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THE STRUGGLE FOR LAWS OF FREE, PRIOR, AND INFORMED CONSULTATION IN PERU: LESSONS AND AMBIGUITIES IN THE RECOGNITION OF INDIGENOUS PEOPLES

Elizabeth Salmón G. †

Abstract: Despite the fact that Peru ratified ILO Convention 169 on December 2, 1993 and was therefore bound by those dispositions, it adopted public policies without consulting indigenous people. This lack of dialogue led to social conflict over the management of natural resources. In June 2009, a violent episode of social unrest emerged in the provinces of Bagua and Utcubamba during the government of Alan García after the entry into force of the United States-Peru Trade Promotion Agreement (“PTPA”). Indigenous people believed that PTPA aimed to sacrifice rainforest conservation for oil and mining exploitation. In this context, indigenous people grew frustrated and blocked a major highway. Such acts of violence resulted in deaths and injuries. Subsequently during the administration of Ollanta Humala, legal and administrative measures of free, prior, and informed consultation were adopted to change the historic exclusion of indigenous peoples. However, one year after the law was enacted there remain acts of violence and protest regarding free, prior, and informed consultation. This article focuses on the reformatory effects of the law and the symbolism it generates for indigenous peoples, as well as the unintended consequences of the law’s boundaries.

I. INTRODUCTION

Peru has experienced a rate of sustained economic growth in recent years. This development is owed in part to the frenetic activity of the extractive industries, the expansion of foreign trade, and the signing of free trade pacts.¹ In 2009, as a response to the signing of a bilateral treaty with the United States, the interior of Peru witnessed one of its most significant indigenous social protests in recent times with demonstrations that left approximately thirty-three people dead and two hundred injured.²

† The author would like to thank Diego A. Mauricio Ocampo, Shane Clauser, and Maria Fortino for their thorough preparatory research and for the revision of this article, and she is grateful to the editors for their insightful comments and suggestions.

¹ According to the statistics provided by the Ministry of Foreign Commerce and Tourism, Peru has ratified fifteen free trade agreements to date, thirteen of which were signed between 2009-2012. See MINISTERIO DE COMERCIO EXTERIOR Y TURISMO, CUADRO RESUMEN 1-3, *available at* http://www.acuertoscomerciales.gob.pe/images/stories/varioc/quadro_resumen_10_07.pdf.

² U.N. Office of the High Commissioner on Human Rights, Report of the situation of human rights and fundamental freedoms of indigenous people (Mission to Peru): Observations on the situation of the indigenous peoples of the Amazon region and the events of 5 June and the following days in Bagua and Utcubamba provinces, para. 21, U.N. Doc. A/HRC/12/34/add.8 (Aug. 18, 2009) (prepared by James Anaya).

The events that took place in the Bagua region exposed an undercurrent of cultural tensions amid the conflictive process of economic growth and the demands of indigenous peoples to acquire a political voice in Peru. The protests marked a turning point in legal regulations affecting Peru's indigenous community. Ollanta Humala, the current president of Peru, addressed the Bagua issue during his campaign³ and later enacted a law mandating free, prior, and informed consultation in efforts to recognize the needs of indigenous peoples.⁴ Despite the adoption of the new law more than a year ago, the social process has not achieved the promise of collective accord implicit in the law. How might this situation be better understood? Is this setback indicative of an unfinished process in which the legal standards are still inchoate and reveal their limitations, or does it rather point only to the slightest hint of transformation that contrasts with actual state policy?

It must be taken into account that the Peruvian state adopted the law with a double motivation: to redress historical injustices of indigenous peoples and to pacify the social demonstrations carried out by the principal indigenous organizations.⁵ However, the state's promotion for the secure extraction of natural resources located in indigenous territories was a clear priority. Traditionally in Peru, the regulation of indigenous rights has been characterized by legal invisibility and social exclusion; this includes the omission of the legal denomination "indigenous" for categories such as "communal groups," "peasant and/or rural communities," and "natives."⁶

³ *Presidente Ollanta Humala promulga mañana en Bagua Ley de Consulta Previa*, PRESIDENCIA DE LA REPUBLICA DEL PERU, Sept. 5, 2011, <http://www.presidencia.gob.pe/presidente-ollanta-humala-promulga-manana-en-bagua-ley-de-consulta-previa>; *Humala promete aplicar Ley de Consulta Previa y respetar opinión de comunidades sobre proyectos*, ANDINA NOTICIAS, Apr. 6, 2011.

⁴ GOBIERNO DEL PERÚ, PERÚ EN 100 DIAS DE GOBIERNO 5 (2011); *Presidente Ollanta Humala llega a Imacita para firmar la Ley de Derecho a Consulta Previa*, FLICKR, Sept. 6, 2011, <http://www.flickr.com/photos/65990097@N03/sets/72157627612235266/> [hereinafter FLICKR].

⁵ At the International Day of Indigenous Peoples, President Humala tweeted that he would work for the inclusion of indigenous peoples. After congress' approval of the law on free, prior, and informed consultation, President Humala tweeted from his official account that this right is a sign of social inclusion that demonstrates that Ollanta is building a Peru for everyone. *Ley de Consulta Previa busca incluir a poblaciones indefensas*, PRESIDENCIA DE LA REPUBLICA DEL PERU, June 11, 2012, <http://www.presidencia.gob.pe/ley-de-consulta-previa-busca-incluir-a-poblaciones-indefensas>; *Humala afirma que Consulta Previa es un signo más de inclusión social*, RPP NOTICIAS, Aug. 24, 2011; *Ollanta Humala Mensaje a la Nación del Presidente de la República, Ollanta Humala Tasso, por el 191º Aniversario de la Independencia Nacional*, PRESIDENCIA DE LA REPUBLICA DEL PERU, Jul. 28, 2012, <http://www.presidencia.gob.pe/mensaje-a-la-nacion-del-senor-presidente-de-la-republica-ollanta-humala-tasso-con-motivo-del-191d-aniversario-de-la-independencia-nacional>.

⁶ Elizabeth Salmón, *Entre las promesas de consulta previa y la continuidad de la protesta social: las ambigüedades de la participación política indígena en el Perú*, in PARTICIPACIÓN POLÍTICA INDÍGENA Y POLÍTICAS PÚBLICAS PARA PUEBLOS INDÍGENAS EN AMÉRICA LATINA 279-281 (2011), available at http://www.kas.de/wf/doc/kas_30218-1522-1-30.pdf?120814170100.

The current legal framework, however, adopts the legal denomination of “indigenous peoples” as a way to channel indigenous demands and eradicate violence in the defense of natural resources. Moreover, the increasing influence of regulatory standards issuing from international human rights law has been fundamental in this shift toward the rights of indigenous peoples.

In Peru, public opinion holds that the rules governing free, prior, and informed consultation are usually sufficient measures to remedy social conflict and to disrupt cyclical episodes of violence.⁷ However, there are various contradictions in the way these objectives have been executed. The current administration recognizes collective rights of indigenous peoples but simultaneously disputes and restricts these rights. With markedly aggressive rhetoric, it has continued to promote the intensive extraction of natural resources in indigenous territories with the intent to sustain the economic boom amid the global financial crisis.⁸ Meanwhile, indigenous peoples have demanded mechanisms for free, prior, and informed consultation, opposing the installation of large-scale development and investment projects, and have not ruled out options of sabotaging these processes if the consequences do not rule in their favor.⁹ The indigenous communities’ historical frustration is a result of the state’s failure to acknowledge their legal rights and demands and has incentivized acts of violence that can be identified as last resort tactics of survival to counteract projects adversely affecting their livelihood and subsistence. In response, the private sector and the state have branded indigenous peoples as extremists.¹⁰ This, in turn, has incited the further polarization of demands and the absence of constructive dialogue. The threat or the use of violence has likewise reopened discussions supposedly settled *vis-à-vis* the application of regulatory procedures.

⁷ *Ley de Consulta Previa evitará nuevos conflictos en el país*, LA REPÚBLICA, June 27, 2011; *Bancadas piden al Pleno aprobar Consulta Previa*, LA REPÚBLICA, May 31, 2011; *Perú: Exigen al Congreso aprobar Ley de Consulta Previa para evitar conflicto social*, AGENCIA CHASKI; *Promulgación de Ley de Consulta Previa ayudará a reducir el conflicto social, afirman*, ANDINA NOTICIAS, Sept. 06, 2011; *Florencio Flores: Consulta Previa ayudará a reducir el conflicto social*, DIARIO ÍMPETU, Sept. 07, 2011; GERARDO CASTILLO, CONSULTA PREVIA EN EL PERÚ: IMPLICANCIAS PARA LAS INDUSTRIAS EXTRACTIVAS, (Sept. 2011), available at http://www.societasconsultora.com/soc_eng/docs/Consulta_previa_Peru_Gestion_Publica.pdf.

⁸ *China-Peru FTA to help Latin American countries face global financial crisis*, ANDINA, Apr. 23, 2009, available at <http://www.andina.com.pe/english/NoticiaImprimir.aspx?id=229409>.

⁹ *Perú: Comuneros de Cañaris en “permanente movilización” tras desencuentro con Gobierno*, SERVINDI, Feb. 5, 2013, available at <http://servindi.org/actualidad/81610>; Luis Hallazi Méndez, *Perú: El caso de la Comunidad de Cañaris y el Derecho a la Consulta Previa*, SERVINDI, Jan. 21, 2013.

¹⁰ *Ley de consulta previa: ¿Caos o inclusión social?*, RSA, Jan. 6, 2012; Marco Sifuentes, *La Consulta Previa: una fuente de conflictos dentro y fuera del gobierno*, LA REPÚBLICA, Feb. 5, 2013.

The present article evaluates the process of adopting a new regulatory framework in Peru, the influence of international law, and the limits of its implementation on public policies. It attempts to arrive at lessons concerning the role of law as an instrument for social transformation, recognition of indigenous resistance, and nurturing peace. Certainly, by their nature, laws possess multiple limitations in their ability to remedy violence, and it must be noted that legal changes in favor of the recognition of rights can also generate undesirable effects. This dynamic, in fact, has characterized the rights of indigenous peoples in Peru, as they have been shaped by the interrelatedness of legal reform with recurring acts of violence.

II. THE PERUVIAN STATE IN CONTEXT: THE EMERGENCE OF INDIGENOUS RIGHTS IN INTERNATIONAL LAW

Peru has ratified several human rights treaties including International Labour Organization (“ILO”) Convention 169, which constrains Peruvian policy to the content of these international standards. The perpetual strengthening of these regulatory systems has similarly attracted indigenous peoples who have experienced gradual empowerment vis-à-vis the utilization of international instruments and legal models. All of this has changed the regulatory course in Peru while decidedly influencing legal interpretation and analysis. A clear result has emerged from international law regarding the rights of indigenous peoples: the indigenous issue has reassumed its exigency. It is now, for instance, a regulated issue mandated by international human rights law and international environmental law.

A. *Standards of Protection in Support of Indigenous Peoples: The ILO and the Systems of International Protection of Human Rights and the Environment*

The regulation of indigenous populations in international human rights law is a relatively recent manifestation. However, these regulations have not been consolidated into one mechanism or singular legal apparatus, but are rather dispersed in several international bodies and diverse instruments that have generated multiple standards.¹¹

It is understood that the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights did not seek

¹¹ Bartolomé Clavero, *Informe sobre el Perú tras la Ley de Consulta (Estándares internacionales, empresas extractivas, consentimiento indígena)*, BARTOLOMÉ CLAVERO: ENSAYOS, OPINIONES Y ACTUALIDAD, at 3-4, Jan. 23, 2012, <http://clavero.derechosindigenas.org/?p=11142>.

to establish special measures for the reversal of inequalities or plights of indigenous populations, nor do they oblige state entities to explicitly address the needs of these groups. As Bartolomé Clavero has pointed out, the myopia of the Universal Declaration of Human Rights has been retained as a result of the structures of colonization that constitute the United Nations; the same can be said for the American Declaration of the Rights and Duties of Man.¹² The states of the Americas did not, in fact, consider the recognition of collective rights. There was a minor regulation, as part of the Universal Declaration of Human Rights, tangentially recognizing rights for racial and religious groups.¹³ The problem lies in the fact that within various states the indigenous populations represent the majority; for this reason “discourse on minorities” is ineffectual in eliminating structural discrimination.¹⁴ However, the indigenous issue has been incorporated in the discourse of ethnic and religious minorities as part of the adaptation of indigenous demands to modify the language of these forums.¹⁵

Prior to the adoption of ILO Convention 169 and its ratification by the Latin-American states, the development of the rights of indigenous persons was limited both in the Inter-American and the Universal Systems for the Protection of Human Rights.¹⁶ An organization specializing in the area of labor rights eventually adopted a comprehensive treaty concerning the fundamental demands of indigenous groups.¹⁷ It became increasingly understood that the indigenous issue had to be regulated due to the labor and social impacts in colonized countries. Thus during the first decades of the ILO, the terms for indigenous labor contracts posed significant international problems. Labor standards were adopted to challenge the extension of the workday, provide rules for non-monetary compensation, and abolish

¹² Bartolomé Clavero, *La consulta en serio como mecanismo supletorio de la libre determinación*, BARTOLOMÉ CLAVERO: ENSAYOS, OPINIONES Y ACTUALIDAD, at 1-2, May 26, 2012, <http://clavero.derechosindigenas.org/wp-content/uploads/2012/05/Consulta-en-Serio.pdf>.

¹³ Universal Declaration of Human Rights art. 26, 26.2 G.A. Res. 217A (III), U.N. Doc A/810 at 71 (Dec. 10, 1948) (“Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.”).

¹⁴ Bartolomé Clavero, *Para el Comité de Derechos Humanos los Pueblos Indígenas siguen siendo Minorías Étnicas*, BARTOLOMÉ CLAVERO: ENSAYOS, OPINIONES Y ACTUALIDAD, Sept. 10, 2009, available at <http://servindi.org/actualidad/opinion/16515>; Augusto Willemsen, *How indigenous peoples' rights reached the UN*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 16, 22 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

¹⁵ ELIZABETH SALMÓN, LA CONSULTA PREVIA, LIBRE E INFORMADA EN EL PERÚ: HACIA LA INCLUSIÓN DEL INTERÉS INDÍGENA EN EL MUNDO DE LOS DERECHOS HUMANOS 24-28 (2012).

¹⁶ ELIZABETH SALMÓN, LOS PUEBLOS INDÍGENAS EN LA JURISPRUDENCIA DE LA CORTE INTERAMERICANA DE DERECHOS HUMANOS 17-27 (2010).

¹⁷ Bartolomé Clavero, *supra* note 12, at 1.

physical sanctions for infractions committed by indigenous workers. As a result of the new labor regulations, the Native Labor Code was established based on several treaties outlined in the ILO that are no longer in use today.¹⁸ Later, however, ILO Convention 107—an agreement upholding the indigenous labor agenda to the permanence of forms of servitude—was passed, but it introduced concerns from the perspective of the progressive assimilation of the indigenous populations in the dominant societies.¹⁹ From here, we can chart the perpetual displacement of indigenous peoples, the unique relationship of indigenous territories with legal regulation, and the eventual sale of their lands.²⁰

ILO Convention 169, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, establishes compliance obligations and corroborates safeguards for its exercise with exceptions for the observance of indigenous rights with other legitimate ends. Article 8.1, for example, mandates that states modify their laws to suit the needs of indigenous groups while respecting their fundamental rights. In the same way, ILO Convention 169 prohibits the displacement of indigenous persons, yet recognizes extenuating circumstances when relocation ensures the protection of lives, as long there are reparations redressing damages for displacement from ancestral territories. Also, the Convention recognizes certain irrevocable assurances and guarantees such as the right to free, prior, and informed consultation and the acquisition of consent for the displacement of indigenous lands, or in respect to the alienation of their lands.²¹

ILO Convention 169 is a fundamental guarantee of the rights of indigenous peoples for the following reasons. First, it conditions the working methods of the supervisory bodies in the interpretation and application of other human rights treaties of the Inter-American Human Rights and Universal Systems.²² Second, it compels the content of the law

¹⁸ DANIEL MAUL, HUMAN RIGHTS, DEVELOPMENT AND DECOLONIZATION: THE INTERNATIONAL LABOUR ORGANIZATION, 1940-70, 23-25 (2012).

¹⁹ JÉRÉMIE GILBERT, INDIGENOUS PEOPLES' LAND RIGHTS UNDER INTERNATIONAL LAW: FROM VICTIMS TO ACTORS 143 (2006).

²⁰ Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries arts. 11 -12, June 16, 1957, 328 U.N.T.S. 247.

²¹ Convention Concerning Indigenous and Tribal Peoples in Independent Countries arts. 6, 16, 17, June 27, 1989, 28 I.L.M. 1382.

²² Case of the Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, paras. 95-96 (June 17, 2005); Sawhoyamaya Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, para. 117 (Mar. 29, 2006); Case of the Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, paras. 92-93 (Nov. 28, 2007); Case of the Xákmok, Kásek Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment,

of free, prior, and informed consultation adopted by Peru. Third, it establishes a mechanism of resistance for indigenous peoples in the face of free trade agreements like the PTPA. Finally, ILO Convention 169 limits the scope of state sovereignty because its provisions must be incorporated and employed within the design and execution of public policy.²³

The Committee of Experts on the Application of Conventions and Recommendations (“CEACR”), the specialized supervisory body within the ILO, is an entity that advances constructive dialogue between states, employers, entrepreneurs, and associated trade unions. Despite the limitations of the ILO system, indigenous peoples have been able, in practice, to incorporate their demands. This has led to the drafting of alternative reports and partnering with trade unions in their respective countries. These partnerships grant indigenous peoples increasingly vital roles in the agenda of periodic reviews carried out by the CEACR.²⁴ The CEACR emphasizes the essential values contained in Article 6 of ILO Convention 169, which guarantees the right to free, prior, and informed consultation, especially as a viable means to resolve social conflict.²⁵ It has recommended that states fully read the provisions of the Agreement, underscoring the interdependence of the right of free, prior, and informed

Inter-Am. Ct. H.R. (ser. C) No. 214, para. 157 (Aug. 24, 2010); *Pueblo Indígena Kichwa de Sarayaku v. Ecuador*, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, paras. 160-164, 201 (June 27, 2012).

²³ Christian Courtis, *Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples*, 10 SUR INT'L J. ON HUM. RTS. 53, 56 (2009).

²⁴ INTERETHNIC ASS'N FOR THE DEV. OF THE PERUVIAN RAINFOREST (AIDSESEP) ET AL., PERU: ALTERNATIVE REPORT 2008 ON THE FULFILLMENT OF THE ILO CONVENTION NO. 169 PRESENTED BY THE GENERAL CONFEDERATION OF PERUVIAN WORKERS (CGTP) (2008); AIDSESEP ET AL., PERU: ALTERNATIVE REPORT 2009 ON THE FULFILLMENT OF THE ILO CONVENTION NO. 169 PRESENTED BY THE GENERAL CONFEDERATION OF PERUVIAN WORKERS (CGTP) (2009); CONSEJO DE LONGKO DEL PIKUN WIJIMAPU ET AL., ALTERNATIVE REPORT 2010 REGARDING COMPLIANCE WITH THE CONVENTION 169: INDIGENOUS AND TRIBAL PEOPLES OF THE ILO, THE FIRST ANNIVERSARY OF ENTRY INTO FORCE IN CHILE (2010); GRUPO DE TRABAJO SOBRE PUEBLOS INDÍGENAS DE LA COORDINADORA NACIONAL DE DERECHOS HUMANOS (CNDDHH), PERÚ: INFORME ALTERNATIVO 2012 SOBRE EL CUMPLIMIENTO DEL CONVENIO 169 DE LA OIT (2012).

²⁵ INT'L LAB. OFF. [ILO] REP. OF COMM. OF EXPERTS, REPORT OF THE COMMITTEE SET UP TO EXAMINE THE REPRESENTATION ALLEGING NON-OBSERVANCE BY ECUADOR OF THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (No. 169), MADE UNDER ARTICLE 24 OF THE ILO CONSTITUTION BY THE CONFEDERACIÓN ECUATORIANA DE ORGANIZACIONES SINDICALES LIBRES (CEOSL) 31, ILO Doc. GB.277/18/4, GB.282/14/2 (2000); ILO REP. OF THE DIRECTOR-GEN., REPORT OF THE COMMITTEE SET UP TO EXAMINE THE REPRESENTATION ALLEGING NON-OBSERVANCE BY BRAZIL OF THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (No. 169), MADE UNDER ARTICLE 24 OF THE ILO CONSTITUTION BY THE UNION OF ENGINEERS OF THE FEDERAL DISTRICT (SENGE/DF) 44, 45, ILO Doc. GB.295/17, GB.304/14/7 (2009); ILO COMM. OF EXPERTS ON THE APPLICATION OF CONVENTION AND RECOMMENDATIONS [CEACR], COMMENTS MADE BY THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTION AND RECOMMENDATIONS, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (No. 169), Guatemala. Session 2005/76^a, at para. 6 (2005).

consultation with other rights as recognized in accordance with indigenous peoples and their legal rights and demands.²⁶

The CEACR has adopted a methodology that draws on the pronouncements of other bodies of human rights organizations as a means to supplement its current policy framework. In Peru, the CEACR has referred to reports from the Inter-American Commission on Human Rights (“IACHR”) to underscore those problems the country is experiencing.²⁷

1. *The Impact of ILO Convention 169 in the Universal System for the Protection of Human Rights*

In the context of the United Nations, Professor Karen Engle summarizes that indigenous groups have transitioned from a position of disinterest and ambiguity towards legal mechanisms and forums to a more active position when the specialized bodies address their demands.²⁸

One of the starting points of human rights for indigenous peoples in the United Nations was the creation of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in which the indigenous issue was associated with the protection of minorities and their move toward greater independence.²⁹ In addition, the Committee on the Elimination of Racial Discrimination interpreted the right to collective property in Article 5 of the Convention for the Elimination of All Forms of Racial Discrimination to mandate the terms of free, prior, and informed consultation and consent in cases where major development or investment plans have a profound impact on indigenous communal property.³⁰ Within these bodies, indigenous demands have had to adapt to the language of established rights in the

²⁶ ILO CEACR, INTERNATIONAL LABOUR CONFERENCE 2009 REPORT OF THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS 672 (2009) (Sess. 2009/98); ILO COMM. OF EXPERTS ON THE APPLICATION OF CONVENTION AND RECOMMENDATIONS, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION (No. 169), para. 3 (2004) (Sess. 2004/75^a) (Ecuador).

²⁷ ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, para. 4 (2002) (73rd Sess.) (Peru); ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION (No. 169), para. 6 (2005) (76th Sess.) (Peru).

²⁸ Karen Engle, *On Fragile Architecture: The UN Declaration on The Rights of Indigenous Peoples, in The Context of Human Rights*, 22 EUR. J. INT. L. 141, 151-153 (2011).

²⁹ Claire Charters & Rodolfo Stavenhagen, *The UN Declaration on the rights of indigenous peoples: How it became and what it heralds, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON INDIGENOUS PEOPLE 9-21* (2009).

³⁰ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969); Committee on the Elimination of Racial Discrimination [hereinafter CERD], Report of the Committee on the Elimination of Racial Discrimination: Annex V-General Recommendation XXIII, at 4(d), U.N. Doc. Supp. No. 18 (A/52/18) (Sept. 26, 1997); CERD, Consideration of reports submitted by States parties under article 9 of the Convention: Guatemala (concluding observations), para. 11, U.N. Doc. CERD/C/GTM/CO/12-13 (May 19, 2010).

respective treaties and agreements; however, ILO Convention 169 has been particularly useful in rendering visible and endowing operational content and meaning to the demands and claims of indigenous groups.³¹

Another critical moment in the recent history of the rights of indigenous peoples was the 2007 adoption of the Declaration on the Rights of Indigenous Peoples by the General Assembly of the United Nations. This declaration widened the scope of rights of indigenous peoples as an effort to close the gap inherited by the Universal Declaration of Human Rights.³² Moreover, the Declaration on the Rights of Indigenous Peoples has served as a translational tool for making the demands of indigenous peoples compatible to the language of human rights, while complementing and facilitating the work of the agencies for the protection of human rights in support of the application of ILO Convention 169.³³

Additionally, this process extends the provisions of ILO Convention 169 to states that have not ratified the treaty, contemporizing the demands of indigenous peoples in light of new social problems that have emerged since its entry into force. It also introduces related issues to the current international human rights law agenda (*i.e.*, the recognition of the need for free, prior, and informed consent preceding military operations and the installation of projects affecting their lands or territories and other resources, and the obligation of redressing the dispossession of cultural, intellectual,

³¹ INDIGENOUS PEOPLES AND UNITED NATIONS HUMAN RIGHTS BODIES: A COMPILATION OF U.N. TREATY BODY JURISPRUDENCE AND THE RECOMMENDATIONS OF THE HUMAN RIGHTS COUNCIL 2-3 (Fergus McKay ed., 2011); CERD, Consideration of reports submitted by States parties under article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: Finland, para. 14, U.N. Doc. CERD/C/FIN/CO/19 (Mar. 13, 2009), *available at* <http://www.unhcr.org/refworld/country,,CERD,,FIN,,49e5ccfb2,0.html>; CCPR Human Rights Comm., Consideration of reports submitted by States parties under article 40 of the Convention: Concluding observations: Chile, para. 9, U.N. Doc. CCPR/C/CHL/CO/5 (May 18, 2007); CCPR Human Rights Comm., Consideration of reports submitted by States parties under article 40 of the Convention: Concluding observations: Panama, at 21, U.N. Doc. CCPR/C/PAN/CO/3 (Apr. 17, 2008); CCPR Human Rights Comm., Consideration of reports submitted by States parties under article 40 of the Convention: Concluding observations: Nicaragua, para. 21, U.N. Doc. CCPR/C/NIC/CO/3, (Dec. 12, 2008); Comm. on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant: Concluding observations: Ecuador, paras. 12, 35, U.N. Doc. E/C.12/1/Add.100 (June 7, 2004); Comm. on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant: Concluding observations: Colombia, paras. 9-11, U.N. Doc. E/C.12/COL/CO/5 (May 21, 2010); Comm. on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant: Concluding observations: Peru, para. 23, U.N. Doc. E/C.12/PER/CO/2-4 (May 30, 2012).

³² James Anaya, *Porqué no debería existir una Declaración de los derechos de los pueblos indígenas*, in DECLARACIÓN SOBRE DERECHOS DE LOS PUEBLOS INDÍGENAS 37 (2009).

³³ Saramaka People. v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, paras. 131-138 (Nov. 28, 2007); Pueblo Indígena Kichwa de Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, paras. 160-166, 180, 185, 201 (June 27, 2012).

religious, and spiritual property, including restitution).³⁴ Moreover, a Special Rapporteur on the Rights of Indigenous Peoples has been appointed to ensure compliance with these provisions.³⁵

2. *The Response of the Inter-American Human Rights System*

In the case of the Inter-American Human Rights System, the member states of the Organization of American States (“OAS”) have not adopted a new instrument to revise and update the language of the American Declaration of Rights and Duties of Man despite the multiple negotiations comprising indigenous groups in the region.³⁶ In this regard, it would seem that the regulatory gap inherited by the American Declaration of the Rights and Duties of Man persists. Given the failure of the regulatory tool, the bodies of the Inter-American Human Rights System have established standards of protection for indigenous peoples, referring directly to ILO Convention 169 and the Declaration on the Rights of Indigenous Peoples of the United Nations.

The Inter-American Court of Human Rights has focused its case law on the protection of indigenous citizens against violence by repressive governmental regimes as well as during times of armed conflict.³⁷ The passing of regulations to circumvent violence continues to retain its urgency in Latin America; however, in recent years other imperative indigenous issues have been introduced (*i.e.*, cultural identity, communal property, free,

³⁴ U.N. Declaration on the Rights of Indigenous Peoples arts. 21, 30, Sept. 13, 2007, 46 I.L.M. 1013.

³⁵ U.N. Human Rights Council, Human rights and indigenous peoples: mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, 6th Sess., at art. 1(g), U.N. Doc. A/GA/61/53 (Sep. 28, 2007) (Res. 6/12).

³⁶ Proposed American Declaration on the Rights of Indigenous Peoples (approved by the Inter-American Commission on Human Rights on February 26, 1997 at its 133rd session, 95th Regular Session) OEA/Ser/L/V/II.95 Doc.6 (1997); Organization of American States [hereinafter OAS], G. A. Res. AG/Res.610(XXIX□O/99), OAS Doc. CP/doc.2878/97 corr. 1 (June 7, 1999).

³⁷ *Aloeboetoe et al. v. Suriname*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 11 (Dec. 4, 1991); *Bámaca-Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, (Nov. 25, 2000); *Plan de Sánchez Massacre v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No.105 (Apr. 29, 2004); *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005); “Las Dos Erres” Massacre v. Guatemala, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 211 (Nov. 24, 2009); *Chitay Nech et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 212 (May 25, 2010); *Fernández-Ortega et al. v. Mexico*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 215, (Aug. 30, 2010); *Rosendo-Cantú et al. v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216 (Aug. 31, 2010); *Cabrera-García and Montiel-Flores v. Mexico*, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220 (Nov. 26, 2010).

prior, and informed consultation, and safeguards for the realization of megaprojects in indigenous territories).³⁸

The IACHR proposed a draft text of a non-conventional mechanism in favor of indigenous peoples that has proven to be a topic of ongoing deliberation. Moreover, the first rapporteur of the IACHR has dedicated his work to the defense of rights of indigenous people since 1990.³⁹ From 1995 until now, the IACHR has granted approximately seventy precautionary measures in favor of indigenous peoples to protect them against violent acts and major development or investment plans that may have a profound impact on their property rights.⁴⁰ Finally, the IACHR has interpreted the standard in favor of indigenous peoples with respect to states that have not ratified the American Convention on Human Rights nor ILO Convention 169 through the processing of individual petitions and the reports on Human Rights in Bolivia, Paraguay, Peru and Venezuela.⁴¹

3. *The Indigenous Issue in International Environmental Law*

In the framework of international environmental law, indigenous demands are increasingly recognized in the laws, policies, and forums of international conferences.⁴² The Declaration of the United Nations Conference on the Human Environment, which is analogous to the Universal

³⁸ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 66 (Feb. 1, 2000); *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No.124 (June 15, 2005); *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); *Yatama v. Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010); *Pueblo Indígena Kichwa de Sarayaku v. Ecuador*, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012).

³⁹ *Mandato*, ORG. OF AM. STATES, <http://www.oas.org/es/cidh/indigenas/mandato/funciones.asp>.

⁴⁰ *Precautionary Measures*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>.

⁴¹ IACHR, Third Report on the Situation of Human Rights in Paraguay, Doc. OEA/Ser.L/VII.110, Doc. 52 (Mar. 9, 2001), available at <http://www.cidh.org/countryrep/Paraguay01eng/TOC.htm>; *Mary and Carrie Dann v. United States*, Case 11.140, IACHR, Report No. 75/02 (Dec. 27, 2002); *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, IACHR, Report No. 40/04 (Oct. 12, 2004); IACHR, Access to Justice and Social Inclusion: The Road toward strengthening Democracy in Bolivia, Doc. OEA/Ser.L/V/II, Doc. 34 (June 28, 2007); IACHR, Follow-up Report—Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia, Doc. OEA/Ser.L/V/II.135, Doc. 40 (Aug. 7, 2009); IACHR, Democracy and Human Rights in Venezuela, Doc. OEA/Ser.L/V/II, Doc. 54 (Dec. 30, 2009); IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, Doc. OEA/Ser.L/V/II, Doc. 56/09 (Dec. 30, 2009); IACHR, Preliminary Observations of the Inter-American Commission on Human Rights on its Visit to Honduras, May 15-18, 2010, Doc. OEA/Ser.L/V/II., Doc. 68 (June 3, 2010).

⁴² PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 294-307 (2d ed. 2003).

Declaration of Human Rights, recognized a universal right to the environment but failed to acknowledge the particularities for its exercise relating to indigenous peoples, among other groups. Twenty years elapsed before other environmental regulations had specified commitments to address the identity of indigenous peoples. Moreover, the Rio Declaration recognizes these environmental commitments and outlines the differences in their execution in accordance with the identities of indigenous communities.⁴³ There are tangential references to indigenous peoples throughout the Rio Declaration. For instance, Principle 22 raises issues with regard to the environmental needs of the “indigenous population.”⁴⁴ Though the Rio Declaration offers a general reference without concrete obligations, it provides the first recognition of support for “indigenous population” as a chief constituent in the realm of international environmental regulations.

After the Rio Conference, the General Assembly of the United Nations adopted new commitments based on the needs of indigenous groups and established leading standards for environmental protection. Recently, “The Future We Want,” the outcome document produced at the latest United Nations Conference on Sustainable Development—the Rio+20—seeks to renew the international environmental commitments while explicitly referring to specific environmental demands of indigenous peoples. It establishes obligations in support of indigenous peoples, such as the eradication of poverty in light of the disproportionate impact globalization has had on destitute populations.⁴⁵ Also, signatory states to the Rio+20 Conference have demanded that indigenous communities achieve representation in government and must be key participants in political processes.⁴⁶ Equally important to the agenda has been the issue of food security and safety measures regarding natural resources for indigenous peoples.⁴⁷

In 1992, along with the Rio Declaration, two environmental treaties were adopted that specifically recognized special rights for indigenous communities. The Conference of the Parties, the supervisory bodies of these treaties, has acknowledged a range of socio-economic problems experienced

⁴³ *Id.* at 56.

⁴⁴ Report of the U.N. Conference on Environment & Development, Rio de Janeiro, Brazil, June 3-14, 1992, Principle 12, U.N. Doc. A/CONF.151/26 (Vol. I), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>.

⁴⁵ Rio+20: U. N. Conference on Sustainable Development, June 20-22, 2012, The Future We Want, paras. 43, 49, 58(j), Res. 66/288, U.N. Doc. A/66/L.56 (Jul. 24, 2012) (outcome document adopted at Rio+20), available at <http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf>.

⁴⁶ *Id.* paras. 71, 109, 131.

⁴⁷ *Id.* paras. 43, 49, 58(j), 71, 109, 131, 175, 197, 211, 229, 238.

by indigenous communities and have interpreted the provisions so as to ensure the compliance with environmental obligations to restore benefits in support of these populations.⁴⁸ The Convention on Biological Diversity establishes Articles 8(j), 10(c), and related provisions in order to obtain prior formal consent to the access of natural resources, mandating that indigenous communities are considered in terms of the sharing of the benefits derived from the utilization of traditional knowledge.⁴⁹ The Conference of Parties to this treaty has adopted a complementary dictum, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, which covers indigenous peoples and refers to them as indigenous and local communities.⁵⁰ This international instrument has made available a series of regulations and commitments designed to ensure indigenous peoples adequate participation in the consultation process and the sharing of benefits with indigenous peoples.⁵¹ The institutional framework for the control of greenhouse gases has also been read in relation to the needs of indigenous peoples. Addressing the potential vulnerability of indigenous peoples in the face of climate change, projects on the mitigation and adaptation (offered in the Kyoto Protocol) of environmental hazards have been designed and implemented with the participation of indigenous communities.⁵² These

⁴⁸ Comm. on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under Articles 16 and 17 of the Covenant: Concluding observations: Australia, para. 27, U.N. Doc. E/C.12/AUS/CO/4 (June 12, 2009); Comm. on the Rights of the Child, Consideration of reports submitted by States parties under articles 44 of the Convention: Concluding observations: Grenada, para. 52, U.N. Doc. CRC/C/GRD/CO/2 (June 20, 2010).

⁴⁹ Convention on Biological Diversity arts. 8(j), 10(c), and related provisions, June 5, 1992, 1760 U.N.T.S. 142, 31 I.L.M. 822.

⁵⁰ Rep. of the Seventh Conference of Parties to the Convention on Biological Diversity (Kuala Lumpur, Malaysia), Decision VII/16 UNEP/CBD/COP/7/21, paras. 253-279 (Apr. 13, 2004), available at <http://www.cbd.int/doc/meetings/cop/cop-07/official/cop-07-21-part1-en.pdf>; Malgosia Fitzmaurice, *Dilemma of Traditional Knowledge: Indigenous Peoples and Traditional Knowledge*, 10 INT'L COMM. L. REV. 255, 262-264 (2008).

⁵¹ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity arts. 5-12, Oct. 29, 2010, U.N. Doc. UNEP/CBD/COP/DEC/X/.

⁵² INGRID BARNSLEY, UNU-IAS GUIDE REDUCING EMISSIONS FROM DEFORESTATION AND FOREST DEGRADATION IN DEVELOPING COUNTRIES (REDD): A GUIDE FOR INDIGENOUS PEOPLES 18-21 (2009), available at http://www.unutki.org/news.php?news_id=50&doc_id=106; Report of the 16th Sess. of the Conference of Parties to the U.N. Framework Convention on Climate, Decision 1/CP.16, paras. 7, 12, 72, 87, Appendix 1(c), 1(d), U.N. Doc. FCCC/CP/2010/7/Add.11 (Mar. 15, 2011), available at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=12>; SBSTA, Report of the Subsidiary Body for Scientific and Technological Advice on its thirty-fourth session, held in Bonn from 6 to 16 June, Annex I para 1, U.N. Doc. FCCC/SBSTA/2011/2 (Aug. 3, 2011) (Framework Convention on Climate Change subsidiary body report), available at <http://unfccc.int/resource/docs/2011/sbsta/eng/02.pdf>; Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011: Addendum: Part Two: Action taken by the Conference of the Parties at its seventeenth

environmental regulations must be read in conformity with international human rights law which dictates the terms of free, prior, and informed consultation as a form of indigenous political participation with the demands for the redistribution of derived benefits to indigenous peoples.⁵³

International mechanisms of human and environmental rights must be valued as having the capacity to introduce and put pressure on indigenous issues brought before state agendas. These forums motivate discussion and dialogue between states and indigenous peoples, supplying and complementing the mechanisms and instruments of political participation established in domestic law. Moreover, international forums, while serving as spaces of discussion, are also important contexts for the recognition of indigenous peoples and their demands. These forums promote dialogue that can alter the historical structures of social exclusion. At the same time, however, the limits and parameters of law, in terms of their capacity to transform societies facing polarization by violence, must be acknowledged in the processes for evaluating the efficacy of legal reform in relation to indigenous peoples.

4. *The Protection of Indigenous Rights in Peru with Regard to Free, Prior, and Informed Consultation*

In Peru, there is an undeniable inconsistency between the standards of international law and domestic law in relation to the rights of indigenous peoples, and in particular the right to free, prior, and informed consultation. At the level of the ILO, the CEACR has examined complaints against Peru for the non-observance of ILO Convention 169 and has recommended that the right to free, prior, and informed consultation be guaranteed by law.⁵⁴

session. Decision 6/CP.17, para. 4, U.N. Doc. FCCC/CP/2011/9/Add.2 (Mar. 15, 2012), available at <http://unfccc.int/resource/docs/2011/cop17/eng/09a02.pdf#page=16>.

⁵³ See generally EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES (4TH SESS.): GRAND COUNCIL OF THE CREES (EYYOU ISTCHEE) ET AL., NAGOYA PROTOCOL ON ACCESS AND BENEFIT SHARING: SUBSTANTIVE AND PROCEDURAL INJUSTICES RELATING TO INDIGENOUS PEOPLES' HUMAN RIGHTS (July 2011), available at <http://quakerservice.ca/wp-content/uploads/2011/08/Expert-Mechanism-Study-re-IPs-Rt-to-Participate-Joint-Submission-on-Nagoya-Protocol-FINAL-GCC-et-al-July-6-11.pdf>; LAL KURUKULASURIYA & NICHOLAS A. ROBINSON, TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW 151 (2006); FRANCESCO MARTONE AND JEN RUBIS, INDIGENOUS PEOPLES AND THE GREEN CLIMATE FUND: A TECHNICAL BRIEFING FOR INDIGENOUS PEOPLES, POLICYMAKERS AND SUPPORT GROUPS 7, 12 (2012).

⁵⁴ ILO CEACR, DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, paras. 8, 15 (1999); ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, para. 9 (2000); ILO CEACR, DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, paras. 2-4 (2002); ILO CEACR, DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, paras. 3, 6-9, 13 (2005); ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, paras. 4, 6 (2005); ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, para. 3 (2007); ILO CEACR,

The CEACR refers directly to acts from previous decades that were executed without consultation and has recommended the suspension of mining concessions and major development or investment plans that may have a profound impact in indigenous territories.⁵⁵

In the Inter-American Human Rights System, Peru has been regarded for decades as the state with the greatest number of condemnations by the Inter-American Court as well as having the most individual petitions currently pending.⁵⁶ The principal issues are directed toward anti-terrorist legislation and the state's repressive measures implemented during the internal armed conflict that continued even in the absence of open hostilities. In this context, the indigenous issue was not a priority nor was it actively promoted by human rights defenders and indigenous organizations. Barriers to access to international justice may have also contributed to the neglect of the indigenous people from Peru in the Inter-American Human Rights System.

Despite this reality, after the events of Bagua, there are now petitions and precautionary measures expressly stated in the Inter-American Human Rights System that support indigenous peoples in Peru.⁵⁷ Also, it should be noted that the role of the Inter-American Human Rights System does not solely involve the process of petitions. In effect, the IACHR has continued in recent decades to address the issues and concerns of indigenous peoples in Peru.⁵⁸ In the period following the *Baguazo* (the colloquial title that refers to the manifestations of violence in Bagua), the IACHR implemented multiple public hearings to examine policies dealing with the exploitation of natural resources in indigenous territories.⁵⁹

INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION (2008); ILO CEACR, DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION (2009).

⁵⁵ ILO CEACR, INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION (2009).

⁵⁶ Until November 2012, the highest number of judgments from the Inter-American Human Rights Court concerned Peru (12.75%), Colombia (7.5%), Argentina (7.5%), and Venezuela (7.5%). According to the IACHR, these three States account for the 46.45% of its current docket of petitions in admissibility and merits: the cases are directed to Peru (315), Colombia (231) and Argentina (222).

⁵⁷ Community of San Mateo de Huanchor and its members (Peru), Report No. 69/04, Petition 504/03: Admissibility, Inter-Am. Comm'n H.R. (Oct. 15, 2004); IACHR, Events that occurred in the town of Cayara, Peru, Report on the Merits, No. 29/91, Cases 10.264, 10.206, 10.276 y 10.446, Inter-Am. Comm'n H.R. (Feb. 20, 1991); Indigenous peoples of Mashco Piro, Yora, and Amahuaca in voluntary isolation, Peru, Precautionary Measures, Inter-Am. Comm'n H.R. (Mar. 22, 2007); *Precautionary Measures*, ORGANIZATION OF AMERICAN STATES, available at <http://www.oas.org/en/iachr/indigenous/protectio/precary.asp>.

⁵⁸ IACHR, Second Report on the Situation of Human Rights in Peru, Chapter X para. 7, Doc. OEA/Ser.L/V/II.106, Doc. 59 rev. (June 2, 2000).

⁵⁹ IACHR, *The Right to Water and Indigenous Peoples in the Andean Region*, ORG. OF AM. STATES, Sept. 6, 2007 (Sess. 129), available at <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17>; *Situation of Indigenous Peoples in Voluntary Isolation in Peru—Precautionary Measures 102/07*

As a result of the regulatory aperture before the Inter-American Human Rights System, these public hearings—along with processes for precautionary measures, petitions, and contentious litigations—have led to the establishment of a forum for clear political advocacy. Moreover, these spaces of dialogue provide an opportunity for collective catharsis where there has historically been a dearth of national dialogue. The increasing use and implementation of the Inter-American Human Rights System's standards are due to the fact that the jurisprudence of the Inter-American Court holds legitimacy at the domestic level. Currently, various societal actors in Peru utilize the standards of the Inter-American Human Rights System: political groups, human rights defenders, conservationists groups, indigenous organizations, and scholars, among others. There has not been, however, a contentious case concerning Peru's indigenous peoples in which the standard has been consulted.⁶⁰ The current challenge existing for Peru lies in its ability to transform these standards into realities at the domestic level.

For its part, the Universal Human Rights System has also generated various standards in respect to the protection of indigenous peoples in Peru and their right to free, prior, and informed consultation. As in the Inter-American Human Rights System, the regulatory bodies have concentrated their efforts on addressing human rights violations during the armed conflict in Peru, and the indigenous issues have continued to be progressively incorporated in its agenda. For instance, only a few days after the events of Bagua, the UN Special Rapporteur on the Rights of Indigenous Peoples organized an immediate visit and confirmed the instability of the situation. Regarding the Amazonian indigenous peoples, the Special Rapporteur

(Kugpakori Nahua Nanti and others), 262/05 (*Mashco Piro, Yora and Arahua*) y 129/07 (*Tagaeri, Taromenane*), ORG. OF AM. STATES, Oct. 12, 207 (Sess. 130), available at <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=23>; *Criminal Processes against Defenders of Indigenous Peoples in Countries in the Region*, ORG. OF AM. STATES, Mar. 20, 2009, (Sess. 134), available at <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17>; *Situation of Indigenous Communities Affected by the Initiative Project for the Integration of Regional Infrastructure in South America (IIRSA)*, ORG. OF AM. STATES, Nov. 2, 2009 (Sess. 137), available at <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17>; *Human Rights Situation in the Peruvian Amazon & Right to Consultation of the Indigenous Peoples of Peru*, ORG. OF AM. STATES, Nov. 3, 2009 (Sess. 137), available at <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17>; *Human Rights Situation of the Ashaninka People in Peru*, ORG. OF AM. STATES, Mar. 23, 2010 (Sess. 138), *Rights of Indigenous Peoples and Energy and Extractive Industry Policy in Peru*, ORG. OF AM. STATES, Oct. 26, 2010 (Sess. 140), available at <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17>; *Indigenous Peoples in Voluntary Isolation in South America*, ORG. OF AM. STATES, Nov. 1, 2012 (Sess. 146), available at <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17>; *Situation of the Achuar People of Pastaza, Peru*, ORG. OF AM. STATES (Sess. 146, Nov. 1, 2012), available at <http://www.oas.org/es/cidh/audiencias/TopicsList.aspx?Lang=en&Topic=17>.

⁶⁰ Salmón, *supra* note 15, at 29.

recommended a series of measures, including the implementation of a law for free, prior, and informed consultation as well as further investigation on the human rights violations.⁶¹

Other bodies of the Universal Human Rights System have shared the opinion that the events of Bagua must be redressed, commenting specifically on the role of free, prior, and informed consultation. The Committee on the Elimination of Racial Discrimination has commented on the community of Ancomarca and has subsequently interpreted that the regulations regarding racial discrimination must protect the Aymaras of Peru from the installation of hydric dams resulting from a lack of free, prior, and informed consultation.⁶² Moreover, the Human Rights Committee, the supervisory body that monitors the implementation of the International Covenant on Civil and Political Rights, has recognized the right to free, prior, and informed consent in the opinion of the case of *Ángela Poma Poma v. Peru*, which considers Peru's obligation after the diverting of the Uchusuma River and its effects on the Aymara community.⁶³

While the number of pronouncements has increased in the Universal Human Rights System, the legal standards are unknown because 1) the Peruvian state does not disseminate the recommendations of the supervisory bodies, and 2) the legal standards are not easily accessible to civil society due to the multiplicity of the rulings.⁶⁴ However, around the world and especially in Peru, the indigenous rights defenders and indigenous organizations have begun to participate in these international forums, appropriating the standards as a means to authorize and channel their demands within normative legal and governmental structures.⁶⁵

⁶¹ U. N. Office of the High Commissioner on Human Rights, *supra* note 2, paras. 33-41.

⁶² CERD, Consideration of reports submitted by States parties under article 9 of the Convention: Concluding observations: Peru, at 20, U.N. Doc. CERD/C/PER/CO/14-17 (Sept. 3, 2009); CERD, Early-Warning Measures and Urgent Procedures, U.N. Doc. CERD/C/PER/CO/14-17 (Mar. 13, 2009), available at http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Peru130309.pdf.

⁶³ CCPR Human Rights Committee, Report of the Human Rights Committee of the International Covenant on Civil and Political Rights, *Ángela Poma Poma v. Peru*, para. 7.6, U.N. Doc. CCPR/C/95/D/1457/2006 (Mar. 27, 2009), available at http://www.worldcourts.com/hrc/eng/decisions/2009.03.27_Poma_Poma_v_Peru.htm.

⁶⁴ PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* 160 (1993).

⁶⁵ CAOÍ, OBSERVACIONES AL INFORME OFICIAL DEL ESTADO PERUANO, OBSERVACIONES DE LAS ORGANIZACIONES INDÍGENAS AL INFORME DEL ESTADO PERUANO ANTE EL COMITÉ PARA LA ELIMINACIÓN DE TODAS LAS FORMAS DE DISCRIMINACIÓN RACIAL (July 23, 2004); COMISIÓN JURÍDICA PARA EL AUTODESARROLLO DE LOS PUEBLOS ORIGINARIOS ANDINOS, ALGUNAS CONSIDERACIONES RELATIVAS AL INFORME PRESENTADO AL POR EL GOBIERNO DE PERÚ AL "CERD" (June 21, 2009); CHIRAPAQ, ACTIONS OF THE PERUVIAN STATE IN RELATION TO THE ICERD (July 2009); AMNESTY INT'L, ET. AL., INFORME DE LA SOCIEDAD CIVIL DE CHILE AL CERD CON MOTIVO DEL EXAMEN DE LOS INFORMES PERIÓDICOS 15°, 16°, 17°, Y 18° DEL ESTADO DE CHILE (Aug. 2009); COMUNIDADES MAPUCHE, INFORME ALTERNATIVO SOBRE LA SITUACIÓN DE DISCRIMINACIÓN RACIAL QUE AFECTA AL PUEBLO MAPUCHE, RESPECTO DEL INFORME PRESENTADO POR EL ESTADO CHILENO ANTE EL CERD (Aug. 2009); MESA TRABAJO MAPUCHE SOBRE

For several years, indigenous organizations along with the Peruvian state have shared the same discourse concerning the protection of the environment. Regarding the protection of biological diversity, the Peruvian state has actively supported the defense of traditional knowledge of indigenous peoples and has adopted various domestic regulations to establish this right.⁶⁶ In the case of climate change, the Peruvian state and indigenous organizations have turned to international law to raise the issue of indigenous vulnerability in the face of global warming and the necessity to incorporate a working perspective toward human rights in the compliance of environmental obligations.⁶⁷

Notwithstanding, in recent years this confluence of interests has reached a turning point, particularly in relation to the implementation of REDD-plus, a term which describes “Reducing Emissions from Deforestation and Degradation” plus sustainable management of forests and the enhancement of forest carbon stocks.⁶⁸ Regarding climate change, Peru has proposed to accept remunerations to maintain the Amazon forest region intact and to provide other environmental services. Responding to this effort, the indigenous communities have expressed opposition to the state’s commercialization of the Amazon and the jeopardizing of the region’s

DERECHOS COLECTIVOS ET. AL., INFORME PARALELO DE LOS DENUNCIANTES RACISMO AMBIENTAL EN LA REGIÓN DE LA ARAUCANÍA, CHILE, POR LOS CASOS DE VERTEDEROS Y PLANTAS DE TRATAMIENTO DE AGUAS SERVIDAS LOCALIZADAS EN COMUNIDADES MAPUCHE (Aug. 2009); PHILIPPINES INDIGENOUS PEOPLES, SHADOW REPORT FOR THE CONSOLIDATED FIFTEENTH, SIXTEENTH, SEVENTEENTH, EIGHTEENTH, NINETEENTH AND TWENTIETH PHILIPPINE ICERD PERIODIC REPORTS (Aug. 2009); CAO ET AL., ALTERNATIVE REPORT SUBMITTED BY THE ANDEAN COORDINATOR OF INDIGENOUS ORGANIZATIONS (CAOI) BEFORE THE CERD (July 2012); FIJI NATIVE TRIBAL CONGRESS, SUPPLEMENTARY REPORT TO THE CERD FOR THE REPUBLIC OF FIJI (July 2012); SAAMI COUNCIL, OBSERVATIONS WITH REGARD TO FINLAND’S 20TH, 21ST, AND 22ND PERIODIC REPORTS TO THE CERD (Aug. 13, 2012); SARSTOON TEMASH INSTITUTE FOR INDIGENOUS MANAGEMENT & MINORITY RIGHTS GROUP INTERNATIONAL REPORT TO THE CERD (Aug. 2012).

⁶⁶ MANUEL RUIZ MULLER, UNA MIRADA AL DEBATE SOBRE ACCESO A LOS RECURSOS GENÉTICOS, PROPIEDAD INTELECTUAL Y CONOCIMIENTOS TRADICIONALES, A PROPÓSITO DEL PROTOCOLO DE NAGOYA 4-5 (2011); Manuel Ruiz Muller, *Peru: Seeking benefit sharing through a defensive approach—the experience of the National Commission for the Prevention of Biopiracy*, in THE CUSTODIANS OF BIODIVERSITY: SHARING ACCESS AND BENEFITS TO GENETIC RESOURCES 43, 44-45 (2011).

⁶⁷ *Ministerio del ambiente renueva su compromiso de trabajo con los pueblos indígenas*, PERU: MINISTERIO DEL AMBIENTE, Feb. 5, 2013, available at http://www.minam.gob.pe/index.php?option=com_content&view=article&id=2008:ministerio-del-ambiente-renueva-su-compromiso-de-trabajo-con-los-pueblos-indigenas&catid=1:noticias&Itemid=21; MINISTERIO DEL AMBIENTE, EL PERÚ Y EL CAMBIO CLIMÁTICO SEGUNDA COMUNICACIÓN NACIONAL DEL PERÚ A LA CONVENCIÓN MARCO DE LAS NACIONES UNIDAS SOBRE CAMBIO CLIMÁTICO 2010, 100-105 (2010).

⁶⁸ U.N. Framework Convention on Climate Change Ad hoc Working Group on Long-term Cooperative Action under the Convention (5th Sess.), Fulfillment of the Bali Action Plan and components of the agreed outcome, U.N. FCCC/AWGLCA/2009/4 (Pt. II) (Mar. 18, 2009), available at <http://unfccc.int/resource/docs/2009/awglca5/eng/04p02.pdf>; LOUIS V. VERCHOT & ELENA PETKOVA, EL ESTADO DE LAS NEGOCIACIONES REDD PUNTOS DE CONSENSO, OPCIONES PARA SEGUIR AVANZANDO Y NECESIDADES DE INVESTIGACIÓN PARA RESPALDAR EL PROCESO 8 (2010).

forestry. Moreover, indigenous peoples reaffirmed that the adoption of these commercial mechanisms is inadequate, and several indigenous communities are still in dispute with the state over territories and its failure to implement effective demarcation of indigenous lands. Seen in this light, indigenous peoples fear that the state reaps a profit from the exploitation of the Amazon and has, therefore, demanded free, prior, and informed consent measures for nature conservation and the eventual transaction of environmental services.⁶⁹

III. THE LEGAL INVISIBILITY OF INDIGENOUS PEOPLES IN PERU

Once the protection standards applicable to indigenous peoples in Peru have been established, it is pertinent to analyze the specific reasons why the rights of indigenous peoples have been violated. Peru was the epicenter of the Spanish colony. For centuries, the Spanish and their direct descendants enjoyed the benefits and access to power. Historical stereotypes, as a result, associated the dominant class as deriving from a particular race and national origin. These ideologies, in turn, were used as justification to subject indigenous peoples to the Spanish Royal Crown; they were required to seek accreditation for the property of their lands through the distribution of titles and forced to work. Officially, the indigenous peoples' right to property was recognized, but its exercise was essentially debilitated by the institutional structures of discrimination.⁷⁰

With the independence of Peru, the republican discourse did not serve to eradicate the stereotypes of disparagement toward the indigenous peoples, but, on the contrary, contributed to these prejudices in order to institute new systems of labor exploitation that solidified the servile condition of the indigenous peoples, providing the justification for the spoiling of their territories. On June 4, 1825, Simón Bolívar prohibited forced indigenous labor; three years later he adopted a decree recognizing the ownership of indigenous peoples to the lands they previously occupied.⁷¹ Later, President Nicolás de Piérola was awarded the role of protector of the indigenous race, criminalizing abuses of indigenous peoples within the context of the War of the Pacific.⁷² Successive governments recognized the symbolic value of the

⁶⁹ *Perú: Proyectos REDD+ violan derechos de pueblos indígenas y agudizarán conflictos por tierras*, SERVINDI, Dec. 1, 2011, available at servindi.org/actualidad/55284; FOREST PEOPLES, LA REALIDAD DE REDD+ EN PERÚ: ENTRE EL DICHO Y EL HECHO, ANÁLISIS Y ALTERNATIVAS DE LOS PUEBLOS INDÍGENAS AMAZÓNICOS 8 (2011).

⁷⁰ Maribel Aróstegui Rodríguez, *La problemática sobre el derecho de propiedad de las poblaciones previstas en el Convenio*, 169 OIT 31 (2011).

⁷¹ *Id.* at 33.

⁷² ROMÁN ROBLES, LEGISLACION PERUANA SOBRE COMUNIDADES CAMPESINAS 57-58 (2002), available at http://sisbib.unmsm.edu.pe/bibvirtualdata/libros/2007/legis_per/cap01.pdf.

liberty and ownership of indigenous peoples, but in practice continued to subject indigenous communities to enslavement by contracts of engagement and to strip them from their property through unfair regulations and state mandates.

Peruvian legislation has regulated the indigenous issue from the moment of its independence; however, it has done so from a paternalistic and assimilationist ideology and not from a standpoint of intercultural dialogue. This has been a detriment to the identity of indigenous peoples and deleterious to the respect for their culture, as well as their entitlement to rights.⁷³

With large-scale social reform at the end of the 1960s, marked by the famous slogan, “the land to the tiller, not for those who obtain profit without labor,” the military government of Velasco Alvarado initiated one of the agrarian reform processes designed to award “social justice for rural demographics” and to overturn long-held prejudices directed at indigenous groups.⁷⁴ In a message to the nation, motivating the promulgation of Legal Decree 17716 (Law of Agrarian Reform) on June 24, 1969, General Velasco Alvarado justified the abandonment of the term “indigenous” as a legal category, substituting it with the more euphemistic denomination: “rural and peasant communities.”⁷⁵

Indigenous peoples had to adapt to identities created artificially by the law due to the fact that this transformation permitted them access to special measures conferred by the government in respect to their lands. Later, the government adopted Legislative Decree 20653 in 1974, known as the Law of Native Communities and Agricultural Promotion of the Jungle, which introduced another denominative heading for some indigenous groups: “native communities.”⁷⁶ From this moment on, references in Peruvian legislation made attempts to circumvent the definition of “indigenous peoples” and adopted several qualifications among which were “rural communities,” “peasants,” “native communities,” “isolated indigenous peoples,” etc. In response to these legal taxonomies, indigenous peoples have preferred to refer to themselves as “*campesinos*” or “natives,” as the adjective “indigenous” is widely perceived as racially connotative or an outright epithet. The Constitution of 1993, for example, does not recognize

⁷³ Carlos Contreras, *El impuesto de la contribución personal en el Perú del siglo XIX*, 29 HISTÓRICA 2, 81 (2005).

⁷⁴ Juan Velasco, *Mensaje a la nación con motivo de la promulgación de la ley de la reforma agraria*, PROBLEMA AGRARIO, available at <http://www.marxists.org/espanol/tematica/agro/peru/velasco1969.htm>.

⁷⁵ JUAN VELASCO, VELASCO: LA VOZ DE LA REVOLUCIÓN 49 (1968).

⁷⁶ Law Decree No. 20653 (Ley de Comunidades Nativas y de Promoción Agropecuaria de Regiones de Selva y Ceja de Selva), arts. 6-10, June 18, 1974 (Peru).

indigenous peoples, but rather refers to the group as “native and peasant communities.”⁷⁷

Peru ratified ILO Convention 169 on February 2, 1994 and in accordance with its provisions, the treaty entered into force one year later. In Article 6 the right to free, prior, and informed consultation is recognized in terms of all measures that affect indigenous peoples. However, since the ratification of the ILO Convention 169, there has existed in Peru what Rodolfo Stavenhagen has identified as a “gap in implementation between the legislation and the quotidian reality.”⁷⁸ José Aylwyn has noted that this gap of implementation is prevalent in Latin America due to the “distance between the constitutional provisions and legal standards and domestic regulations and practices, the absence of mechanisms to constitutionally enforced recognized rights, and the lack of resources or will to develop public policy as a means to render those resources effective”—all of which has resulted in what might be referred to as a phenomenon of indigenous frustration.⁷⁹ In the case of Peru, this gap of implementation is a result of the state and other entities’ failure to incorporate these laws both in the design and the implementation of public policies focusing on communal property and the continued exploitation of natural resources. At the same time, this regulatory lag might be indicative of the state’s deference to international instruments to establish rights for indigenous groups in Peru.

With respect to the question of legal denominations, the CEACR of the ILO has pointed out that the diverse legal categories in Peru generate confusion and that the concept of indigenous peoples is “broader than that of the communities to which such peoples belong and that, whatever such communities are called, it is irrelevant for the purposes of the application of the Convention, as long as ‘native’, ‘rural’ or other communities are covered by Article 1(1)(a) or (b), of the Convention.”⁸⁰ Legal differences at the domestic level have created tensions between Peru’s indigenous groups and the state in terms of the application and implementation of ILO Convention 169. These tensions have become even more manifest amid the installation

⁷⁷ Constitución Política del Perú [CONSTITUTION], arts. 88-89 (Peru) [hereinafter Constitution of the Republic of Peru].

⁷⁸ RODOLFO STAVENHAGEN, *LOS PUEBLOS INDÍGENAS Y SUS DERECHOS: INFORMES TEMÁTICOS DEL RELATOR ESPECIAL SOBRE LA SITUACIÓN DE LOS DERECHOS HUMANOS Y LAS LIBERTADES FUNDAMENTALES DE LOS PUEBLOS INDÍGENAS DEL CONSEJO DE DERECHOS HUMANOS DE LA ORGANIZACIÓN DE LAS NACIONES UNIDAS 115* (UNESCO 2007).

⁷⁹ JOSÉ AYLWIN, *DERECHOS TERRITORIALES DE PUEBLOS INDÍGENAS EN AMÉRICA LATINA: SITUACIÓN JURÍDICA Y POLÍTICAS PÚBLICAS 7* (2011).

⁸⁰ ILO CEACR, *PERU: INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989, 699* (2008) (Sess. 91, 2008).

of major development and investment plans that may have a profound impact in indigenous regions.

IV. THE *BAGUAZO* AND THE CONTENTION OVER DEVELOPMENTAL AND INVESTMENT PLANS IN PERU

The violence during the events of Bagua allowed indigenous peoples to abandon their disdain toward recognizing themselves as indigenous and to take ownership of the discourse on indigenous peoples' rights.

A. *Violence in Bagua as Turning Point for Indigenous Rights*

In his presidential speeches, Alan García introduced developmental policies that were particularly aggressive in macroeconomic terms without considering the social impacts of the state's projects.⁸¹ The state granted concessions for hydrocarbon and reforestation programs in territories inhabited by indigenous peoples or under the influence of communities belonging to the Amazonian regions. Moreover, the state supported mining projects in areas sharing close proximity and in regions under dispute with those zones inhabited by the rural communities of the sierra and the coast. State policy was defined by its determined promotion of economic development; the state opposed a group known by the moniker "farmer's dogs," a colloquial term meaning "those that neither eat nor allow others to eat," a faction defined by its defense of the rights of indigenous communities and isolated indigenous peoples.⁸² In a scenario that was perceived by many as both an insult and a threat to Amazonian indigenous communities, the state witnessed the emergence of a series of social conflicts mobilized by indigenous peoples in various regions within the country.⁸³

One of the most violent episodes occurred in the jungle province of Bagua in the Department of Amazonas. After a series of several

⁸¹ For instance, in 2007, the press noticed the existence of the Mascho Piro, isolated indigenous peoples in the forest regions affected by mining and oil exploitation. A couple months later, President Alan García wrote an article where he questioned the existence of these citizens: "Against oil, they [the environmentalists] have created the figure of the 'uncontacted' native jungle dweller; that is, unknown but presumed, and thus millions of hectares cannot be explored, and Peru's petroleum must remain underground while the world is paying US \$90 per barrel. They prefer that Peru continue importing its oil and getting poorer." Alan García, *El síndrome del perro del hortelano*, EL COMERCIO, Oct. 28, 2007; David Hill, *Who are the Mashco-Piro tribe and can they still hope to stay 'uncontacted'?*, THE ECOLOGIST Feb. 1, 2012.

⁸² *Id.*; Alan García, *El perro del hortelano contra el pobre*, EL COMERCIO, Mar. 2, 2008, at a4, available at http://www.scribd.com/fullscreen/16274544?access_key=key-2ndod0wq3zmc4iyrs61.

⁸³ CONGRESO DE LA REPÚBLICA DEL PERÚ, INFORME EN MINORÍA DE LA COMISIÓN ESPECIAL PARA INVESTIGAR Y ANALIZAR LOS SUCESOS DE BAGUA 121-122 (2010), available at http://www.idl.org.pe/webpanel/informes/180411file_informeminoria.pdf.

international negotiations, the administration under Alan García passed the PTPA. The free trade treaty was met with the immediate rejection from the rural and native communities who felt that their livelihoods had been threatened with the imminent arrival of multinational firms from the United States. The state failed to assuage their fears and excluded these groups from the negotiation process of the treaty that outlined the terms of free trade in the region.⁸⁴ Moreover, the state did not provide valuable information regarding the legal safeguards involving traditional knowledge, biological diversity, and access to environmental justice contained in the treaty.⁸⁵

Detached from the concerns expressed by the indigenous community, the Congress of the Republic delegated faculties to the Executive Power to implement, at the national level, obligations outlined by the commercial treaty in Law 29157 on December 19, 2007.⁸⁶ Between March and June of 2008, the government adopted a series of legislative decrees, including the Wildlife and Forestry Law⁸⁷ and the Law Establishing the Special Temporary Regime of the Formulation of Rural Property.⁸⁸ Indigenous people were not consulted according to international law, despite the fact that the decrees explicitly affected them.

The Executive Power adopted its own regulatory standards while several other state and international entities expressed their objections. The Ombudsman,⁸⁹ the Commission of Andean Peoples, Amazon and Afro-Peruvians, Environment and Ecology Commission of the Republic of the Congress,⁹⁰ and the CEACR of the ILO⁹¹ argued that these laws should be

⁸⁴ U.N. Office of the High Commissioner on Human Rights, *supra* note 2, para. 8.

⁸⁵ United States-Peru Trade Promotion Agreement (with annexes, understandings, and related exchange of letters as amended by Protocol of Amendment to the United States-Peru Trade Promotion Agreement), arts. 18.1-18.5, US-Peru, Apr. 12, 2006; Manuel Ruiz Muller, *Biodiversidad, propiedad intelectual y el tratado de libre comercio con los Estados Unidos de América*, 2 REVISTA DE LA COMPETENCIA Y LA PROPIEDAD INTELECTUAL 48-51 (2006).

⁸⁶ Law No. 29157 [Ley que delega en el Poder Ejecutivo la facultad de legislar sobre diversas materias relacionadas con la implementación del Acuerdo de Promoción Comercial Perú-Estados Unidos, y con el apoyo a la competitividad económica para su aprovechamiento], Dec. 20, 2007 (Peru).

⁸⁷ Legislative Decree 1090 [Decreto Legislativo que aprueba la Ley Forestal y de Fauna Silvestre], June 28, 2008 (Peru).

⁸⁸ Legislative Decree 1089 [Decreto Legislativo que Establece el Régimen Temporal Extraordinario de Formalización y Titulación de Predios Rurales], June 28, 2008 (Peru).

⁸⁹ DEFENSORIA DEL PUEBLO, *EL DERECHO A LA CONSULTA DE LOS PUEBLOS INDÍGENAS*. INFORME DE ADJUNTÍA N° 011-2009-DP/AMASPPI-PPI (May 2009); DEMANDA DE INCONSTITUCIONALIDAD CONTRA EL DECRETO LEGISLATIVO N° 1064 QUE APRUEBA EL RÉGIMEN JURÍDICO PARA EL APROVECHAMIENTO DE LAS TIERRAS DE USO AGRARIO (June 4, 2009); ANÁLISIS DE LAS PRINCIPALES DISPOSICIONES DEL DECRETO LEGISLATIVO N° 1090, QUE DEROGA LA LEY N° 27308, LEY FORESTAL Y DE FAUNA SILVESTRE INFORME DE ADJUNTÍA N° 027-2008-DP/ASPMA.MA (Oct. 20, 2008).

⁹⁰ COMISIÓN DE PUEBLOS ANDINOS, AMAZÓNICOS Y AFROPERUANOS, AMBIENTE Y ECOLOGÍA, MEMORIA DE LA GESTIÓN PARLAMENTARIA PERÍODO LEGISLATIVO 2008-2009, available at http://www.congreso.gob.pe/comisiones/2008/pueblos_andinos/MEMORIA-2008-2009-CPAAAAE.pdf.

formulated in consultation with the indigenous groups prior to their implementation and be modified accordingly. At this juncture, the Interethnic Association for the Development of the Peruvian Rainforest (“AIDSESP”), one of the principal indigenous federations of the Amazon, held a conference to express their opposition to the new legislative decrees. Within a short period of time, the member organizations of AIDSESP overcame longstanding historical divisions and established a common agenda to resist the governmental policies under Alan García.⁹²

As a result of these initiatives, in August 2008 various Amazonian organizations conducted demonstrations to publically challenge the decrees; these protests ultimately stalled the installation of oil companies in the regions and led to the kidnapping of several officials. For the first time in decades, indigenous organizations regrouped systematically and took collective action as an alternative to resist the privatization of the forests. Other protests resulted in the permanent blocking of a major conduit of national transport, where protestors used blockades to obstruct the major highway crossings. In response to this, the government declared a state of emergency in the regions affected by the social unrest, including Bagua.⁹³

During a period of several months, the government established roundtable discussions with indigenous leaders that ultimately were deemed as generally unsatisfactory by several Amazonian Indigenous Peoples.⁹⁴ These meetings were held while indigenous protesters were blocking major highways and taking hostages. As a result, AIDSESP retired from its negotiations with the state and called for resistance from all Amazon indigenous organizations.⁹⁵ On April 8, 2009 the leaders of approximately 1,350 Amazon communities enacted an indefinite protest in the entirety of Peru’s Amazonian region.

On June 5, 2009, after two months of massive indigenous protests, the Peruvian police force carried out an operation for the eviction of all protestors along the Fernando Belaúnde Terry highway in the provinces of Bagua and Utcubamba. The confrontation resulted in the deaths of approximately twenty-four members of the police and ten civilian

⁹¹ ILO CEACR, PERU: INDIVIDUAL OBSERVATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989, 699 (Sess. 97, 2008); ILO CEACR, PERU: DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, 1989 (Sess. 80, 2009).

⁹² Juan Pablo Saavedra Limo, *Efectos post Bagua: el debilitamiento de la institucionalidad indígena de los pueblos Jibaros del Marañón en la región Amazonas-Perú*, Congreso Internacional de la Red Latinoamericana de Antropología Jurídica RELAJU-BOLIVIA, at 147-148.

⁹³ U.N. Office of the High Commissioner on Human Rights, *supra* note 2, paras. 15-16.

⁹⁴ *Id.* para. 18

⁹⁵ Theodore Macdonald, *Amazonian Indigenous Views on the State*, 33 SUFFOLK TRANSNAT’L L. REV. 453, 455 (2010).

protestors.⁹⁶ In Station 6 of Petroperú, out of vengeance for the earlier events, twelve policemen were assassinated after they were already handcuffed and in custody. Of the twenty-four members of the police that were murdered, there was at least one other policeman seized by a group of dissenters who is still missing.

Moreover, these events resulted in injuries to more than two hundred persons, eighty-two of which were injured by firearms.⁹⁷ Following the incident, police raided places in which the injured were receiving medical attention in order to make arrests.⁹⁸ The government prosecuted several leaders of AIDSEP for allegedly inciting violence. Ten days after the events of *Baguazo*, James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples, visited the site in order to analyze the situation. He expressed the need for a process of free, prior, and informed consultation as a measure to prevent further outbreaks of violence.⁹⁹

In response to this issue, the Congress of the Republic suspended and abolished the most controversial legislative decrees, such as the Wildlife and Forestry Law.¹⁰⁰ The Congress of the Republic initiated a process of political participation of indigenous peoples in the drafting of a new forestry law. Likewise, the Congress adopted a legal project for the rule of free, prior, and informed consultation that was vetoed by President García, who justified the actions due to the need of the country's economic development.¹⁰¹ Overall, however, the state argued that indigenous peoples did not possess significant nor sufficient reasons to limit state power and its objectives for sustained economic growth and development. In the press, the President made his aims explicit, showing prejudice toward indigenous peoples by stating:

[O]rder is a basic principle, societies always demand that the state implements order . . . these persons are not in power; they

⁹⁶ Wilfredo Ardito, *Bagua: doble espíritu de cuerpo, doble impunidad*, PUNTO EDU, June 8, 2010, available at <http://puntoedu.pucp.edu.pe/entrevistas/bagua-doble-espiritu-de-cuerpo-doble-impunidad/>.

⁹⁷ U.N. Office of the High Commissioner on Human Rights, *supra* note 2, at 21.

⁹⁸ DEFENSORIA DEL PUEBLO, ACTUACIONES HUMANITARIAS REALIZADAS POR LA DEFENSORÍA DEL PUEBLO CON OCASIÓN DE LOS HECHOS OCURRIDOS EL 5 DE JUNIO DEL 2009, EN LAS PROVINCIAS DE UTCUBAMBA Y BAGUA, REGIÓN AMAZONAS, EN EL CONTEXTO DEL PARO AMAZÓNICO, INFORME DE ADJUNTÍA N° 006-2009-DP/ADHPD 26-27, available at <http://www.defensoria.gob.pe/modules/Downloads/informes/variados/2009/informe-adjuntia-006-2009-DP-DHPD.pdf>.

⁹⁹ U.N. Office of the High Commissioner on Human Rights, *supra* note 2, at 1-7.

¹⁰⁰ CONGRESO DE LA REPUBLICA, PROCESO DE CONSULTA PREVIA, LIBRE E INFORMADA A LOS PUEBLOS INDÍGENAS DEL PROYECTO DE LEY N° 4141/2009-PE EN EL MARCO DEL CONVENIO 169 DE LA OIT DE LA COMISIÓN AGRARIA, available at http://www.congreso.gob.pe/comisiones/2010/agraria/ley_forestal/objetivos.htm.

¹⁰¹ JUAN CARLOS RUIZ MOLLEDA, LA IMPLEMENTACIÓN DEL DERECHO A LA CONSULTA PREVIA DE LOS PUEBLOS INDÍGENAS: UNA MIRADA CONSTITUCIONAL 107 (2011), available at <http://www.justiciaviva.org.pe/webpanel/publicaciones/archivo20122011-150924.pdf>.

are not citizens of the first class. Four hundred thousand natives cannot say to twenty-eight million Peruvians that “you do not have the right to come here.” This is a grave error, and those who think like this want us to revert to the irrationality and primitivism of the past.¹⁰²

In the most recent presidential elections, Ollanta Humala and his wife Nadine Heredia dressed as Incan descendants and natives during their electoral campaign activities in different regions around the country. Humala incorporated traditionally indigenous elements in his outfit, donning feathered headdresses, seed necklaces, fish scales, etc. In his speeches, he promised large-scale social improvement based on the recognition of the rights of natives.¹⁰³ During his final electoral meeting, Humala stated:

[I]f the communities are not in agreement with projects that affect their environment and the development of human rights, such as the hydroelectric project of Inambari, those projects will not be carried out. The voice of the community is of essential importance; if I become President, it will be for your votes, and we will defend that voice.¹⁰⁴

Humala’s electoral campaign was in concordance with the social demonstrations demanding the implementation of a law for the right to free, prior, and informed consultation. Humala’s “indigenous campaign” was, in large part, the reason that he was elected to the presidency. From his earliest speeches, he delivered a politics of social transformation, affirming “Peru as a multilingual and multicultural country.” He likewise stated that this:

[D]iversity constitutes, without doubt, [Peru’s] greatest wealth. For a long time, a discourse and practice of exclusion has been prevalent as well as the rejection of difference, the idea that “you are not like me” that has harbored discrimination and intolerance.¹⁰⁵

¹⁰² *Conozca las "patinadas" verbales de Alan García*, LA REPÚBLICA, July 3, 2011, available at <http://www.larepublica.pe/03-07-2011/conozca-las-patinadas-verbales-de-alan-garcia>.

¹⁰³ *Presidente Ollanta Humala promulga mañana en Bagua Ley de Consulta Previa*, PRESIDENCIA DE LA REPUBLICA DEL PERU, Sept. 5, 2011, <http://www.presidencia.gob.pe/presidente-ollanta-humala-promulga-manana-en-bagua-ley-de-consulta-previa>; *Ollanta Humala aplicará La ley de consulta previa*, LA PRIMERA, Apr. 7, 2011; *Humala promete aplicar Ley de Consulta Previa y respetar opinión de comunidades sobre proyectos*, ANDINA NOTICIAS, Apr. 6, 2011; GOBIERNO DEL PERÚ, PERÚ EN 100 DIAS DE GOBIERNO 5 (2011); FLICKR, *supra* note 4.

¹⁰⁴ *Ollanta cerró campaña electoral en Puno*, NOTICIAS SER, Apr. 6, 2011, available at <http://www.noticiasser.pe/06/04/2011/puno/ollanta-cerro-campana-electoral-en-puno>.

¹⁰⁵ Ollanta Humala, *Discurso del Presidente*, PRESIDENCIA DE LA REPÚBLICA DEL PERÚ, July 28, 2011, available at <http://www.presidencia.gob.pe/discurso-del-presidente-ollanta-humala-28-de-julio-2011>.

A new legislative process was created to introduce the law of free, prior, and informed consultation in efforts to welcome the initiatives proposed by indigenous peoples. The final text was a result of a parliamentary consensus and the expediencies of a recently installed government. The law was enacted on September 6, 2011 in the city of Imacita-Bagua as a symbolic gesture. On the day of the law's enactment, Humala declared the new regulatory standard as a cessation to the institutional exclusion of indigenous peoples.¹⁰⁶ He insisted that the new regulations be introduced in order to grant agency to indigenous peoples in the political decision-making process on issues affecting them (referring specifically to ILO Convention 169).¹⁰⁷

B. Multiple Meanings of a Law of Free, Prior, and Informed Consultation

Humala's law was designed to recognize the identities of indigenous peoples while transitioning away from prior confrontational policy. On the one hand, the law acknowledges the legitimacy of the motivations behind the Amazonian indigenous demonstrations; on the other hand, it redresses the fatal and unjust consequences and the need to circumvent another uprising similar to Bagua. The law also confronts the symbolic violence that has been manifest in declarations made by President García, particularly in categorizing Amazonian natives as second-class citizens. It appears, therefore, that the law for free, prior, and informed consultation initiated a new form of relation between indigenous groups and the state based on the recognition of indigenous rights.

The law of free, prior, and informed consultation also aims to prevent the recurrence of violent acts, rechanneling conflicts through administrative measures, and proceedings between state entities and indigenous peoples.¹⁰⁸ The law was established, therefore, as a new social pact to confront violence. The social pact serves as a reminder that all forms of violence are illegal and that free, prior, and informed consultation, dialogue, and other democratic forms of indigenous political participation are legally acceptable and

¹⁰⁶ Ollanta Humala, *Hoy damos un paso trascendental en la construcción de una Nación que respete a sus comunidades*, PRESIDENCIA DE LA REPÚBLICA DEL PERÚ, Sept. 6, 2011, available at <http://www.presidencia.gob.pe/presidente-ollanta-humala-hoy-damos-un-paso-trascendental-en-la-construccion-de-una-nacion-que-respete-a-sus-comunidades>.

¹⁰⁷ *Id.*

¹⁰⁸ Law Decree 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)], art. 1, Sept. 7, 2011 (Peru).

essential parts of the political process of negotiation.¹⁰⁹ It should be affirmed, therefore, that the law for free, prior, and informed consultation has acted as a “spell against violence”¹¹⁰ while providing hope¹¹¹ for indigenous peoples in the more equitable allocation of the legal apparatus, making available administrative procedures and judicial processes in an otherwise hegemonic system. In sum, from inside this system, the state revolutionized its public policy through the integration of an “ethnic focus.” Moreover, the law reverses the gap of implementation of ILO Convention 169 and other international norms that require indigenous political participation through mechanisms of free, prior, and informed consultation.¹¹²

Immediately after the law was passed, public officials as well as representatives from the corporate sector believed that the measure would serve to reverse the effects of social unrest in the country.¹¹³ Violent social demonstrations as those in the region of Bagua were not isolated events and were replicated in other territories where natives and indigenous communities had been affected by similar mining projects. According to Iván Degregori, in those systems in which political parties are institutionalized, the unmet demands of minorities are received by political parties serving as translators for proposals before the state.¹¹⁴ However, in countries such as Peru, in which political parties have experienced crises of representation, disgruntled collectives resort to means of social protest to negotiate directly with the state. Negotiations addressing the recognition of indigenous rights have traditionally foregone institutional channels developed by the state and literally have taken to open-air protests. Due to the state’s failure to effectively respond to the demands of protestors claiming historical debts, the collective indigenous frustration has espoused

¹⁰⁹ JULIETA LEMAITRE RIPOLL, EL DERECHO COMO CONJURO: FETICHISMO LEGAL, VIOLENCIA Y MOVIMIENTOS SOCIALES 343-345 (2009).

¹¹⁰ *Id.* at 25-40.

¹¹¹ Julieta Lemaitre Ripoll, *Derecho, violencia y movimientos sociales en Colombia*, in DERECHO Y CULTURA 16 (2007).

¹¹² Law Decree 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)], arts. 2-4, Sept. 7, 2011 (Peru).

¹¹³ *Defensoría del Pueblo propone acciones para afrontar los conflictos sociales en el país*, ANDINA NOTICIAS, June 22, 2011, available at <http://www.andina.com.pe/Espanol/video-defensoria-del-pueblo-propone-acciones-para-afrontar-los-conflictos-sociales-el-pais-20301.aspx>; *Wola: Nuevo gobierno debe aprobar consulta previa y buscar sakudas negociadas a conflictos*, ANDINA NOTICIAS, July 13, 2011; *CCL espera que Ley de consulta previa contribuya a mantener la paz social*, ANDINA, Aug. 24, 2011; *Ley de consulta previa permitirá superar desencuentros con comunidades nativas*, ANDINA, Sept. 27, 2011.

¹¹⁴ Carlos Iván Degregori, *Lo indígena y representación política*, 169 IDEELE 32 (2005).

violent forms of remonstrance to achieve a political voice, for example in the cases of the Project Minas Conga.¹¹⁵

In August 2012, in accordance with the Ombudsman, 245 social conflicts were reported (169 in activity and 76 latent).¹¹⁶ Of those active social conflicts, 148 were of an environmental character; this is to say that 60.4% of social conflicts in Peru are linked to environmental impacts resulting from projects for the exploitation of natural resources.¹¹⁷ The most recent report of the Ombudsman details, in broad terms, the environmental conflicts in which various indigenous organizations and rural communities are in competition with extractive industries and state entities at the national, regional, and local levels.¹¹⁸ In the majority of these socio-environmental conflicts, the debate on free, prior, and informed consultation and land rights have become the central axes for the polarization between indigenous communities, extractive industries, and the state. As a result, Peru has wielded its force to suppress several demonstrations, which, in turn, has led to more deaths and injuries emerging even after the adoption of the law for free, prior, and informed consultation.¹¹⁹

According to the Ombudsman, the terms of social conflict in Peru presuppose that economic growth has not in fact assuaged the conditions of poverty facing indigenous peoples.¹²⁰ On several occasions, extractive industries have outright threatened those means of subsistence for residents in conflict zones. It has also been pointed out that there has been insufficient intercultural dialogue between the state and indigenous peoples.¹²¹ In many cases, negotiation processes result in false dialogue that becomes a justification for violence.¹²² Such limitations become even more visible when culturally diverse actors intervene in the social conflict. The multicultural character and multiplicity of interpretations that arise out of the processes of negotiation—following the particularity and cultural specificity

¹¹⁵ Pedro Sánchez Legrás, *Conga: Luces y sombras*, NOTICIAS SER, Dec. 26, 2013, at 43-44.

¹¹⁶ DEFENSORÍA DEL PUEBLO, REPORTE DE CONFLICTOS SOCIALES N° 102, 5 (Aug. 2012), available at <http://www.defensoria.gob.pe/conflictos-sociales/objetos/paginas/6/61reporte-sociales-n-101-julio-12.pdf>

¹¹⁷ *Id.* at 5.

¹¹⁸ *Id.* at 11.

¹¹⁹ *Perú: A cinco se elevó cifra de muertos por protestas antimineras en Cajamarca*, SURTITULARES, July 6, 2012, available at <http://surtitulares.com/noticia/39979/per%C3%BA-a-cinco-se-elev%C3%B3-cifra-de-muertos-por-protestas-antimineras-en-cajamarca.html>.

¹²⁰ Defensoría del Pueblo, *Violencia en los conflictos sociales*, INFORME DEFENSORIAL, Mar. 26, 2012, at 36, <http://www.defensoria.gob.pe/modules/Downloads/informes/defensoriales/informe-156.pdf>.

¹²¹ *Id.*

¹²² *Id.*

of the community—determine events and discourses that constitute the subject and object of social conflict in the regions.¹²³

Furthermore, the Ombudsman revealed that social conflicts and violence involving indigenous peoples are manifestations of cultural disagreements often historically neglected. It has expressed that the official discourse of the Peruvian state clearly privileges economic growth and is incompatible with the autonomous visions of the indigenous community. Thus, we have found ourselves in the same scenario as before the approval of Humala's law.

V. ONE YEAR AFTER THE LAW OF FREE, PRIOR, AND INFORMED CONSULTATION: CONSIDERABLE PROGRESS AND ADVERSE EFFECTS

The Peruvian state resorted to the law to guarantee the rights of indigenous peoples and to remove obstacles and structures of social exclusion resulting from social tensions and conflict especially in response to foreign investment interests. In only a year, there have been some notable reforms in favor of indigenous peoples. However, there are also structural concerns regarding the enforcement of the regulatory framework.

A. *Achieving a Law of Free, Prior, and Informed Consultation: Building an Indigenous Agenda at the State and Social Level*

The government acknowledged that it was necessary for the state to adopt laws and standards to guarantee the right to free, prior, and informed consultation. In this regard, the Congress of the Republic and other governmental bodies bear the onus to adopt rules and regulations to clarify the proceedings of consultation for national, regional, and local laws.¹²⁴ Furthermore, the technical bodies of each ministry must identify the measures under discussion for consultation. The Ministry of Energy and Mining has the responsibility to specify the measures of enquiry regarding the construction of hydroelectric projects as well as the awarding of mining concessions. Similarly, the Ministry of Transportation and Communication

¹²³ *Id.*

¹²⁴ Mariella Balbi, *La ley de consulta previa tendrá varios reglamentos*, EL COMERCIO, Nov. 28, 2011, available at <http://elcomercio.pe/politica/1340480/noticia-ley-consulta-previa-tendra-varios-reglamentos>; *Perú: Proponen reglamento para consultar a indígenas medidas legislativas que los afecten*, SERVINDI, June 27, 2012, available at <http://www.servindi.org/actualidad/67221>; CONGRESO DE LA REPÚBLICA, PROYECTO DE LEY 1183/201-CR, RESOLUCIÓN LEGISLATIVA QUE MODIFICA EL REGLAMENTO DEL CONGRESO DE LA REPÚBLICA Y AGREGA COMO ANEXO EL PROCEDIMIENTO LEGISLATIVO DE CONSULTA PREVIA A LOS PUEBLOS INDÍGENAS SOBRE MEDIDAS LEGISLATIVAS QUE LES AFECTEN (May 28, 2012).

must include the participation of indigenous actors during the consultation process for the construction of the Trans-Oceanic Highway.

Additionally, for better implementation, the free, prior, and informed consultation law advocates for the creation of a database of indigenous peoples.¹²⁵ A database is vital for the development of public policies supporting these groups. Moreover, the state has conducted training of interpreters for assuring intercultural dialogue.¹²⁶ Finally, the state has the obligation to adopt educational measures for the protection of indigenous rights.

From this perspective, then, I argue that the law of free, prior, and informed consultation has in fact achieved a reformatory effect in shaping the state's public policy. Currently, each investment project directly involving indigenous communities must be immediately introduced in discussions on the right to free, prior, and informed consultation as a safeguard to protect indigenous peoples. Indigenous peoples view the legislation as a means to legitimize their demands and demonstrations, to strengthen their initiatives for resistance and political advocacy, and to ensure their active participation in the negotiations relating to the management of natural resources.

At the international level, the CEACR of the ILO,¹²⁷ the supervisory bodies of the Universal Human Rights System,¹²⁸ the UN Special Rapporteur on the Rights of Indigenous Peoples,¹²⁹ and IACHR¹³⁰ recognized this law as a significant step forward in Peruvian legislation

¹²⁵ MINISTERIO DE CULTURA, RESOLUCIÓN MINISTERIAL N° 202-2012-MC: APROBAR DIRECTIVA N° 03-2012/MC-DIRECTIVA QUE REGULA EL FUNCIONAMIENTO DE LA BASE DE DATOS OFICIAL DE PUEBLOS INDÍGENAS U ORIGINARIOS (May 22, 2012).

¹²⁶ *Preseleccionan intérpretes de lenguas indígenas para consulta previa en Amazonas*, ANDINA, May 13, 2012; Gianfranco Hereña, *Traductores aborígenes para Ley de consulta previa*, ANDINA, May 13, 2012; MINISTERIO DE CULTURA. RESOLUCIÓN VIVEMINISTERIAL N° 001-2012-VMI-MC: APROBAR DIRECTIVA N° 03-2012/MC CREAM, RESPECTO AL PROCESO DE CONSULTA PREVIA ESTABLECIDO EN LA LEY N° 29785, LOS REGISTROS DE INTÉRPRETES DE LENGUAS INDÍGENAS U ORIGINARIAS Y DE FACILITADORES, Aug. 20, 2012.

¹²⁷ ILO CEACR, PERU: DIRECT SOLICITATION ON THE INDIGENOUS AND TRIBAL PEOPLES CONVENTION, (Sess. 101, 2012).

¹²⁸ *Comité de ONU califica de positivo Ley de Consulta Previa en Perú*, MINJUS, May 22, 2012, available at <http://www.minjus.gob.pe/ultimas-noticias/comite-de-onu-califica-de-positivo-ley-de-consulta-previa-en-peru/>.

¹²⁹ James Anaya, *Peru: Consultation law marks key step forward in the country and region*, says UN expert, JAMES ANAYA: SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES, Aug. 25, 2011, available at <http://unsr.jamesanaya.org/statements/peru-consultation-law-marks-key-step-forward-in-the-country-and-region-says-un-expert>.

¹³⁰ Press Release, Inter-Amer. Comm'n on H. R., IACHR Welcomes Enactment of Prior Consultation Law in Peru (Sept. 12, 2011), available at http://www.oas.org/en/iachr/media_center/PReleases/2011/099.asp.

dealing with the rights of indigenous peoples.¹³¹ Despite the fact that international bodies did not make any pronouncements regarding the content of the domestic law, the Peruvian state acknowledged that these entities validated the specific regulations on the law for free, prior, and informed consultation.

While there was an upsurge in political voicing and support for the rights of indigenous peoples, the business and corporate sectors expressed concerns that the law would delay, if not inhibit, external investments and jeopardize their economic commitments valued in millions of dollars.¹³² Quick to address these concerns, the state remarked that the law of free, prior, and informed consultation did not grant a right to veto in favor of an indigenous community.¹³³ This interpretation of the law proved invalid, for the obtaining of free, prior, and informed consent is explicitly recognized in cases referred to in ILO Convention 169 (the alienation of lands and indigenous displacement) or in other international instruments. The state therefore affirmed that the law of free, prior, and informed consultation does not make explicit, for example, that Asháninkas possess the right to suspend the phases of implementation of the major electric project, Paquitzapango. This project outlines the plans for the construction of a hydroelectric dam resulting in the displacement of various native communities, affecting their societies and compromising food security. Moreover, the state has not resolved the question of whether the law specifically refers to projects approved prior to the implementation of the law.

¹³¹ OIT: *Consulta previa es señal importante de respeto a derechos de los pueblos indígenas*, ANDINA, Aug. 24, 2011; *ONU señala que Ley de consulta previa es un logro clave para el país y la región*, COORDINADORA NACIONAL DE DERECHOS HUMANOS, Aug. 25, 2011, available at <http://derechoshumanos.pe/2011/08/onu-senala-que-ley-de-consulta-previa-es-un-logro-clave-para-el-peru-y-la-region/>.

¹³² *Perú caerá en ranking de competitividad minera con consulta previa*, ANDINA, Sept. 13, 2011, available at http://www.rpp.com.pe/2011-09-13-peru-caera-en-ranking-de-competitividad-minera-con-consulta-previa-noticia_403516.html; *Perumin debatió ley de consulta previa y aporte minero voluntario*, RPP NOTICIAS, Sept. 17, 2011, available at http://www.rpp.com.pe/2011-09-17-perumin-debatio-ley-de-consulta-previa-y-aporte-minero-voluntario-noticia_404621.html; *Mineros reclaman participación en reglamento de Ley de consulta previa*, RPP NOTICIAS, Sept. 17, 2011, available at http://www.rpp.com.pe/2011-09-17-mineros-reclaman-participacion-en-reglamento-de-ley-de-consulta-previa-noticia_404650.html; *Señalan que Ley de consulta previa retardará inversión minera*, RPP NOTICIAS, Sept. 13, 2011, available at http://www.rpp.com.pe/2011-09-13-senalan-que-ley-de-consulta-previa-retardara-inversion-minera-noticia_403450.html; *PPK: La ley de consulta previa es un "obstáculo" a la minería*, LA REPÚBLICA, Oct. 30, 2011, available at <http://www.larepublica.pe/30-10-2011/ppk-la-ley-de-consulta-previa-es-un-obstaculo-la-mineria>.

¹³³ Hans Huerta Amado, *Derecho a consulta no es derecho al veto, señala viceministro de Interculturalidad*, EL COMERCIO, Nov. 18, 2011, available at <http://elcomercio.pe/politica/1335491/noticia-derecho-consulta-no-derecho-al-veto-senala-viceministro-interculturalidad>.

This conciliatory discourse between the state and the business sector has generated outright rejection and concern among indigenous peoples, for it invokes the aggressive economic policies of the former government in terms of foreign investments and unfettered industrial development in the region. Yet for the indigenous community, the law of free, prior, and informed consultation is regarded as an emancipatory tool that can be deployed as a means of subverting the aims of external interests.

B. Undesirable Effects of the Law of Consultation

A problem of origin relating to the law of free, prior, and informed consultation is the fact that the regulation itself was not derived from a process of consultation. In less than two months, the law was adopted based on the earlier submitted draft from the government of Alan García.¹³⁴ However, certain indigenous organizations sacrificed the right to free, prior, and informed consultation due to time constraints. Moreover, indigenous organizations had validated the absence of the rule of free, prior, and informed consultation given that some measures adopted by the state were regarded as best faith efforts. For example, indigenous communities petitioned that a human rights defender for indigenous peoples be designated the chief of the Institute for the Development of Andean, Amazonian, and Afro-Peruvian Peoples (“INDEPA”)—a state entity which is part of the Ministry of Culture.¹³⁵ INDEPA was the entity responsible for the further regulation associated with the new law for free, prior, and informed consultation.

INDEPA launched the implementation of the Unity Pact, an informal organization reuniting the principal indigenous organizations. It serves as one of the focal points during negotiations with the other public agencies involved in the process of regulation. Within this context, indigenous organizations believed that the technical insufficiencies of the law would be resolved through regulatory process. The adoption of the law of free, prior, and informed consultation would be the first advancement in accordance with ILO Convention 169, integrally reflecting the demands of indigenous peoples that had been long neglected.

In the first rounds of negotiation, the Unity Pact outlined a series of non-negotiable principles regarding the right to free, prior, and informed consultation while disclosing some problems in respect to the proposed text

¹³⁴ CONGRESO DE LA REPÚBLICA DEL PERÚ, EXPEDIENTE DEL PROYECTO DE LEY 00089 (Aug. 2011), available at <http://ht.ly/6b5HO>.

¹³⁵ PACTO DE UNIDAD, CARTA DIRIGIDA A LA MINISTRA DE CULTURA, SUSANA BACA (Sept. 29, 2011), available at <http://lamula.pe/barra/servindi.org/1791>.

of the regulatory process. Among its demands, the Unity Pact critiqued the draft text for its failure to recognize the right to free, prior, and informed consent as referred to in international law.¹³⁶ For the indigenous organizations that made up the Unity Pact, the gap in implementation still persisted because the duty to obtain consent in the case of large-scale development or investment projects was not recognized, despite the passing of the law of free, prior, and informed consultation, and became accentuated during negotiations outlining the regulatory processes. In this context, the indigenous organizations claimed the unconstitutionality of the law of free, prior, and informed consultation, alleging the insufficient implementation of ILO Convention 169.¹³⁷

Other problems emerged in the framework of the adoption of the regulations for the law of free, prior, and informed consultation. The Multi-Sectoral Commission failed to include several indigenous women's organizations and Aymaran organizations in its drafting of the regulations.¹³⁸ The government adopted corrective measures,¹³⁹ but the Aymaras rejected

¹³⁶ The Unity Pact drafted a document called "Minimal Principles for the Compliance of the Rights to Participation, Consultation and Free, Informed and Prior Consent" where the involved organizations based their demands in several international instruments including ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, paragraph 137 of the Case of the Saramaka People v. Suriname of the Inter-American Court of Human Rights, and the views of supervisory bodies of the United Nations. See Pacto de Unidad, Principios mínimos para la aplicación de los derechos de participación, consulta y consentimiento previo, libre e informado at 2, Nov. 17, 2011, available at http://servindi.org/pdf/PACTO_DE_UNIDAD.pdf.

¹³⁷ Gianni Velásquez, *Solicitarán inconstitucionalidad de Ley de Consulta Previa*, ALERTA PERU, Apr. 4, 2012, available at <http://www.alertaperu.pe/index.php/peru/item/186-solicitar%C3%A1n-inconstitucionalidad-de-ley-de-consulta-previa>; Javier Ugaz, *Perú: Estados y pueblos indígenas: viejas prácticas con nuevo rostro*, SERVINDI, Feb. 23, 2012; *Perú: El borrador de reglamento de consulta no ayuda a resolver problemas y es provocador*, SERVINDI, Dec. 14, 2011, *Perú: regiones del sur presentan aportes a la ley de consulta previa y su reglamentación*, SERVINDI, Dec. 24, 2011.

¹³⁸ PRESIDENCIA DE CONSEJO DE MINISTROS, RESOLUCIÓN SUPREMA N° 337-2011-PCM, CREA COMISIÓN MULTISECTORIAL DE NATURALEZA TEMPORAL CON EL OBJETO DE EMITIR UN INFORME A TRAVÉS DEL CUAL SE PROPONGA EL PROYECTO DE REGLAMENTO DE LA LEY N° 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) (Nov. 16, 2011); COMISIÓN MULTISECTORIAL DE NATURALEZA TEMPORAL CON EL OBJETO DE EMITIR UN INFORME A TRAVÉS DEL CUAL SE PROPONGA EL PROYECTO DE REGLAMENTO DE LA LEY N° 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), ACTA SEGUNDA SESIÓN-COMISIÓN MULTICULTURAL (Jan. 9, 2012), available at http://www.indepa.gob.pe/PDF/comision_multisectorial/Acta%202.pdf; Javier Ugaz, *Perú: El pueblo aymara y su derecho a participar en el reglamento de consulta previa*, SERVINDI, Jan. 12, 2012; *Niegan participación de aymaras en reglamentación de Ley de consulta previa*, LOS ANDES, Jan. 10, 2012; Miluska Pizarro, *Aymaras en desacuerdo con la consulta previa*, LOS ANDES, Jan. 10, 2012; *Reglamento y ley de consulta previa fue rechazada por aymaras y más de 700 líderes indígenas reunidas en Cusco*, CONACAMI, Jan. 23, 2012.

¹³⁹ FEMUCARINAP, INCORPORAN A LA FEMUCARINAP EN LA COMISIÓN MULTISECTORIAL QUE ELABORA EL REGLAMENTO DE LA LEY DEL DERECHO A LA CONSULTA PREVIA (Feb. 22, 2012), available at <http://femucarinap.org/eventosacciones/115-incorporan-a-la-femucarinap-en-la-comision-multisectorial->

the regulation while intending to sabotage the process of the implementation of the law and to radicalize their demands as a result of a partial participatory process.¹⁴⁰ An additional problem was that state officials were not flexible in the modification of the terms of the draft text submitted during the negotiations.¹⁴¹

The Aymaran and other indigenous organizations denounced the law and its regulations, contesting the fact that rural and native communities—considered distinct denominations among indigenous peoples—would only be consulted if they complied with the requirements, terms, and vocabularies defining these groups as set forth in international law. Moreover, the various indigenous organizations contested that the new law did not guarantee safeguards protecting regions from the major development or investment plans that may have a profound impact on their territories, thus being catalysts for cultural conflict. As a result of negotiations with the state, AIDSESP and other rural communities withdrew from the rounds of negotiation that dictated the terms of the regulatory processes. Only two indigenous organizations remained active: the Confederation of Amazonian Nationalities of Peru and the Rural Confederation of Peru.¹⁴² In the end, the first processes of alleged free, prior, and informed consultation resulted in the frustration of the majority of indigenous organizations as they felt that the promises of President Ollanta Humala had largely been unmet.

The Ministry of Culture approved the regulation of the law of free, prior, and informed consultation on April 3, 2012.¹⁴³ The state maintained its position with respect to indigenous rights: that it does not possess the

que-elabora-el-reglamento-de-la-ley-del-derecho-a-la-consulta-previa-; FEMUCARINAP, APORTES DE LA FEMUCARINAP PARA LA REGLAMENTACIÓN DEL DERECHO A LEY DE CONSULTA PREVIA (Feb. 20, 2012), available at http://www.indepa.gob.pe/pdfconsultaprevia/01Agenda/aportes_org_ind_FEMUCARINAP_21%2002%202012/1.PDF.

¹⁴⁰ Liubomir Fernández, *Aimaras marcharán en Lima por modificación de Ley de Consulta Previa*, LA REPUBLICA, Apr. 10, 2012, available at <http://www.larepublica.pe/10-04-2012/aimaras-marcharan-en-lima-por-modificacion-de-ley-de-consulta-previa>; Prensa Radio Pachamama, *Comunidades aymaras de Puno rechazan Ley de Consulta Previa*, RADIO PACHAMAMA, Apr. 2, 2012, available at <http://www.pachamaradio.org/02-04-2012/comunidades-aymaras-de-puno-rechazan-ley-de-consulta-previa.html>.

¹⁴¹ Leonidas Ramos, *El descontento con el reglamento de la Ley de Consulta Previa*, NOTICIAS SER, Apr. 13, 2012.

¹⁴² Presidencia del Consejo de Ministros, Secretaría General, Oficina de Prensa e Imagen Institucional, *Nota de prensa 107-PCM, Pueblos indígenas y poder ejecutivo suscriben proyecto de reglamento de ley de consulta previa*, Mar. 5, 2012, available at <http://www.pcm.gob.pe/Prensa/ActividadesPCM/2012/Marzo/05-03-12-b.html>; Javier La Rosa, *Ley de Consulta: Cuando la forma es tan importante como el fondo*, REVISTA DEL INSTITUTO DE DEFENSA LEGAL, Apr. 2012, available at <http://www.revistaidee.com/idee/content/ley-de-consulta-cuando-la-forma-es-tan-importante-como-el-fondo>.

¹⁴³ Ministerio de Cultura, *Decreto Supremo N° 001-2012-MC, Reglamento de la Ley N° 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)*, DIARIO OFICIAL EL PERUANO, 463588-95.

power to overturn measures passed prior to the implementation of the law without the consultations of indigenous communities. Moreover, the text outlining the regulation incorporated several articles that were not part of the consultation processes and negotiations.¹⁴⁴ Similarly, the regulation did not expressly recognize the right to free, prior, and informed consent. Nevertheless, following a comprehensive reading of the text, the regulation does in fact guarantee the right to consent in the circumstance of indigenous displacement and the transportation and storage of toxic wastes, as well as in situations where the lives of indigenous peoples are threatened or their means of subsistence compromised.¹⁴⁵ However, these notable achievements are generally unknown and, therefore, disregarded by indigenous organizations.

Despite notable advancements, the process for drafting regulations on the law for free, prior, and informed consultation had manifested into social conflict. Indigenous groups turned to social protest once again as a means to demand their rights. For these communities, it has been clear that violence serves as a political end for interrupting and suspending megaprojects in their territories—and that the rule for free, prior, and informed consultation is largely incapable of achieving this end. Therefore, collective action expressed with violence remains an alternative when the state is unwilling to account for indigenous demands. Subsequently, the process of consultation for drafting the legal regulations has been disappointing for all parties involved.

As Ramón Pajuelo has made clear, the law of free, prior, and informed consultation does not meet the actual demands of indigenous peoples.¹⁴⁶ Currently, indigenous communities not only demand proceedings for free, prior, and informed consultation, but additionally mandate the recognition of territorialities and a guarantee to free, prior, and informed consent. In this scenario, the law of free, prior, and informed consultation and the correlative regulations only serve as palliative measures and are not truly transformative mechanisms for indigenous peoples.

¹⁴⁴ PEDRO CASTILLO, REGLAMENTO DE LA LEY DE CONSULTA PREVIA NO RECOGE LAS OBSERVACIONES DE LAS ORGANIZACIONES INDÍGENAS, CEPES-RURAL (Apr. 10, 2012), *available at* <http://lamula.pe/2012/04/10/ppedro-castillo-%E2%80%9Creglamento-de-la-ley-de-consulta-previa-no-recoge-las-observaciones-de-las-organizaciones-indigenas%E2%80%9D/cepesrural>.

¹⁴⁵ JUAN C. RUIZ MOLLEDA, INFORME JURÍDICO: LA CONSTITUCIONALIDAD DEL REGLAMENTO DE LA LEY DE CONSULTA 5 (Apr. 19, 2012), *available at* http://www.justiciaviva.org.pe/webpanel/doc_trabajo/doc_19042012-143556.pdf.

¹⁴⁶ Javier Torres, *Ramón Pajuelo: La ley de consulta previa llegó tarde*, LA MULA, May 18, 2012, *available at* [http://lamula.pe/2012/05/17/ramon-pajuelo-en-el-arriero/javierto](http://lamula.pe/2012/05/17/ramon-pajuelo-en-el-arriero/javierto; Los campesinos piden que la consulta sea vinculante); *Los campesinos piden que la consulta sea vinculante*, EL COMERCIO, Apr. 4, 2012, at A9.

VI. CONCLUSION

How, then, can we assess the process of free, prior, and informed consultation in Peru? Rodríguez-Garavito's study on the case of the Colombian Embera indigenous peoples' challenging of the construction of a mining project serves as a significant precedent for analyzing the issue.¹⁴⁷ Rodríguez-Garavito determines that the right to free, prior, and informed consultation ultimately leads to ambivalent results concerning the relations of indigenous peoples.¹⁴⁸ In theory, the right to free, prior, and informed consultation mandates that participants and actors in the process, especially those with opposing ideological perspectives, enact inclusive measures to foster terms of negotiation, dialogue, and continued communication.¹⁴⁹ However, in practice, the exercise of this right has the potential to frustrate the terms of negotiation and perpetuate the polarization between the parties involved.¹⁵⁰ Moreover, the process of free, prior, and informed consultation can reinforce systems of domination as well as provoke demonstrations and acts of sabotage that are detrimental to all parties.

Upon examination, the process of regulation of the law of free, prior, and informed consultation in Peru is representative of the analysis rendered by Rodríguez-Garavito. The involvement of various sectors, including the government and multiple representatives from many of the indigenous communities in Peru, complicated the negotiation process. It was vital that the state maintain its good faith effort throughout the negotiations, but the initial exclusion of several indigenous organizations served to generate mistrust from the majority of indigenous representatives. Additionally, the right to free, prior, and informed consent was utilized by indigenous groups as a tool of negotiation and sabotage in which they compromised the obligations of the state with the private sector. Indigenous organizations demanded the modification of economic agreements that affected their territories, basing their claims in the right to free, prior, and informed consent.

The law of free, prior, and informed consultation, therefore, exposes the limitations of law in its capacity to address and prevent forms of violence. In each of the aforementioned cases, the process of legal implementation is a complex process with varying ideological perspectives. This has certainly been the case in the most unstable period of contemporary

¹⁴⁷ César Rodríguez-Garavito, *Ethnicity.gov: Global governance, indigenous peoples, and the right to prior consultation in social minefield*, 18 *IND. J. GLOBAL LEGAL STUD.* 263, 268 (2011).

¹⁴⁸ *Id.* at 304-305.

¹⁴⁹ *Id.* at 292.

¹⁵⁰ *Id.* at 295.

Peruvian history: the twenty-year period of internal armed conflict. According to the Truth and Reconciliation Commission:

The weight of an ethnic and racial component has loomed large in these histories of conflict—within contexts conducive to the continued emergence and propagation of confrontation—and resides at the most immediate level of those perceptions and quotidian behaviors demonstrated by the various actors directly and indirectly implicated in this history.

This racial and ethnic component, despite its latency, was present during the entirety of the conflict. Only in those moments where physical violence erupted was discrimination most explicit, resulting in murder, torture, violations, and demonstrations of symbolic violence. In many cases, ethnic and racial differences served as the criteria for the institutionalization of social inequalities, invoked by the perpetrators as justification for their actions.¹⁵¹

In the case of Peru, a historical debt must be dealt with by a government that has been constructed on the basis of the subjugation of indigenous peoples. The unaccounted debt owed to the indigenous peoples has been the main factor contributing to multiple forms of social conflict. The state, therefore, must recognize that the resulting violence during social conflicts is not spontaneous in nature, but rather stems from processes of cultural disengagement and discord as well as frustrated negotiations.

The events of Bagua reveal this historical tension; in response, the law of free, prior, and informed consultation adopted a language for peace and reconciliation and was regarded as a self-sufficient formula against the social conflict associated with natural resources in the regions. Currently, indigenous groups and the state are disillusioned by the unsatisfactory results and the reality that the law has not generated social pacification. In response to these events, violent and undemocratic measures have been equally attractive to both the state and indigenous groups. The resolution of cultural tension is therefore dependent upon the capacity of both parties to interpret the right of free, prior, and informed consultation as only one integral part of the process for the resolution of violence that is not only exhausted in the domain of law, but that also encourages the adoption of mechanisms generating mutual trust and a culture of dialogue that, over time, may provide recourse to episodes of conflict.

¹⁵¹ COMISIÓN DE LA VERDAD Y RECONCILIACIÓN DEL PERÚ, INFORME FINAL, TOMO VIII SEGUNDA PARTE: LOS FACTORES QUE HICIERON POSIBLE LA VIOLENCIA 104 (2003).