

THE RIGHT OF INDIGENOUS PEOPLES TO FREE, PRIOR AND INFORMED CONSENT:

THE NEED FOR CONCERTED ACTION.

THE PERUVIAN CASE, AND PRINCIPLES WITH BROAD APPLICATION IN THE AMERICAS

Mónica Yriart*

“We will have to repent in this generation not merely for the vitriolic words and actions of the bad people, but for the appalling silence of the good people.” Martin Luther King, Jr.

The distinguished Peruvian human rights lawyer, Dr. Juan Carlos Ruiz Molleda, has asserted that the right of indigenous peoples to grant or deny “free, prior and informed consent” regarding investment and development projects on or affecting their territories is “one of indigenous peoples’ most important rights, just as is their right to self-determination, which is concretized through the right of consent.” Dr. Ruiz emphasizes that indigenous peoples’ right to consent is, indeed, legally recognized in Peru’s internal juridical system, and it is one of Peru’s international law commitments. However, it seems in Peruvian mainstream society this is the right “nobody wants to talk about,” and the State has effectively rendered it invisible.¹

In 2007, in the case of *The Saramaka People v. Suriname*, the Inter-American Court of Human Rights (IACtHR), a judicial organ of the OAS, set forth a rule of law that requires nation states to obtain the consent of indigenous peoples before authorizing large-scale development or investment projects 1) that would impair their practice of customs and

* Attorney, specialist in Constitutional Law in the Americas, International Human Rights, the Rights of Indigenous Peoples. Juris Doctor, George Washington University School of Law, Washington D.C., U.S.A; Bachelor of Arts, Anthropology, Swarthmore College, Swarthmore, P.A., U.S.A. All translations from Spanish to English are by the author.

¹ Juan Carlos Ruíz Molleda, “El derecho de los pueblos indígenas del cual nadie quiere hablar: El derecho al consentimiento” 2013, <<http://servindi.org/actualidad/88116>>

traditions that form the basis of their physical or cultural survival, or 2) that would physically displace them, or 3) that would place toxins on their territories.² This rule was reaffirmed in 2012 in *The Kichwa Sarayaku People v. Ecuador*.³ As is demonstrated in Peru's legal system, in the analysis below, judicial decisions of the IACtHR are, generically, assigned the status of *hard law*, as a matter of national constitutional law, within the internal legal systems of most American nations. This is true even though the *Saramaka* case is largely, or indeed overwhelmingly, not implemented. This is the crux of a very profound problem, and an opportunity for profound change in indigenous-state relations.

In addition, in 2007 the United Nations General Assembly adopted the UN Declaration of the Rights of Indigenous Peoples (UNDRIP).⁴ Resolutions of the United Nations General Assembly are considered "recommendations" with respect to member states and are not directly enforceable on nations.⁵ However, UNDRIP is regarded by many as being declarative of other rules of law contained in treaties and customary law that are binding and are widely applicable in the Americas, while UNDRIP, itself, merely projects these human rights into the factual contexts of indigenous peoples.⁶ 143 countries voted for the UNDRIP in the UN General Assembly on September 13, 2007. All the countries of the Inter-American System voted in favour of it with the exception of Canada (against), the United States (against), and Colombia (abstained). The United States and Canada subsequently submitted endorsements of the Declaration to UN Secretary General Ban Ki-Moon in 2010, and Colombia submitted an endorsement in 2011.

UNDRIP provides a far broader right of consent than that stated in *Saramaka*. The declaration is based on a paradigm of unconditional consent, in which the existence of the right of consent requires no narrow factual predicates, but arises with respect to any government or third party actions that may affect indigenous peoples, territories or natural resources, which include waters and subsoil.⁷

² IACtHR (Judgment) November 28, 2007, *The Saramaka People v. Suriname*. paras. 128, 131, 133-137.(*Saramaka*)

³ IACtHR (Judgment) June 27, 2012, *The Kichwa People of Sarayaku v. Ecuador*, paras. 168, n.219, 171, n. 221. 178, n. 236, *passim*.

⁴ United Nations Declaration on the Rights of Indigenous Peoples: Resolution of the General Assembly, 2 October 2007, A/RES/61/295 (UNDRIP).

⁵ Articles 10, 15, United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. (UN Charter).

⁶ United Nations Permanent Forum on Indigenous Issues, Report on the eighth session (18-29 May 2009) Economic and Social Council, Official Records, Supplement No. 23E/2009/43, E/C.19/2009/14 Annex, paras. 6, 10.

⁷ Articles 10, 11(2), 19, 28(1), 29(2) 32(2) UNDRIP.

Opponents of the right to consent pose a serious legal threat to the longevity of the indigenous right to free, prior and informed consent, particularly with its present scope and legal consequences

As in most countries of the Americas, the majority of Peruvian government officials, elected and appointed, are vociferously opposed to indigenous peoples' right to effectively give or withhold consent to commercial or public investment projects that are on their territories or significantly affect their territories. They frequently deny the existence of the legal right. They enact laws and issue judgments, at a level inferior to the constitution, that prohibit the right of consent. The projects that are protected in this manner typically involve mining, petroleum and gas extraction, agribusiness, timber extraction, and infra-structure programs. These tend to have a profound impact on the ecologies and land that form the material substrate of indigenous peoples' cultural, ethnic, and physical survival, thus destroying these or placing them in extreme stress or jeopardy. The destruction of ethnic groups may be deemed the price of majoritarian advancement.

State representatives to the Organization of American States (OAS), correspondingly, often vent strong opposition to the indigenous right of consent. Such OAS representatives are delegates from the Executive Branches of their governments. National Executives are *the* principal brokers and implementers of commercial and public contracts that utilize indigenous territories for resources, and they are *the* architects of the political economic plans that map out the usage of indigenous lands, and quantify the expected revenues in their budget plans. Their plans are physically implemented in indigenous communities with massive deployments of police, armed forces, and private security forces, often by hundreds or thousands of armed personnel.⁸

⁸ For example approximately 2000 police and armed forces were deployed together to a site where the Yanacocha gold mining company seeks to implement its gold mining project, denominated "*Conga*," in Cajamarca, Peru. In May of 2014, the IACmmHR issued precautionary measures requesting the state Peruvian to take affirmative steps protect indigenous leaders who are protesting the *Conga* project on their ancestral lands, because a number of them had been beaten, killed and otherwise injured, and at least 46 leaders faced imminent danger to their lives and physical integrity arising from confrontations with state forces and unidentified attackers. However, the government has been taken more than a year and a half to take any of the recommended steps and cancelled a country visit planned by the IACmmHR to investigate the violence. IACmmHR (Precautionary Measures) May 5, 2014, PM 452/11 - *Leaders of Campesino Communities and Campesino Patrols in Cajamarca, Peru*, para. II. 3. b.; Perú: A un año de medida cautelar de la CIDH Estado recién se reúne con beneficiarios, *Servicios en Comunicación Intercultural Servindi* <<http://servindi.org/actualidad/128996>>

In 2013, President Rafael Correa, of Ecuador, addressed a plenary session of the General Assembly of the OAS, declaring to representatives of each of OAS' 34 member states that the indigenous right of consent, as defined by the Inter-American Court of Human Rights in the *Sarayaku* case, represented an “extremely serious,” “illegitimate,” “radical and irresponsible,” “affront to national sovereignty.”⁹

It is ominous for the future of the indigenous right of consent, that it is not just representatives of national Executive Branches who oppose it, nor even just Legislators, Judges and Administrative Officials within countries—all of whom contravene national constitutional and international law when they defy the right of consent -- but it is also high level international jurists, who are specialized in human rights and constitutional law, and whose work is traditionally directed to defending oppressed peoples against government transgressions. Many such people are working today to reverse or extinguish the indigenous right to consent, in order to free their ethnic homelands for national resource extraction and exploitation.

For example, the erudite Peruvian jurist, Dr. Diego García-Sayán, is the former president of the Inter-American Court of Human Rights. He and a now a judge on that Court and also currently serves as the Director General of the highly prestigious Latin American human rights agency, the Andean Commission of Jurists (CAJ). In this capacity, Dr. García-Sayán teaches a publically available on-line legal course on the subject of human rights and social conflicts in Peru. Regarding large-scale investment projects affecting indigenous territories, Dr. García-Sayán teaches that all forms of the “indigenous veto” are prohibited (meaning indigenous peoples’ withholding of consent to such projects), he subsequently questions the existence of any indigenous right to consent, and then stresses the importance of expanding natural resource extraction throughout Peru.¹⁰ Estimates hold that fully one fourth (25%) of the national territory of Peru is now subject to mining operations,¹¹ and three quarters (75%) of the Amazonian region is under natural resource extraction operations.¹²

⁹ President of the Republic of Ecuador, Rafael Correa, 42nd General Assembly of the Organization of American States (OAS) Cochabamba, Bolivia, 4-6 June 2013, <<https://www.youtube.com/watch?v=O97fat1hkXA>>

¹⁰ Dr. Diego García-Sayán, Director, Andean Commission of Justice, Judge and former President, Inter-American Court of Human Rights. On-line Legal Educational Video Series: La Corte Interamericana y la Consulta Previa: “Prevención y Manejo de Conflictos Sociales en Perú” (2013). <<https://www.youtube.com/watch?v=x-kvuOREbsQ&feature=share>>

¹¹ Perú: Informe Alternativo de 2012 Sobre el Cumplimiento del Convenio 169 de la OIT (Lima, European Union, et al., (sponsors.) (2012), p.1.

The latter region is home to the largest concentration of diverse indigenous peoples in Peru. Peru appears bent on exhausting its natural territories.

The term “veto” requires some explanation. The term is commonly used by opponents of the indigenous right to consent, throughout the Americas, to delegitimize indigenous peoples’ legal prerogative to deny consent to large-scale projects in contexts that meet the requisite criteria that give rise to the right, such as those defined in the legally binding *Saramaka* case. The “veto” concept vaguely implies a democratic theory or principle, however an accepted definition or exposition of such a theory has yet to surface. The concept is contrary to the law, and perhaps its users sense that, while its political punch is effective, the less said regarding it, the better, consigning such a discussion to “the right nobody wishes to speak of.”

While some courts have adopted the “veto” concept, including the Constitutional Tribunal of Peru,¹³ the “veto” has no root in any legal source or foundation of any kind. It is regarded by proponents of indigenous causes as a sheer artifice, without legal validity, and coined to block the legally well-founded right of consent.

In Peru, the Vice Minister of Inter-Culturality, Patricia Jacquelyn Balbuena Palacios, who is the chief officer in charge of indigenous-state and indigenous-corporate relations regarding large-scale development and investment projects on indigenous peoples’ territories, expresses the motto “there is no indigenous veto” at virtually every public speaking opportunity, in Peru and internationally.

Internationally, other attorneys, such as those working in a human rights centre in Belgium, have written in 2014, in a legal text with global circulation, that the Inter-American Court of Human Rights was mistaken in its reading of key legal sources when it first established the binding legal right to consent in the *Saramaka* case.¹⁴

¹² “Ley de Consulta aprobada por unanimidad, Pueblos indígenas deberán dar su consentimiento sobre decisiones que los afecten directamente” (Perú, *Noticias Aliadas* agosto 31, 2011.) <<http://www.noticiasaliadas.org/articles.asp?art=6448> >

¹³ *Gonzalo Tuanama Tunanma y más de 5000 ciudadanos c/ Decreto Legislativo No. 1089*, Tribunal Constitucional de Perú, Exp. No. 0022-2009-PI/TC. 9 de junio 2010. Fundamento VIII.

Because of the activities of influential opponents of indigenous peoples' legal right to grant or deny consent to large-scale development projects, it cannot be taken for granted that the present rule of international law, and derivatively, of constitutional law, within countries, will survive the skilled legal assaults of its opponents. Its current breadth and definition may not survive. Nonetheless, the universal guarantee of the effective practical exercise of the right to consent is a conscious goal of indigenous peoples throughout the Americas. However, its realization appears as a distant, and even theoretical objective in countries such as Peru, given the reality of the government conduct, the prohibitive infra-constitutional law and policy, and state violence in the imposition of large-scale projects that surround indigenous peoples today.

However, in our view, it is of paramount importance that the pursuit of this vision now should not be postponed; nor should insistence on the present realization of the right be delayed; and, indigenous organizational strategies ought not to limit themselves to traditional methods of redress and social change. It is suggested that to consign the right of consent to an *undefined future* at this time may be an error that could be regretted in future generations. It is humbly suggested that Indigenous peoples must define, determine, and bring into being, the Future, while the law is in their favour.

The implementation of the right of consent would re-cast the balance of power between indigenous peoples and the State; for this reason, its establishment is central to changing the course of the history of indigenous peoples.

There are important legal actions in progress in Peru, which, instigated by NGO's, are realizing an essential campaign of strategic litigation in the legal subject matter and substantive rights of indigenous communities. This litigation is designed to shape the law and public thinking, as well as safeguard the rights of indigenous communities.¹⁵ Some of these law suits

¹⁴ Oswaldo Ruiz-Chiriboga, "Pueblos Indígenas y la Corte Inter-Americana de Derechos Humanos: Fondo y Reparaciones," *La Convención Americana de Derechos Humanos: Comentario*, pp. 990-993. Christian Steiner & Patricia Uribe (eds.), Konrad Adenauer Stiftung, Bolivia, 2014. University of Ghent, Division of Public Law, Centre for Human Rights. Ghent, Belgium.

¹⁵ Juan Carlos Ruíz Molleda, *Guía de Litigio Estratégico Constitucional en Defensa de los Pueblos Indígenas*, Instituto de Defensa Legal, Lima 2013.

include, among many other arguments, demands regarding the right of consent. But the Peruvian Constitutional Tribunal (CT), which generally controls lower courts, has prohibited the indigenous peoples' exercise of the right of consent through its use of the political "veto" concept.¹⁶ In addition, the very slow pace of litigation, which takes years, and the legal limitations placed on the results, even in successful cases, and, in addition the frequent failure of the state to implement court orders, and the aggravation of the emergence of new threats just after a case is concluded, all lead to the result that the indigenous peoples of Peru are not able to defend their territories by this method alone. Despite numerous cases in litigation, this means of defence simply cannot compete with the velocity with which the State consumes and/or destroys indigenous territories, and thereby, indigenous ethnic life and existence.

Silence rests upon the understanding that the enforcement of the right of consent, as legally defined, would create a new unprecedented control of indigenous peoples over their territories.

A comprehensively exercised right to consent could indeed block present national political economic strategies that are significantly aimed at the utilization of indigenous virgin territories for resource extraction and exploitation. That power stems from the indigenous right to decline such large-scale development projects, which is intrinsic to the essential nature of this rule of law. The rule designs indigenous control over the use and occupation of their territories. While some question how the right of consent could be implemented when most states such as Peru, are woefully remiss in the demarcation and titling of indigenous territories. This should pose no barrier. Like the right of consent, itself, indigenous territories, as customarily occupied and utilized by indigenous peoples, are defined by international and constitutional law, and the right to consent attaches to indigenous territories defined by these standards. Indigenous peoples have a right to the acknowledgement and protection of their territories according to this law. If the state has failed to demarcate and title territory, or has done so in contravention to international law, domestic law and practice cannot defeat the state's obligation to fully implement and respect international and constitutional standards. Binding jurisprudence of the Inter-American Court of Human Rights, the doctrine of the IACmmHR, and Articles 13 and 14 of the legally binding International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent

¹⁶ *Gonzalo Tuanama Tunanma y más de 5000 ciudadanos c/ Decreto Legislativo No. 1089*, Tribunal Constitucional de Perú, Exp. No. 0022-2009-PI/TC. 9 de junio 2010. Fundamento VIII.

Countries of 1989 (ILO Conv. 169),¹⁷ all require the state to recognize and protect territories *traditionally occupied or otherwise used* by indigenous peoples, in effect presumptively establishing the plenary right to collective property, while a correct and formal state recognition is pending. The state has a direct obligation to recognize and protect indigenous traditional lands, comprising not just dwellings, but customarily used lands for subsistence or other cultural activities, sacred lands, and the environment, safeguarding them from third parties and from the state itself.¹⁸ Concessions for the exploration or exploitation of natural resources on untitled or un-demarcated such territories may not be undertaken without the indigenous peoples' full consultation and *consent*.¹⁹

This is essential to indigenous peoples' fundamental rights since the demarcation and titling process is a bureaucratic and political quagmire, with no end in sight, in Peru and many American states. It is important that indigenous peoples stand up for the recognition of this international territorial right, because states frequently sell off untitled indigenous territories to developers, while the indigenous wait through a protracted but, in fact, illusory title application process.

A campaign for the exercise of the right of consent is therefore in no way blocked by the state's non-demarcation or ill-demarcation of indigenous territories: the right of consent is operable with respect to territorial rights recognized constitutionally and in international law, inferior norms that may be inconsistent, notwithstanding. A more detailed analysis of the legal status of international law in Peru's constitutional system, is explained below.

¹⁷ Articles 13-19, the International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries of 1989, C169, Geneva, 27 June 1989, (ILO Conv. 169).

¹⁸ IACtHR (Judgment) January 31, 2001, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 140; IACtHR (Judgment) June 17, 2005, *The Yakye Axa Indigenous Community v. Paraguay*, paras. 211-217.

¹⁹ IACtHR (Judgment) August 31, 2001, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, para. 153, IACmmHR (Recommendation) October 12, 2004 *Maya Indigenous Communities of the Toledo District (Belize)*, paras. 127, 153. b; The Inter-American Commission on Human Rights, "Indigenous and Tribal Peoples' Rights over their Ancestral and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System," 35 *American Indian Law Review* 263, pp. 296-310. (2010-2011), pp.73-122.

Some indigenous peoples desire to cooperate with and participate in large-scale development projects. For these communities, the right to give or deny consent to a project could fundamentally alter their stature in negotiations, prevent the sacrifice of their self-determination, and ensure that compensation would be honest, reflecting market values, rather than today's usually tiny monetary concessions, that reflect a social class bias, and are absurd relative to the stream of revenue produced by a project, and the value of the land it appropriates. Indigenous communities endowed with the power to grant or deny approval of a project could also have sufficient leverage to re-structure paternalistic employer-employee relations that are prevalent in such projects today, again reflecting a social class bias, when indigenous peoples are employed on their own lands. With the right of consent as leverage, indigenous peoples could re-direct both the direction of the flow, and the balance, of authority.

The Pacto de Unidad de Las Organizaciones de los Pueblos Indígenas de Perú (Pact of Unity of the Indigenous Organizations of Peru)²⁰ is an umbrella organization composed of regional indigenous federations, which in turn, are composed of indigenous community leaders and local organizations. Despite express government opposition to the right of consent, in legislative, administrative, judicial and executive manifestations, The Pacto de Unidad boldly spearheads the advance of the indigenous right to free, prior, and informed consent throughout the country.

In December of 2014, in its Pronunciamiento del III Encuentro Nacional Frente al Cambio Climático (Pronouncement on the Third National Meeting on Climate Change), the Pacto de Unidad issued an official Communiqué to the government, requiring it to, “annul every kind of concession authorized within the territories of indigenous peoples without their consultation and free, prior and informed consent.”²¹ Already in 2011, the Pact had issued a list of “situations in which Consent is required of the State in order to approve a proposed measure.” The list was denominated a set of “minimal,

²⁰ Pacto de Unidad de Las Organizaciones de los Pueblos Indígenas de Perú. Camino a la autodeterminación de nuestros Pueblos <http://pactodeunidadperu.org/?page_id=7113#>

²¹ Pacto de Unidad de Organizaciones Indígenas de Perú, Pronunciamiento del III Encuentro Nacional Frente al Cambio Climático, Exigencia al Estado Peruano No. 6, <http://pactodeunidadperu.org/?page_id=7832>.

non-negotiable principles.” The Pacto’s list is scrupulously founded upon points of law and doctrine derived from the Inter-American Court and Commission of Human Rights, the legally binding ILO Conv. 169, and UNDRIP.²²

The factual and legal criteria that give rise to the indigenous right of free, prior and informed consent, according to *hard law*, and the most modest of the applicable legal models: the case of *Saramaka v. Suriname* (IACtHR 2007).

A cornerstone of the legal right to prior consent, which is uncontestably mandatory *hard law* in Peru (as it is in many countries of the Americas), is the jurisprudence of the Inter-American Court of Human Rights in its decision in *Saramaka v. Suriname*.²³ According to *Saramaka*, the right to consent arises when proposed projects affect or would affect indigenous peoples, territories or resources in such a manner that any one of the following criteria are present: 1) the exercise of traditional or customs, upon which an indigenous peoples’ cultural or physical survival depends, is compromised, 2) or, the physical displacement of *people* is required, 3) or, toxic materials or wastes are to be introduced into indigenous territories.²⁴ The *Saramaka* case prohibits any “restriction” of the peoples’ use of their territories which would create a “denial of their traditions and customs in a way that endangers the very survival of the group.” In sum, it is important to emphasize that what this legal norm protects is 1) the survival of the people, 2) on their territory, 3) by means of their traditions and customs.²⁵

Why is the *Saramaka* model *hard law* within the Peruvian national legal and constitutional system?

The right of consent has its sources in the Political Constitution of the Republic of Peru of 1993, and in international treaties ratified by Peru, as they are interpreted by their authoritative legal bodies.²⁶ The *Saramaka* case is based in the

²²Pacto de Unidad de Organizaciones Indígenas de Perú, La Declaración del Primer Encuentro Nacional, <http://pactodeunidadperu.org/?page_id=896>

²³ IACtHR (Judgment) November 28, 2007, *The People of Saramaka v. Suriname*, paras. 128-138. (*Saramaka*).

²⁴ Ibid.

²⁵ *Saramaka* para. 128

²⁶ Convenio de la Organización Internacional del Trabajo N° 169 sobre Pueblos Indígenas y Tribales en los Países Independientes (Convenio OIT 169); Convención Americana sobre Derechos Humanos (Convención Americana), Pacto Internacional de Derechos Civiles y Políticos (PIDC), Pacto

first instance on Article 21 of the American Convention on Human Rights (ACHR, American Convention),²⁷ which defines the human right to property, and is ratified by Peru.²⁸ Article 21 is interpreted with respect to indigenous peoples by the Inter-American Court of Human Rights (IACtHR), which is the legally authoritative interpreter of the American Convention.²⁹

Article 55 of Peru's Constitution of 1993 states that, "treaties signed by the State and in legal effect form a part of the national law." The Fourth Final and Transitory Disposition (Disposición Final y Transitoria Cuarta) of the Peruvian Constitution, which has full constitutional force, states that, "the rights and liberties that are recognized by the Constitution shall be interpreted in conformity [...] with international treaties [...] regarding the same subject matter."³⁰ The Code of Constitutional Procedure (Código Procesal Constitucional) establishes: "Constitutional rights ... must be interpreted in conformity the decisions adopted by the international human rights tribunals."³¹ The Constitutional Tribunal (CT) itself has repeatedly held, including in legally binding precedent,³² that in Peru, "the decisions of the Inter-American Court of Human Rights are binding upon all the public powers."³³ This, the CT has said "is by virtue of the constitutional order."³⁴

Internacional de los Derechos Económicos, Sociales y Culturales (PIDESC), Convención Internacional sobre la Eliminación de todas las formas de Discriminación Racial (CIEDR).

²⁷ Organization of American States, American Convention on Human Rights, "Pact of San Jose" Costa Rica, 22 November 1969, (henceforth ACHR). Perú ratified the ACHR and acceded to the contentious jurisdiction of the Inter-American Court of Human Right in 1978. Decreto Ley N° 22231, de 11 de julio de 1978. Instrumento de Ratificación de la Convención Americana de Derechos Humanos de 12 de Julio de 1978. Depositado el 28 de julio de 1978. Entrada en vigencia el 28 de julio de 1978.

²⁸ *Saramaka* paras. 118-123, 124-137

²⁹ Article 68.1 ACHR, IACtHR (Judgment) 26 September 2006, *Almonacid Arellano y otros v. Chile*, para. 124; IACtHR (Judgment) 26 September 2006, *Trabajadores Cesados del Congreso (Aguado Alfaro y otros) v. Perú*, para. 128.

³⁰ Disposición Final y Transitoria Cuarta de la Constitución Política del Perú de 1993.

³¹ Artículo V, Código Procesal Constitucional, Ley N° 28237, Promulgado 28-05-2004, *El Peruano* 31-05-2004.

³² *Caso Miguel Cornelio Piura* EXP. N.º 3771-2004-HC/TC, *Recurso Extraordinario, Hábeas Corpus*, 29 de diciembre de 2004, Fundamentos 3, 4. Pedro Andrés Lizana Puelles c/ Corte Superior de Justicia de Piura, Amparo, EXP. N.º 5854-2005-PA/TC, Tribunal Constitucional de Perú, 8 nov. 2005, Fundamento 35.

³³ *Caso Colegio de Abogados Del Callao c. Congreso de la República*, N.º 007-2007-PI/TC, 19 de junio Del 2007, Tribunal Constitucional de Perú. Fundamentos. 36.

³⁴ *Ibid*, Fundamentos 12, 14.

Moreover, it has been established by the Constitutional Tribunal, in accord with Peru's commitment under the Vienna Convention on Treaties of 1968 as well as under the ACHR, *the State may not invoke norms of internal law to justify the failure to implement international legal obligations.*³⁵ This is to say that Peru's Law on the Right to Prior Consultation³⁶ and its Regulations, as they are interpreted today,³⁷ the frequent failure to recognize indigenous territories without titles, to the extreme prejudice of their rights, and the legal prohibition of the exercise of the right of consent, which may also be to the extreme and irreversible prejudice of indigenous peoples' rights, and the whole body of related laws governing mining, petroleum extraction, agriculture and infra-structure, as well as the judicial decisions, administrative acts and policy measures that give them effect, which all block the exercise of the right of consent, are invalid – in relation to the indigenous human right of consent.

According to Peru's juridical order, articles 88 and 89 of the Constitution, which guarantee to indigenous peoples, 1) “the right to property over their land” and, 2) that indigenous peoples must be “autonomous ... [in] the use and the free disposition of their ... lands,” must be interpreted in accord with Inter-American jurisprudence on the same subject matter: to wit, the right to possess and autonomously control territory and resources established in *Saramaka v. Suriname*. In failing to comply with its own constitutional rule of law, Peru violates the “democratic state of law” that defines its democracy.³⁸ This broad breach of the law threatens the survival of ethnic minorities, as such, and threatens to suffocate and/or extinguish ethnic life in order to appropriate wealth from such peoples. Mirrored throughout the Americas, this massive, and rapidly advancing human rights crisis, requires an indigenous peoples' movement that is equal to it in power and dimensions.

³⁵ Artículos 27° y 53° de la Convención de Viena sobre el derecho de los tratados de 1969, ratificado por el Perú mediante el Decreto Supremo N.º 029-2000-RE, de fecha 14 de septiembre de 2000. Caso *Juan Nolberto Rivero Lazo*, Exp. N.º 4677-2005-PHC/TC, emitido el 12 de agosto del 2005.

³⁶ Ley Nacional No. 29.785. Ley de Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios Reconocido en el Convenio No. 169 de la Organización Internacional del Trabajo. República de Perú. 23 agosto 2010. *El Peruano* 6 septiembre 2011. (Law on Prior Consultation).

³⁷ Reglamento de la Ley No. 29785, Ley del Derecho a la Consulta Previa a los Pueblos Indígenas u Originarios reconocido en el Convenio 169 de la Organización Internacional del Trabajo (OIT) .Decreto Supremo N.º 001-2012-MC, República de Perú, *El Peruano*, 3 abril 2012. (Regulation on the Law on Prior Consultation).

³⁸ Article 3, Political Constitution of the Republic of Peru of 1993.

The implementation of the right to free, prior and informed consent

The implementation of the right to free, prior and informed consent requires a strategy that pressures the State, makes it markedly visible, on the national and international planes, while focussing on the issue of the legality of the right of consent, and the issue of the illegality of the conduct of the State and the massive armed advance with which it enforces an illegal economic model. A multi-faceted, comprehensive campaign is required, one which pre-defines progressive stages towards a well delineated outcome that is both pragmatic and ideal. Such a campaign should be planned according to a pre-determined chronology which proceeds in a specific order in public offices on the planes of the United Nations, the Inter-American System, and national and local institutions. The campaign should employ popular, diplomatic, legal and public relations methods and pressure with equal, simultaneous and maximum force. These coordinated forces should focus on and proactively define: 1) this single right (although connected international rights to territory and indigenous identity, for example, are implicated) 2) the mechanisms for its implementation 3) the processes for its functioning 4) and, the mechanism for its continuous international monitoring. With these defined and presented to public offices, the expectation would be to receive recognition or a similar official version from such public offices.

It is recommended that this be an absolutely peaceful campaign, which would not cease until its full implementations is achieved. It is recommended that non-violence be declared publicly by all indigenous peoples. Indigenous peoples, as shown, are entitled to the immediate application of international law standards, and can be expected to cooperate peacefully with these, but, where safety considerations permit, non-violent *non-cooperation with illegal oppression*, would also be an option, as part of the popular campaign, in the successful tradition of Mahatma Gandhi. It is recommended that all indigenous campaign activity, while it may uphold the correct constitutional and international law, rather than the state's illegal standards, should be under-taken in the context of 100% non-violence. As stated, Peru, like other countries in the Americas, is in the habit of imposing large-scale development and investment projects with the hands-on collaboration of hundreds or thousands of armed forces. A pledge of 100% non-violence would render such deployments manifestly absurd, and create a forceful public relations liability for an already illegally acting State, while affording traction in favourable public visibility for indigenous peoples. No one can deny the dangers associated with

these situations, which are costly and brutal today, and which might be ameliorated, if not cured, by the universal adoption of a 100% non-violence pledge.

It is suggested that only a movement of the stature of the historic campaigns of Mahatma Gandhi, Martin Luther Kings, Jr. and Nelson Mandela can achieve the exercise of the right of consent for indigenous peoples, which would alter the balance of powers between indigenous peoples and the state, and gain recognition of indigenous peoples' dominion over their ancestral and traditional lands.

Mahatma Gandhi, who freed the people of India from the empire and armed forces of Britain in 1947, demonstrated that the least dangerous and infinitely most effective route to success was the absolutely non-violent action of the people. Armed only with the truth and justice, and a posture of absolutely peaceful non-cooperation with illegitimate acts of the State, through his movement, the unlawful power of the State ultimately dissipated and disappeared.³⁹ It was an arduous march, but the values that were at stake justified it, for that and future generations. Martin Luther King Jr. in the United States, and Nelson Mandela in South Africa, ultimately applied the same principles.⁴⁰ It is suggested that only a movement of the stature of these historic campaigns can triumph in fully establishing the right of consent and its necessary connected territorial rights.

Does the right to consent arise only as an exceptional legal recourse, or are its legal predicates commonplace throughout the Peru? The first stage in a campaign to realize the plenary exercise of the right to consent is to document the existing factual contexts that legally give rise to right to consent.

The initial phase of the movement here described entails the documentation, by means of a legally formulated and executed questionnaire, of the factual predicates that characterize the situations present among indigenous peoples, whose

³⁹ Mohandas Gandhi, *Freedom's Battle Being a Comprehensive Collection of Writings and Speeches on the Present Situation* (1922), Chap. 8 Non-Cooperation.

⁴⁰ Martin Luther King, Jr. "Non-Violence and Racial Justice," *Christian Century*, February 6 1957. In 1993, Nelson Mandela shared the Nobel Peace Prize with South Africa's President F.W. de Klerk for their peaceful efforts to bring a non-racial democracy to South Africa. Black South Africans voted for the first time in the 1994 election that brought Mandela the presidency of South Africa.

potential or actual relations with state and private entities, meet the legal criteria that give rise to the right of consent. In this manner a thematic legal/factual study will be compiled, and serve as the key informative back-drop in the campaign's inter-actions with international and national public offices, in subsequent stages. It will be important to focus, to the degree possible, on un-contested and un-contestable public knowledge, in order to avoid the need for litigation, national or international, which can stall a campaign for more than a decade.

Now, it has been said by some, who do not have this kind of evidence in hand, that the right to consent arises only in exceptional and very few cases. However, a comparison of the triggering criteria set forth in the legally binding *Saramaka* decision, as against the record of socio-environmental and territorial indigenous conflicts throughout Peru, reveals that toxic contamination, the obstruction or extinction of traditional means of survival, and the physical displacement of peoples are day to day occurrences as the result of large scale resource extraction and exploitation. These cases are not exceptional, rather they characterize the general human rights condition and landscape of indigenous peoples.⁴¹ Moreover, as stated, tremendous sectors of the national territory have been placed under concessions for extraction/exploitation, and plans for growth in this sector is on the public agenda.

This proposed documentation shall use the definitions of "indigenous or tribal peoples" that correspond to international law that is in effect in Peru, and not inferior "legal" norms that are restrictive and, contradicting international law, exclude indigenous peoples that the state has denominated as "campesinos" from enjoying the rights that correspond to them.⁴²

There are new diplomatic avenues available today that are focussed specifically upon the on-site practical implementation of human rights that have not been fulfilled in nation states, through the cooperation of the UN, the OAS and the countries at issue.

⁴¹ Observatorio de Conflictos Mineros en el Perú < <http://www.cooperacion.org.pe/observatorio-de-conflictos-mineros-del-peru> >

⁴² See Article 1, ILO Conv. 169.

It is suggested that today there are new diplomatic avenues focussed specifically upon the on-site implementation of human rights, and that, as a second stage in the campaign, it is necessary to utilize these new pathways in order to garner the legitimation, accompaniment, international visibility and technical assistance that UN, OAS, and national offices can offer. It is strategically important to begin with those international officials and diplomatic spaces that most firmly foment the indigenous right to free, prior and informed consent. These are found in the United Nations and include the Office of the Special Rapporteur on Indigenous Rights, the Permanent Forum on Indigenous Issues, and the Expert Mechanism on the Rights of Indigenous Peoples. The officials within these fora work within the United Nations Human Rights Council and the Council on Economic, Social and Cultural Rights. In the OAS, the most propitious allies are found in the Inter-American Commission on Human Rights, and with the OAS Rapporteur on Indigenous Rights, Rose-Marie Belle Antoine. These allies are to be approached with the compiled and legally structured documentation of Peruvian territorial and social-environmental conflicts which demonstrate the juridical traits that give rise to the right to consent in international and Inter-American law. It is important that these international offices be approached in a *strategic sequence*, designed to maximize the campaign's international and national legitimacy and visibility. It is also important that its strategic steps be crafted in order to avoid long periods of unproductive waiting, and meetings and informational sessions that produce no concrete results. This will require special detailed strategizing with reference to the specific functioning of the offices involved.

As stated, one therefore should begin with the strongest proponents of the right of consent in the United Nations. Let us remember that the former Special Rapporteur, James Anaya, established the, “general rule that extractive activities should not take place within the territories of indigenous peoples without their free, prior and informed consent.”⁴³ The Current Rapporteur, Victoria Tauli-Corpuz, has reaffirmed that “minimum international standards” require “the need to obtain free, prior and informed consent of indigenous peoples before any development project is brought into their

⁴³ J. Anaya, Human Rights Council, Report of the Special Rapporteur on the rights of indigenous peoples, “Extractive industries and indigenous peoples,” Twenty-fourth session, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, United Nations General Assembly Distr.: General, A/HRC/24/41, 1 July 2013, para.25.

communities.⁴⁴ The mandate of the Special Rapporteur includes receiving information from indigenous peoples and their organizations, and to ““examine ways and means of overcoming existing obstacles to the full and effective protection of the human rights and fundamental freedoms of indigenous peoples.”⁴⁵ The Special Rapporteur will be provided with the facts of the Peruvian cases, with each case in which human rights violations are on-going or imminent and deemed to present irreversible harm, categorized as emergency situations. Recognition of the right to consent, based upon on the facts, as testified and witnessed in the study, will be requested. Note that the data from Peru is to be keyed to the narrower criteria required for the right of consent derived from *Saramaka v. Suriname*. The Special Rapporteur has announced, as just quoted, that consent is required “before any development project is brought into [indigenous] communities.” This is in accord with the unconditional right of consent to all activities in indigenous territories and communities mandated by the United Declaration on the Rights of Indigenous Peoples (UNDRIP), which binds all UN officials. Thus, asking for validation of the right of consent with regard to Peru’s specific record will not ask the Special Rapporteur to make a factual or legal leap beyond what is available on the public record. The right to consent should be easily discernible to UN officials from uncontested and incontestable information. The Special Rapporteur will be further requested to recommend an explicit system of procedural rules to regulate the practical implementation of free, prior and informed consent in those and future cases in Peru. The campaign should elaborate and present a model of such procedural rules to facilitate the work of the Special Rapporteur and contribute important participation from indigenous peoples. The support of the other relevant offices, which also promote the right of indigenous peoples, and the right of consent in accord with UNDRIP, will be solicited.

Having gained the support of the UN, the campaign will, in its next stage, approach the Inter-American Commission on Human Rights (IACmmHR). However it will do so in the special context of a new accord of special collaboration between the United Nations High Commissioner on Human Rights and the IACmmHR. This accord is specifically

⁴⁴ Victoria Tauli-Corpuz Special Rapporteur on the rights of indigenous peoples, Indigenous Innovations, 2014 < <http://unsr.vtaulicorpuz.org/site/index.php/en/interviews/34-indigenous-innovations> >

⁴⁵ Resolution 15/14 Adopted by the Human Rights Council, Distr.: General A/HRC/RES/15/14, 6 October 2010 < <http://unsr.vtaulicorpuz.org/site/index.php/en/un-mandate/12-hrc-res-15-14-2010>> See also Human Rights Council Resolution 24/9, A/HRC/RES/24/9, Oct. 8, 2013, < <http://unsr.vtaulicorpuz.org/site/docs/docsonu/2013-a-hrc-res-24-9-en.pdf>>

directed to the task of implementing neglected human rights in a practical manner, on the ground, within countries.⁴⁶ On November 19, 2014, the President of the IACmmHR, Dr. Tracy Robinson, and the UN High Commissioner on Human Rights, Zeid Ra'ad Al Hussein, announced their plan of cooperation jointly. In their announcement, they stated, “We are concerned about resistance by certain individual countries towards the regional system and urge all OAS member States to abide by their responsibility to support the Inter-American Commission by complying with its decisions.” President Robinson stated: “Our alliance is therefore crucial to strengthening our role in helping States to meet their human rights obligations and victims to enjoy their rights.”⁴⁷

Thus, in this stage, it is recommended that the campaign not seek traditional Inter-American litigation, which generally takes more than half a dozen years to reach resolutions, but will instead seek direct technical assistance to countries on the ground, with the help not only of the IACmmHR, but the Rapporteur of the OAS on Indigenous Rights, and offices such as the OAS Committee on Political and Judicial Affairs, to take direct action to implement procedural norms to effectuate the right of consent in all instances in which it applies, and to implement an automatic mechanism for regular international monitoring and reporting. This is necessary to guard against the ever-common deviations or failures of political will that prevail frequently in the region, to prevent evasion from attention and reaction when the right of consent is not honoured or any other related illegality takes place. The Office of the United Nations System in Lima, Peru will be solicited to coordinate with the OAS and the UN in accord with the mandates of the new accord between the IACmmHR and the UN High Commissioner on Human Rights to collaborate on in-country implementation of the neglected human rights of indigenous consent.

⁴⁶ OAS »Inter-American Commission on Human Rights (IACHR) » Media Centre » Press Releases » 2014 » 137, 19 November 2014. The Inter-American Commission on Human Rights, represented by its President, Tracy Robinson, The Office of the High Commissioner of the United Nations on Human Rights represented by the High Commissioner, Zeid Ra'ad Al Hussein.

<http://www.oas.org/en/iachr/media_center/PReleases/2014/137.asp >

⁴⁷ Ibid.

It is key that every stage of the campaign be accompanied by non-violent popular mobilization centred on the theme of the implementation of the rule of law, and the peaceful withdrawal of the cadres of state and private armed forces deployed in indigenous territories to effectuate unlawful ends. National and international media should link the diplomatic and popular mobilizations.

It is the obligation of all organs of the United Nations, including the organs of the OAS, to fully and effectively implement the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

One of the many articles that set forth the unconditional indigenous right of consent to any matters affecting indigenous peoples, lands or resources,⁴⁸ Article 32 UNDRIP states,

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

However, UNDRIP also affirmatively charges all offices, organs and agencies of the United Nations to work towards the full implementation of the UNDRIP, to provide technical and financial assistance to this end, and to follow up on the effectiveness of their efforts.

Article 41 UNDRIP states,

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42 states,

⁴⁸ Articles 10, 11(2), 19, 28(1), 29(2) 32(2) UNDRIP.

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration (emphasis added).

It is frequently forgotten that the OAS is a “regional agency within the United Nations” as defined in Article 1 of its constitutive Charter.⁴⁹ Therefore, it falls within the above prescriptions of Articles 41 and 42 of UNDRIP: it is also obliged to dedicate its facilities, resources and technical assistance to achieve the full and effective implementation of the unconditional right of consent which UNDRIP requires.⁵⁰

Despite political negotiations now underway under the auspices of the OAS, in which agreement on the right of consent is the most contentious issue in an on-going effort to craft an American Declaration on the Rights of Indigenous Peoples, it is already, paradoxically, the obligation of existing bodies of the OAS to provide resources directed at establishing this right in an operational fashion at the country level. Why are indigenous peoples struggling with states in negotiations within the OAS, to gain recognition of a right that has already been established by the IACtHR in *Saramaka* and, unconditionally, by the United Nations, of which the OAS is a part?

The right of consent is, indeed, insufficiently spoken about, and insufficiently understood legally, within the OAS as well, to the detriment of indigenous peoples’ territorial security and integrity.

Continuing with the strategic sequence of campaign stages to implement the right of consent in Peru, through the simultaneous use of law, diplomacy, and popular mobilization: once having gained legitimization and participation of the

⁴⁹ Article 1, Charter of the Organization of American States (OAS), OAS A-41, 119 UNTS 3, 30 April 1948. Entry into force: 13 December 1951. (OAS Charter).

⁵⁰ Articles 10, 11(2), 19, 28(1), 29(2) 32(2) UNDRIP.

United Nations agencies charged with implementing indigenous rights, grounded upon the situation in Peru, where massive consumption of indigenous territories, the toxic contamination of territories, and human displacement from territories occur, without consent, in plain sight, and having added to this, the legitimization and participation of the Inter-American system jointly with the Office of the UN High Commissioner on Human Rights, the campaign will be poised to approach Peruvian state authorities.

This will to be accomplished within the scope of another new accord of 2014 made between the Inter-American Commission on Human Rights (IACmmHR) and the Peruvian Ministry of Justice and Human Rights. As part of the Ministry's National Plan for Human Rights for 2014-2016, on 31 October 2014, representatives of the Peru pledged to join the IACmmHR in implementing an "unprecedented mechanism" in the Peruvian government, designed to ensure that "all of the recommendations of international human rights organs are translated into guidelines for the development of public policies within every one of the branches of the State."⁵¹ Peruvian representatives pledged to work "closely" with the Commission to this end, and to rely on its aid in order to realize this purpose.⁵² Therefore, it is recommended to insert the indigenous right of consent, procedural rules for the practical implementation of that right, and the planned mechanisms for its regular monitoring into this "unprecedented" process of creating human rights policy in every branch of the Peruvian government, undertaken by the Peruvian Ministry of Justice and Human Rights. This effort is to be undertaken in the plain sight of and in collaboration with the United Nations and the IACmmHR.

⁵¹ "... [A]segurar que todas las recomendaciones de organismos internacionales de derechos humanos se traduzcan en lineamientos para la elaboración de políticas públicas dentro de cada una de las ramas del Estado". Informe sobre el 153 Período de Sesiones de la Comisión Interamericana Derechos Humanos, Perú: Plan Nacional de Derechos Humanos, 2014, p. 28.

⁵² Dr. Henry José Ávila Herrera, Viceministro de Derechos Humanos y Acceso a la Justicia, Dr. Arturo Manuel Martínez Ortiz, Presidente del Consejo de Defensa Jurídica del Estado, 153 Período de Sesiones de la Comisión Interamericana Derechos Humanos, Perú: Plan Nacional de Derechos Humanos, 31 Octubre 2014, Video de la audiencia. < <http://www.oas.org/es/cidh/multimedia/sesiones/153>> Plan Nacional de Derechos Humanos, Decreto Supremo N° 005-2014-JUS, El Peruano, 5 de Julio de 2014.

It is noteworthy that, regarding Peru's National Plan for Human Rights, the IACmmHR asserted to the Peruvian delegates that, "human beings, and not the implementation of an economic model, must lie at the centre of any human rights plan."⁵³ In Peru, the human rights of indigenous peoples are systematically denied to hundreds of thousands, precisely because of the implementation of a political economic policy that is heavy in natural resource extraction and exploitation.

Through the Ministry of Justice and Human Rights, it is recommended to implement procedural rules through which the right of consent can be concretely and universally exercised, with the support of the Inter-American Commission on Human Rights, the two Rapporteurs, one from the OAS and one from the UN, and the office of the UN High Commissioner on Human Rights. As stated, these legal and diplomatic efforts must be accompanied by massive popular pressure with national and international visibility focussed on one theme: legality, the direct implementation of the international law that the nation has committed to within its constitutional system and within the community of nations. The end of the mass violation of the international law of human rights taking place on an industrial scale within Peru, and the hands of the armies of the state.

What is sought to be established in Peru, concretely?

What is sought from the international and regional human rights institutions is 1) the recognition that the right to consent properly corresponds to documented factual situations in Peru, through the use of legal questionnaires and public records, 2) a system of procedural rules suitable for implementing and regulating the exercise of the right of free, prior and informed consent, 3) a chronological plan for the on-going monitoring and reporting on the fulfilment of this right, 4) the utilization of Inter-American and international law to define relevant territorial and indigenous identity statuses.

⁵³ Informe sobre el 153 Período de Sesiones de la Comisión Interamericana Derechos Humanos, Perú: Plan Nacional de Derechos Humanos, 2014, p. 28.

In Peru, international human rights treaties with constitutional rank, such as the ACHR as interpreted by the IACtHR in the *Saramaka* case, are of direct application within the legal system, and the existence of legal norms or standards that contradict them, provide no justification for failing to apply the international norms.⁵⁴ Thus three avenues of legal advance of the right of consent are open: direct implementation, actions to change the interpretation of existing norms, and actions to change existing norms. It is suggested that the first avenue is legally required by international and constitutional law, and that the implementation of the right of consent should proceed directly, to save time, and to prevent further irreparable harm beyond what has already occurred, while the second two avenues may serve as follow-up actions designed to harmonize inferior norms with the correct mandates of the higher law.

Throughout the proposed campaign it is important at each stage to present to the government and the public, a workable and professional legal avenue forward. Whether it is the case of presenting procedural norms for implementation of the right, or a reasonable re-interpretation of the Law on the Right of Prior Consultation, it is important to provide an avenue forward. The space at hand permits one critical example.

Article 3 of the Law on the Right to Prior Consultation, and Article 5 (d) of its Regulations⁵⁵ establish that the “end,” “finality” or “purpose” (*finalidad*) of Prior Consultations with indigenous peoples with regard to investment and development projects affecting their territories or peoples, is to “reach an agreement or consent between the State and the indigenous peoples” (*alcanzar un acuerdo o consentimiento entre el Estado y los pueblos indígenas.*) When, however, the factual predicates that give rise to the right of consent are present, the term “end” or “finality” in these clauses can and must be interpreted in its imperative sense. This is easily accommodated by the plain language of the norm, requiring no change. At present that term is universally interpreted by government in an aspirational sense, denying any independent decision-making authority to the indigenous at all, and requiring State approval of every decisions concerning the project. It is submitted that the aspirational interpretation is not only a less natural reading of the language, it is flatly

⁵⁴ Artículos 27° y 53° de la Convención de Viena sobre el derecho de los tratados de 1969, ratificado por el Perú mediante el Decreto Supremo N.º 029-2000-RE, de fecha 14 de septiembre de 2000. Caso *Juan Nolberto Rivero Lazo*, Exp. N° 4677-2005-PHC/TC, emitido el 12 de agosto del 2005.

⁵⁵ Artículo 3 Ley de Consulta Previa *supra* n. 36; Reglamento de la Ley del Derecho a la Consulta Previa *supra* n. 37.

unconstitutional and in contravention to the American Convention on Human Rights (ACHR), the jurisprudence of the IACtHR, and to the “democratic state of law” of Article 3 of the Constitution.

It is not an obstacle that this set of norms states that “the final decision regarding the approval of a legislative or administrative measure corresponds to the competent state entity.”⁵⁶ This is because, as this set of norms, and the nation’s juridical order both express, the State is at no time free to make a decision that departs from “the collective rights recognized in the Political Constitution of Peru and the treaties ratified by the Peruvian State.”⁵⁷ This means that the right of consent, defined by the IACtHR interpreting the ACHR, must be applied in all cases in which one or more of the criteria for its application are present. This is a subject matter of fundamental human rights that governs by authority of the Constitution in Peru.⁵⁸

This is an example of a number of technical proposals which can be brought to the table at the Ministry of Justice and Human Rights for inclusion in its program of “multi-sectorial” implementation of human rights, with the support of the educational materials gained from the relevant organs of the United Nations, the IACmmHR, the Rapporteur on Indigenous Rights, and the study of territorial and social-environmental conflicts in Peru that demonstrate the factual predicates giving rise to the right to consent.

As stated, the recommended methodology for the campaign is to provide solutions and concrete procedural norms and avenues to the State and to all public institutions at every stage in a context of popular pressure, national and international publicity, and support from international and regional institutions.

⁵⁶ Artículo 23.1 Reglamento Consulta Previa *supra* n. 37; Artículo 15 Ley de Consulta Previa *supra* n. 36.

⁵⁷ *Ibid.*

⁵⁸ Además, la Disposición Complementaria, Transitoria y Final, Séptima (b) del Reglamento requiere explícitamente “consentimiento” de los “titulares” de las tierras de pueblos indígenas para “almacenar [o] realizar la disposición final de materiales peligrosos [o] emitir medidas administrativas que autoricen dichas actividades” Reglamento Consulta Previa *supra* n. 37.

Conclusion

The right to free, prior, and informed consent does not, at present, have an assured future. Whether the present historical-legal moment will endure is a cause for concern. However, the right of consent is at the controlling core of all connected indigenous rights related to the preservation, occupation and control of their territories. Simply stated, without the right of consent, indigenous lands are the state's, for the taking, upon a non-binding consultation in which independent decisions are denied to the peoples.

For this reason it is necessary to trace a well-planned and well timed strategy, from the first phase unto the last. It must be a strategy which, as Nelson Mandela maintained in the face of the oppression of *Apartheid*, "Failure is not an option." Instead, following his example, a peaceful determination is appropriate, with a steady, planned movement forward that is characterized by absolute confidence that the goal *will be reached*, as long as a concerted focus is trained and sustained to this end. Mahatma Gandhi, who overcame the British Empire in India, opined that a people possessed of the truth and of justice, who mobilized according to principles of absolute peace, would finally be invincible before any repressive power.⁵⁹ In my opinion, this cause must be conceived in terms of the dimensions of the causes of Mandela, Gandhi, and King because the present challenge is of historical, national and international dimensions. Indigenous peoples in Peru, in the spirit of the Pacto de Unidad must define the future, and realize it. They must establish and operate the right of consent, and the right to territory. The state's dismal and violent illegalities must cease.

To obtain more information, the author may be contacted at monicayriart@gmail.com

⁵⁹ Mohandas Gandhi, *Freedom's Battle Being a Comprehensive Collection of Writings and Speeches on the Present Situation* (1922).