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Right to Consultation and Consent of Indigenous Peoples in the Americas

Written statement to the 21st session of the UN Human Rights Council (10-28 September 2012)

“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 [for new oil projects in the Amazonia], but given the circumstances, it is not sensible for us to attend those workshops. In their view, mere information-sharing is consultation”

Patricia Gualinga, one of the Kichwa People of Sarayaku (Ecuador) leaders.

This statement encapsulates one of the main challenges Indigenous peoples face when their ancestral territories are suddenly the site of development projects. Motorways, pipelines, hydroelectric dams and open-cast mines are some of the projects which governments across the Americas continue to carry out on or near Indigenous territories without obtaining their free, prior and informed consent. Indigenous peoples are denied the right to have a say on decisions that may have devastating consequences for their cultural survival.

Amnesty International welcomes the attention that the Human Rights Council and its mechanisms are giving to such a central issue for Indigenous peoples.

There are many ways in which States fail to protect and other powerful actors fail to respect the right to consultation. This statement highlights three of the most frequent shortcomings that the organisation has identified in partnership with Indigenous peoples from the Americas.

First, consultation usually takes place *after* decisions have been made. In **Bolivia**, for example, since 2003 the authorities have adopted key decisions on the construction of a motorway across the Isiboro Sécure Indigenous Territory and National Park (Territorio Indígena y Parque Nacional Isiboro Sécure, TIPNIS), including a call for tender and the allocation of the project to a company. However, many communities from the TIPNIS 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. Amnesty International is concerned that the consultation process, which started on 29 July 2012, falls short of Bolivia’s international human rights obligations. It was not agreed with all affected Indigenous peoples in advance, and some members of the affected communities challenged the process in the courts. Failure to involve Indigenous peoples early in this process has alienated many communities and created a climate of strong opposition to the road’s construction.

Second, consultation sometimes takes place in a hostile environment for the affected Indigenous peoples or they are harassed if they claim their right to be consulted. The experience of the Indigenous Wiwa communities who live in the Sierra Nevada de Santa Marta in **Colombia** is a case in point. The limited consultation to which they had access in relation to the construction of the El Cercado dam took place in a context of serious human rights abuses committed by armed forces, paramilitaries operating with their support and acquiescence—and guerrillas. One meeting was held with members of the Wiwa Indigenous community in May

2005, but those attending the meeting made clear that they were not empowered to make decisions on behalf of the communities; they stressed that the authorities would have to speak to the Council of Traditional Authorities which represents the four Indigenous peoples of the Sierra Nevada at the national and international levels. From 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.

Indigenous and *campesino* communities of **Ecuador** are another example. They have taken to the streets to protest the lack of consultation around government proposed laws and policies on issues such as mining and water 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 them, Indigenous leader Marco Guatemal told Amnesty International that these cases of criminalization “discourage and limit us, creating fear among young people who would be emerging now as leaders”.¹

Third, the consultation process may lack a robust legal framework with effective accountability mechanisms. An example is the case of The Hul’qumi’num Treaty Group (HTG) in British Columbia, **Canada**. The HTG has been in negotiations with the federal and provincial governments for almost two decades in an effort to obtain redress for the historic, unilateral appropriation of much of their traditional territory. The HTG has 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 are too slow and too onerous to meet international standards of justice. While negotiations drag on, the HTG has been denied effective interim protection of their rights. Corporations are buying and selling lands in the HTG territory and carrying out logging and other development projects without the HTG’s consent. Although Canadian courts have affirmed a state duty to consult with, accommodate, and in some instance obtain the consent of Indigenous peoples in respect to development decisions, the narrow interpretation and limited implementation of these requirements by governments has denied Indigenous peoples any effective recourse if governments and corporations decide to ignore their concerns. HTG negotiator Robert Morales has said, “[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.”

As some of the examples in this written statement illustrate, due to the lack of adequate national mechanisms, some Indigenous peoples are left with no choice but to appeal to international human rights bodies to demand redress for the violations of their right to consultation.

This is the case of the Sarayaku community of **Ecuador** who took 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 the community 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.” The Court ruled in

¹ 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>

favour of the community in July 2012.² It is essential that the government complies promptly with the judgement's Orders.

Regrettably, governments sometimes 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 Brazil 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 that case to no longer require Brazil to suspend the project pending consultation. Construction work on the dam is currently underway. Many Indigenous communities maintain that they have not been adequately consulted and that the government has failed to put in place previously agreed mitigation measures.

Conclusion

There is a need for urgent and concrete steps by governments across the Americas in order to make the rights to consultation and to free, prior and informed consent a reality for Indigenous peoples. One such step is the adoption of laws giving effect to these rights, developed in accordance with international standards and with the agreement of Indigenous peoples. While economic development is a legitimate goal and can be instrumental in advancing human rights, it should not be pursued at the expense of the human rights of Indigenous peoples.

² 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>