on Indigenous and Tribal Peoples, No. 169, which has been ratified by most states in the Americas. The rights have also been repeatedly endorsed by UN and regional human rights treaty bodies, including the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Inter-American Court of Human Rights, as well as the Special Rapporteur on Rights of Indigenous Peoples, the UN Permanent Forum on Indigenous Issues, and the UN Expert Mechanism on the Rights of Indigenous Peoples.

Amnesty International and the Indigenous Kichwa People of Sarayaku, in Ecuador, have produced a documentary which highlights how important it is for Indigenous peoples to be consulted on issues that matter to them. For further information please go to www.bit.ly/jaguar-trailer.

ⁱ Amnesty International, *'So that no one can demand anything': Criminalizing the right to protest in Ecuador?*, 17 July 2012, available from <http://www.amnesty.org/en/library/info/AMR28/002/2012/en>

ⁱⁱ Amnesty International, *Ecuador: Inter-American Court ruling marks key victory for Indigenous Peoples*, 27 July 2012, available from <http://www.amnesty.org/en/news/ecuador-inter-american-court-ruling-marks-key-victory-indigenous-peoples-2012-07-26>