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Contributions of the RCA on the right to Free, Prior and Informed Consultation and Consent to the thematic study of the UN Expert Mechanism on the Rights of Indigenous Peoples

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Introduction

Based on its experience in Brazil, the Amazonian Cooperation Network (*Rede de Cooperação Amazônica*: RCA) presents the following concept note in response to the United Nations High Commissioner for Human Rights (UNHCHR) request to submit contributions on the implementation of the right to Free, Prior and Informed Consultation and Consent (FPIC), as part of a thematic study of the implementation of this right by the Expert Mechanism on the Rights of Indigenous Peoples.

The RCA is an network of 13 indigenous and indigenist organisations working in Brazilian Amazonia with the mission of promoting cooperation and the exchange of knowledge, experiences and capacities between these organisations in order to strengthen the autonomy and enhance the sustainability and welfare of indigenous peoples in Brazil.

As its main objective, the RCA seeks to promote the coordination and political activism of these organizations around strategic themes related to sustainability and local governance in indigenous lands; public recognition of the fundamental role that indigenous peoples play in forest conservation, strengthening of indigenous and indigenist organisations in the defence of indigenous interests and rights in Amazonia, and the enhancement of indigenist and environmentalist public policies.

RCA is today constituted by 13 organisations, 9 of them indigenous (AMAAIAC, Apina, ATIX, CIR, FOIRN, Hutukara, OGM, OPIAC and Wyty-Catê) and 4 indigenist (CPI-AC, CTI, Iepé and ISA),¹ representing more than 86 indigenous peoples living in the Amazonian biome and

¹ AMAAIAC - Associação do Movimento dos Agentes Agroflorestais Indígenas do Acre; Apina - Conselho das Aldeias Wajápi; ATIX - Associação Terra Indígena Xingu; CIR - Conselho Indígena de Roraima; FOIRN - Federação das Organizações Indígenas do Rio Negro; Hutukara Associação Yanomami; OGM - Organização Geral Mayuruna; OPIAC - Organização dos

surrounding regions, especially along the corridors formed by indigenous lands in the following regions: Acre-Javari/AM; Rio Negro-Roraima; Bacia do Xingu/MT; Amapá-norte do Pará and Complexo Timbira/MA-TO. As a coordinating network, RCA develops activities that directly and indirectly attain more than 136,000 indigenous peoples of both sexes and all age groups, inhabiting 93 indigenous lands from the Amazonian region covered by the work of the 13 member indigenous and indigenist organizations, inhabitants of a territory that totals around 47 million hectares of forest.

As well as most of the organizations being partners of the Rainforest Foundation Norway (RFN), all the organizations belonging to RCA share the fact that they are active in Brazilian Amazonia, maintain strong political, thematic and methodological affinities in their work with different indigenous peoples, and over recent years have been seeking to influence public policies targeted at indigenous peoples. The field of action of this coordination work was delimited by the member organizations in terms of the realization of collective activities involving intercultural exchanges, thematic seminars, regional encounters, staff training and capacity building, production and divulgation of publications, monitoring of indigenist and environmentalist public policies, and political advocacy.

The right of indigenous peoples to be consulted by the State, when a legislative or administrative measure may affect their rights, ways of life and territories, has been recognized in Brazil since the country ratified Convention 169 of the International Labour Organization.²The organizations belonging to RCA launched the proposal to elaborate Autonomous Consultation and Consent Protocols, formulated by the indigenous peoples and communities in an autonomous and independent form, as part of a process of preparing to exercise the right to be adequately consulted by the Brazilian state.

Accompanying the script proposed by the Expert Mechanism on Indigenous Rights, the present contribution proposes to discuss in detail points 1, 2, 3, 4 and 5.

1. On different conceptual approaches to the right to Free, Prior and Informed Consultation and Consent in Brazil.

In Brazil the term *oitiva indígena*, 'indigenous hearing,' is treated ambiguously, as though it were a right similar but not equivalent to the right to consultation established under Convention 169 of the ILO and the United Nations Declaration on the Rights of Indigenous Peoples. Sometimes the government, companies and even the judiciary use the concept as a synonym for FPIC, but at other times they refer to it merely as an obligation to listen, which limits its range to the mere obligation of the government to 'hear' indigenous peoples, without binding the content of what is 'heard' to its final decision.

Professores Indígenas do Acre; Wyty-Catê - Associação dos Povos Timbira do Maranhão e Tocantins; CPI-AC - Comissão Pró-Índio do Acre; CTI - Centro de Trabalho Indigenista; Iepé - Instituto de Pesquisa e Formação Indígena e ISA - Instituto Socioambiental.

² In Brazil, it took 12 years for the text of Convention 169 to pass through the discussion phase in National Congress before the ratification and incorporation of its concepts into Brazilian legislation. It was only in 2002, through Legislative Decree 143/2002, that Convention 169 was approved by National Congress and ratified by the Brazilian Government with the ILO. In 2004, Presidential Decree 5.051/2004 promulgated Convention 169, integrating it into the national legal framework.

The concept of the indigenous hearing originates in the 1988 Federal Constitution, prior therefore to the existence of ILO Convention 169 itself and to the United Nations Declaration. This fact has been employed as an argument for treating the hearing as a more limited obligation of the government and the National Congress than the right to consultation and consent, which is later in time and ranked lower on Brazil's legal framework.

Efforts have been made to differentiate the concepts with the country's legal doctrine and promote a systematic interpretation of the term 'hearing,' in the sense of recognizing that this can only be interpreted within the conceptual framework of the international instruments upheld by Brazil on the theme and, therefore, despite using the term 'hearing' with its constitutional origin, it refers to the same legal regulation concerning the right to FPIC (Rojas 2008 and Pontes 2015).

It is essential to clarify, therefore, that any consultation process related to administrative and legislative measures that effect the rights of indigenous and traditional peoples, irrespective of the concept used to refer to them, must meet the standards, content and scope of the legal regulation on the right to FPIC established in international legal instruments upheld by Brazil and amply developed by national and international jurisprudence on the matter.

2. Right holders, legal status and applicability.

2.1.FPIC right holders

In Brazil there exists an undisputed understanding that, in addition to indigenous peoples, quilombola populations should also be considered as FPIC right holders. Discussion in the country has centred primarily on the applicability of the right to prior consultation to 'traditional peoples and communities' insofar as, despite repeated legal recognitions, there has yet to be an express manifestation from the government on the applicability of ILO Convention 169 to these collective subjects, who are frequently rendered invisible in contexts of public decision-making processes, both administrative and legislative.

In Brazil, the legal category 'traditional peoples and communities' covers a diverse range of sociocultural realities institutionally recognized by the National Council of Traditional Peoples and Communities (CNPCT), created by Decree 6.040/2007, which institutes the National Policy of Sustainable Development of Traditional Peoples and Communities.

This instrument recognizes as traditional communities, among others, the riverine communities, babassu coconut breakers, fundo de pasto (distant pasture) communities, Roma and extractivist populations, based on the normative criteria of Convention 169, which in turn are reiterated by Decree 6.040/2007, identifying culturally differentiated groups that recognize themselves as such and that maintain social, political and cultural institutions distinct from the hegemonic society.

A sample of the wide diversity of traditional peoples living in Brazil includes those who today compose the National Council of Traditional Peoples and Communities (CNPCT): as well as the indigenous peoples and quilombolas, there are *terreiro* peoples and communities /African-origin peoples and communities, Roma peoples, artisanal fisher people,

extractivists, coastal and marine extractivists (including caiçaras), faxinal dwellers (faxinalenses), folk healers (benzedeiros), islanders (ilhéus), root healers (raizeiros), caatinga dwellers (caatingueiros), river shore dwellers (vazanteiros), cerrado dwellers (veredeiros and geraizeiros), wild flower collectors, wetland dwellers (pantaneiros), hill dwellers (morroquianos), Pomeranians, mangaba fruit gatherers, babassu coconut breakers, retreat dwellers (retireiros) of the Araguaia River, fundos de pasto and fecho de pasto communities, riverside dwellers, vine gatherers (cipozeiros), andiroba gatherers (andirobeiros), and caboclos (see Decree 8.750 issued 9 May 2016, establishing the National Council of Traditional Peoples and Communities).

Despite an evident regulatory coincidence between the international instrument and the domestic legislation establishing the criteria for identifying the FPICC right holders (Duprat, 2015), the Brazilian state's position vis-à-vis the requirement to consult traditional peoples is ambiguous, limited only to those cases where it is legally bound to do so (Lima, 2017).

The normative criteria established in Convention 169 enable us to conclude that it should be applied to all culturally differentiated groups whenever they self-identify as such.

An excellent example of how traditional peoples have been demanding their right to be consulted is the elaboration and publication of autonomous consultation protocols, which set out the guidelines to be followed by a FPICC process adapted to the characteristics and circumstances of each people. This is the case of the traditional community of riverside dwellers of Montanha Mangabal in the state of Pará, who published their autonomous consultation protocol to demand the right to be consulted about government plans to build a set of dams on the Tapajós River, directly affecting their traditional territories.

We are not invisible and we will not give up our place. In the past, the land grabbers said that nobody lived in Montanha and Mangabal, but we fought and managed to get our right to land recognized. Now it is the government that says that we do not exist and plans to build dams on the Tapajós River without consulting us. But we know that the law guarantees our right to prior consultation and we demand that it is fulfilled. We were born and raised here on this river shore. We caught malaria, we braved the waterfalls, we extracted rubber, we hunted big cats, we fished, we planted our swiddens. That was our work. We buried our parents and our children by the shores of the Tapajós. We demand to be consulted.³

Irrespective of the government's recognition of the applicability of the right to consultation of traditional peoples, therefore, these communities continue to demand the implementation of this right and, working with the Federal Public Prosecution Service (MPF), have succeeded in winning important legal precedents in this regard in the lower and higher federal courts.⁴

³ The full text of the Montanha Mangabal consultation protocol can be accessed at: http://www.prpa.mpf.mp.br/news/2014/arquivos/Protocolo%20de%20Consulta%20Montanha%20e%20Mangabal_Set_2014.pdf

⁴ TRF1, Ruling in Civil Lawsuit n. 6962-86.2014.4.01.3200, Polo Naval do Amazonas.

2.2. The legal status of the right to FPICC

Evidently the right to consultation is not merely a procedural right, in the sense that it guarantees the right to self-determination and autonomy of peoples, meaning, therefore, that its scope encompasses both the procedure and the binding nature of its outcome.

The right to consultation, materially conceived, should guarantee the adequacy and respectfulness of the procedures, but is not limited to the latter. The requirement for the parties to reach agreements is ultimately the element differentiating a FPICC process from any other type of instance or process of relationship between interested peoples and the State. It is, therefore, confirmation of the impact of the consultation process on the State's final decision that proves the existence of this same consultation process.

The confirmation of the material content relating to the right to self-determination in the consultation processes is expressed in at least two hypotheses. First, in the recognition of the legitimacy of the absence of any agreement or consent; in other words, in the right to say no (Lima, 2016). Second, in the State's accommodation of the considerations made by the interested peoples, or in the legitimate, constitutional and proportional motivation of the reasons that prevent the government or the legislative power from incorporating, in the final decision of the State, the considerations made by the interested peoples.⁵

Finally, some of the legal consequences of defining the right to FPICC as a procedural and material right are expressed in the fact that it also encompasses the right of peoples not to participate in FPICC processes not of interest to them. The recognition of the right not to participate forms part of the recognition of the scope of the right to self-determination and autonomy in the choice of development priorities, as guaranteed both by ILO Convention 169 and the UN Declaration on Indigenous Rights.

Along these lines, the Juruna people of Volta Grande do Xingu included in their consultation protocol the reiteration of their legitimate right to decide not to participate in consultation processes:

We assert our right not to participate in consultation processes that do not interest us or that do not respect our protocol.⁶

Hence, the material comprehension of the right to consultation is necessarily linked to the right to self-determination of the peoples.

2.3. Preparation and procedures for obtaining consent

In Brazil over the last four years, indigenous, quilombola and traditional peoples from all over the country have been moving various steps ahead of the State in terms of guaranteeing that

⁵OEA. IDH Court. Pueblo de Saramaka versus Surinam. Sentence issued 28 November 2007.

⁶The full text of the protocol of the Juruna people can be accessed at:
https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/2017_protocolo_de_consulta_juruna_completo.pdf

the right to FPICC is respected through the definition and publication of autonomous consultation protocols.

The proposal to elaborate their own consultation protocols in an autonomous and independent form, thereby empowering indigenous peoples and communities vis-à-vis the State and providing an alternative to the impasse preventing the Brazilian government's regulation of this provision, was taken up by the indigenous movement and by the Federal Public Prosecution Service, which began to support the elaboration of autonomous protocols by some indigenous and traditional communities.

The protocols emerged in the context of the unsuccessful attempt of the federal government to discuss a proposal for national regulation of the right to consultation between 2011 and 2013. The precarious attempt at regulation quickly showed signs of how a national regulatory framework could come to limit both the content and material scope of the right to CCLPI, and the legitimate holders of this right.

From the initial debates to define consultation on the regulation process itself, the government excluded the participation of representatives of traditional peoples, limiting the consultation to indigenous and quilombola peoples, considering that the former should not be recognized as rights holders under ILO Convention 169, despite the existence of national legislation (Decree 6.040/2007) that recognizes traditional peoples as special holders of rights that derive from the cultural, historical, social and economic characteristics that differentiate traditional peoples from the surrounding society.

At the same time that the process was denounced as exclusionary, the government interpreted the need to define 'exceptional' situations that would override the right to FPICC, through the publication of an administrative act of a regulatory nature (Directive 303/2012 of the Federal Attorney General) where it was established that: topics denominated strategic to national defence, such as: "the installation of military bases, units and posts and other military interventions, *the strategic expansion of the road network, the exploration of alternative strategic energy sources and the protection of strategic resources*, at the discretion of the competent bodies (Ministry of Defence and National Defence Council), will be implemented independently of consultation of the indigenous communities involved."⁷

In the same legal instrument, Directive 303/2012, the government adopted a narrow legal interpretation of the right to territory, to autonomy and to the scope of the right to FPICC, making ambiguous and imprecise use of the concept of 'hearing' as mentioned in the first item of this concept note, establishing that: "(IX) the *Chico Mendes Institute for the Conservation of Biodiversity will be responsible for the administration of the area of the conservation unit also affected by the indigenous land with the participation of indigenous communities, who should be heard*, taking into account the uses, traditions and customs of indigenous peoples, supported where necessary by FUNAI."⁸

⁷ "(V) the usufruct of the Indians does not override the interest of the national defence policy, the installation of military bases, units and posts and other military interventions, the strategic expansion of the road network, the exploration of alternative strategic energy supplies and the protection of strategic resources, at the discretion of the competent bodies (Ministry of Defence and National Defence Council), will be implemented independently of consultation with the indigenous communities involved or FUNAI." Directive 303 issued 2012, AGU.

⁸ Ibid.

Finally, it should be mentioned that despite the absence of a domestic regulatory framework on the right to FPICC since January 2017, the legal report on “institutional safeguards for indigenous lands” remains in force, including the narrow interpretations of the right to FPICC mentioned in Directive 303/201, through the publication of a legal report that accommodates the content of the aforementioned Directive issued by the Federal Attorney’s Office (AGU) and approved by the President of the Republic to binding effect in relation to all bodies of the Federal Public Administration.

In other words, a legal interpretation of compulsory compliance is in force in Brazil, at the level of the Federal Executive, which understands that the right to FPICC does not apply to decisions considered to be of national security, nor is its scope fully recognized in cases involving an overlap between indigenous territories and environmental protection areas like Conservation Units.

In this context of the clear threat of the material scope of the right to FPICC being narrowed,⁹ indigenous peoples, quilombolas and traditional communities from across the country began to publish their **autonomous consultation protocols**, with the objective of making explicit the minimal rules and guidelines that need to be respected in order to establish adequate consultation processes for each of them.

Elaborating autonomous consultation protocols involves each indigenous people or each traditional or quilombola community thinking about how they should be consulted by the government, taking into consideration their traditional forms of decision making, their modes of constructing internal agreements, their forms of organizing politically and their ways of representing themselves to national society and the State. After formalization, the protocols constitute the explicit and public definition of the rules of representation, organization and monitoring of decision-making processes of each people, setting out the ways that they consider adequate for dialoguing with the State.

Conceived in this way, the autonomous consultation protocols are a proposal to formalize the appropriate forms of dialogue between the State and each people, organization or community concerned, when the intention is for the former to participate honestly in decision-making processes that may affect their lives, rights or territories. They organize and enable the peoples and communities to reach internal agreements concerning who represents them and how the decision-making processes should be conducted in cases of consultation of the State. Agreeing and disseminating internal rules on decision-making and political representation, the consultation protocols politically prepare the traditional peoples and communities for dialogue with the government, empowering them in the arenas of discussion with government and legislators, and fulfil the role of informing the representatives of the State about the rules to be respected when they intend to conduct consultation processes with indigenous peoples, traditional communities and quilombolas.

⁹ The Federal Executive’s attempt to regulate its duty to consult indigenous and tribal peoples involved the creation of an Inter-Ministerial Working Group (GTI), with representatives from all the ministries but without representation from the right holders, coordinated by the then Secretary-General of the Presidency of the Republic and the Foreign Ministry (Itamaraty). After two years of work, the GTI was unable to build a consensus within the government itself, and concluded its work without attaining its objective, such that Brazil does not possess a national regulatory framework on FPICC.

They can guarantee, therefore, security and legitimacy to processes that tend to be conflictual and unequal at the outset.

The Wajãpi of Amapá were the first indigenous people in the country to elaborate their own consultation protocol: *Wajãpi kō oōsātamy wayvu oposikoa romō ma'ë –Wajãpi Consultation and Consent Protocol*, published in 2014. RCA has worked to disseminate the right of indigenous peoples to consultation and the State's obligation to consult them and support the processes enabling them to develop autonomous consultation protocols. The *Consultation Protocol of the Juruna (Yudjá) of the Paquiçamba Indigenous Land of Volta Grande do Rio Xingu* and the *Consultation Protocol of the Indigenous Peoples of the Xingu Territory* were supported by RCA. Other peoples and communities mobilized to achieve the same and new protocols have been elaborated and published over the last few years, such as the *Munduruku Consultation Protocol*, *Montanha Mangabal Consultation Protocol*, *Krenak People Prior Consultation Protocol*, *Consultation Protocol of the Munduruku and Apiaká Indigenous Peoples of Planalto Santareno*, *Quilombo Jambuaçu Consultation Protocol*, among others.¹⁰

The elaboration of Consultation and Consent Protocols was presented by RCA's representatives to the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, as a path for indigenous peoples to be able to advance with regard to their rights and oblige the State to meet its internationally agreed commitments in a voluntary form, both with the UN and with the ILO. During the rapporteur's mission in Brazil, in March 2016, with the objective of verifying the situation of indigenous peoples and the gathering of information for the elaboration of a report presented to the UN, this group of representatives from RCA submitted the document "*Difficulties and resistances in the process of implementing the right to free, prior and informed consent in Brazil.*" This denounced the failure to fulfil the duty to consult and the consequent violation of the right to autonomy of indigenous peoples in Brazil, revealing the limited understanding of this right among the three spheres of power in the country.¹¹

In a recent decision by the Brazilian justice system (12/2017), a higher court recognised the obligation to observe the autonomous consultation protocols in the case of the Juruna people against a mining company that intended to set up base less than ten kilometres from the Paquiçamba Indigenous Land in the State of Pará. In the final decision, the court ruled to:

...over turn the annulment of the previous license issued to the Projeto Volta Grande do Xingu enterprise, conditioning the validity of the installation license [IL] on the elaboration of the ICS [Indigenous Component Study] based on primary data, in the form required by FUNAI, **as well as the free and informed consultation of the indigenous peoples affected, in compliance with the respective consultation protocol, should this exist, in accordance with the provisions of ILO Convention 169**, maintaining, therefore, the suspension of the IL. Finally it is emphasized that

¹⁰ These protocols can be accessed at <http://rca.org.br/consulta-previa-e-protocolo/>

¹¹ An English version of this document can be found at <http://rca.org.br/wp-content/uploads/2016/08/Folder-Obst%C3%A1culos-ingl%C3%AAs.pdf>

the maintenance of the validity of the previous license already issued does not preclude subsequent alteration, depending on the conclusions of the ICS and the prior consultation hereby required.

Consequently, the consultation protocols have become consolidated as an important tool for preparing indigenous and traditional peoples to engage in the FPICC processes in less asymmetric conditions.

In addition to the consultation protocols, it is recommended that for each specific process a 'Consultation Plan' is jointly elaborated and approved by interested peoples and State representatives, detailing, among other topics, the timetable, resources and representatives of the parties for each consultation. The Plans are the instruments used to operationalize the protocols, since the latter refer merely to general guidelines that need to be translated case by case, depending on the object of each consultation.

It is important to emphasize that the right to consultation exists in Brazil under a strong and systematic violation by different State powers, in which political, economic and private interests override the human rights of socially and culturally differentiated collectives, revealing the fragile and inchoate capacity of the State to establish an intercultural dialogue with indigenous peoples, traditional communities and quilombolas and to respect their fundamental rights. Brazil's voluntary adherence to international human rights agreements and commitments is supplanted by the resurgence of an outmoded view in which traditional populations and the environment are conceived and treated as obstacles to progress and a problem for the large infrastructural works. In this scenario, autonomous consultation protocols have emerged as an instrument for ensuring that the right to FPICC is exercised.

3. On situations in which free, prior and informed consent is required

3.1. Obligation to obtain consent in cases of forced removal and environmental degradation of territories

In Brazil, by express constitutional stipulation, indigenous peoples cannot be removed from their original territories, except "in the event of a catastrophe or epidemic that places the population at risk or in the interest of national sovereignty, after deliberation of the National Congress, guaranteeing, under all circumstances, immediate return as soon as the risk ceases" (1988 Federal Constitution, Article 231, § 5). Since the constitution's promulgation, this stipulation has proven effective in avoiding the forced removal of indigenous peoples.

Nonetheless, processes of forced removal occur in disguised form through administrative decisions that formally maintain indigenous peoples' ownership of their territories, but that at the same time authorize the depletion of the natural resources that constitute the physical basis for maintaining and continuing their ways of life. Such is the case of the Volta Grande do Xingu region, in Pará state, an approximately 100 km section of the Xingu River from which an average of 80% of the river's natural flow was diverted for energy production by the Belo Monte Hydroelectric Dam. The project has disfigured the ecosystemic conditions of the Volta Grande do Xingu river where the Paquiçamba and Arara da Volta Grande indigenous lands are located, belonging to the Juruna and Arara peoples respectively, which in practice

constitutes a territorial loss through environmental degradation, insofar as their lands have lost a productive capacity and resources related to their traditional way of life.

The consultation protocol of the Juruna people of the Volta Grande do Xingu contains the affirmation of their right to refuse enterprises and public decisions that end up making continuation in their traditional territory impossible:

We do not accept any project that relocates us away from the Xingu River or makes our continued living on the river impossible. We were not consulted about the construction of the Belo Monte Hydroelectric Dam, which diverted the Xingu river from our land to use its water to produce energy. With the building of the plant, we began to lose our main source of food and income, which was artisanal fishing and the catching of ornamental fish. We do not know what will happen to the river, the animals or the forest, nor even ourselves from here on. We are worried about our children and our continued existence in our land. In the past, we lived in peace, without perturbations.¹²

Hence, if the obligation to obtain consent through consultation processes is considered to be linked to situations posing a high risk to the physical and cultural survival of indigenous peoples, like, for instance, the cases of forced removal (Art. 10. DDPINU), or the dumping of toxic wastes (Art. 29.2. DDPINU), then it should be included among the hypotheses where it is obligatory to obtain consent for public decisions that entail a significant socioenvironmental impact on the territories and ways of life of the peoples concerned.

On the other hand, processes involving the territorial expulsion of traditional peoples associated with large infrastructural projects in Amazonia and the advance of agribusiness have posed the biggest challenges when it comes to recognizing and respecting the basic rights of these peoples.

Unfortunately, before discussion on the obligation to obtain consent for processes involving the forced removal of traditional peoples, in the vast majority of cases the application of this right needs to be preceded by recognition of their rights to identity (as a group differentiated from the surrounding society) and to territory (linked to maintaining traditional ways of life), given that these peoples have proven to be invisible to the State bodies and private companies responsible for promoting processes of forced deterritorialization.

The most emblematic case of forced removal of river communities in Brazilian Amazonia has been the Belo Monte Hydroelectric Dam, which, despite being constructed on the shore of the Xingu River, a region of riverside communities, only recognized the existence and rights of the so-called traditional communities three years after conducting the forced removal of hundreds of families living on the islands and shores of the Xingu, but which had been flooded to form the plant's principal reservoir (Barbosa, 2017).

¹²The full text of the protocol of the Juruna peoples can be accessed at: https://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/2017_protocolo_de_consulta_juruna_completo.pdf

Hence the absence of recognition of the applicability of ILO Convention 169 to traditional peoples in Brazil has been placing at risk the maintenance of the material conditions necessary for the continuation of their traditional modes of life and, therefore, these peoples' collective right to physical and cultural existence. In practice, the public decisions for forced removal of traditional peoples in this context translate into violent processes of deterritorialization that lead to the violation of basic rights like identity, autonomy, territory and FPICC.

Before the State promotes, authorizes or directly implements forced deterritorialization to enable infrastructural works of agro-extractivist activities, it is necessary to verify the presence of traditional peoples and territories, and not just indigenous lands or quilombolas, which to a certain extent has been done, albeit in a precarious and insufficient way.

4 and 5. On the scope of the right to FPICC

In order to effectively guarantee the right of the interested peoples to influence the administrative and legislative decisions that affect their rights and territories, the FPICC processes and cooperation mechanisms should be incorporated into the flowchart and budget of the administrative and legislative decision-making procedure from its initial phases, differentiating the object of each consultation, but within a holistic perspective of the set of decisions that make up the process of deliberating and implementing public decisions.

The absence of a regulatory framework unequivocally identify the opportune moment for realizing FPICC processes with the interested peoples has encouraged contradictory interpretations on the part of the State in relation to which administrative and legislative decisions need to be preceded by consultation processes. Most of the contradictions arise from the understanding of the right to FPICC as a single moment, rather than as a process of dialogue over the course of the intermediary decisions that make up the administrative or legislative decision-making process.

This is the case of the EF-170 Railway, or Ferrogrão (Grain-rail), a logistic project for the outflow of grains and importation of pesticides, which promise to intensify agricultural production for large-scale exportation of soy and maize in the interfluvial region of the Amazonian basins of the Tapajós and Xingu Rivers, where 37 demarcated Indigenous Lands and 10 Indigenous Lands under study are located, along with 9 Conservation Units and hundreds of riverside communities, which would without doubt be impacted by the implementation of the regional-level logistics project.

In June 2017, the federal government categorically rejected the request of indigenous peoples of some of the lands included in the railway's areas of influence to be consulted about the content of the Technical and Economic Viability Studies (EVTE) and the private concession model for the construction and operation of the railway for 65 years. The government cited three main reasons: (1) no national regulation exists relating to the form of undertaking the consultation process; (2) according to Inter-Ministerial Directive 60/2015, the Indigenous Lands located in the area of influence are found at distance of more than 10 km from the railway project; and (3) the space for participation of the interested peoples would take place later as part of the procedure for environmental licensing and public tender of the project, through public hearings already foreseen in the relevant legislation.

Still in relation to the effectiveness of the right to consultation, it needs to be considered that there already exists in Brazil abundant jurisprudence that recognizes the obligation and immediate applicability of this right, irrespective of whether any regulatory framework exists.¹³ On the other hand, the fact that the railway is located more than 10 km from the region's Indigenous Lands does not imply a presumption that the project is incapable of generating any kind of environmental impacts on the peoples interested in the consultation. In other words, the criterion 'distance' is not the sole and definitive factor in determining impacted or 'affected' lands (in accordance with Article 6 of C169/ILO) for the purposes of the obligation to FPICC.

It is important to note that the aforementioned Directive 60 of 2015, cited among the government's arguments for rejecting the obligation to consult, specifically concerns the "activities of bodies and entities from the federal public administration in environmental licensing processes under the responsibility of IBAMA (Brazilian Institute of Environment and Renewable Natural Resources),"¹⁴ a factual situation that does not correspond in the slightest to the facts narrated here, given that it is not a question of a plea requesting the realization of FPICC as part of the environmental licensing procedure, something that was indeed never presented to a competent body.

In this case, it is a question of the discussion relating to the legal grounds and legitimacy of exercising the right to FPICC on a project still in an early planning phase. There is no doubt about the obligation to consult during the design and planning phase of the project, precisely due to the relevance of the information that the consultation process can, and should, provide towards the conception phase of projects, and also indeed to the phase prior to the evaluation of alternatives. Despite the government's allegation that it is premature for the interested peoples to participate in the public decision process on the implantation of the railway, the fact is that the peoples of the region had already been unduly excluded from the previous decision phase related to evaluating the best (or the lowest impact) alternative for the distribution of the region's agricultural production and the economic sector requesting the infrastructural project.

It is worth emphasizing that the Ferrogrão forms part of the Federal Government's 'Investment Partnership Program IPP – Grow Project,' which defined a set of infrastructural works with impacts on regional development that clearly interface with and impact the territories of indigenous peoples, quilombolas and traditional communities. Though acknowledging this fact, however, **the federal government recognizes that its planning includes neither the budget nor time to undertake FPICC processes with the interested peoples within the administrative schedule for approving and licensing the work.** This is expressly contrary to the contents of Article 7, 1, of ILO Convention 169, which confers the interested peoples the prerogative of "participating in the formulation, application

¹³ ACP n. 61827-77.2015.4.01.3700 – recognition by the Federal Courts of the obligation to consult the Awá Guajá people affected by the works for doubling the track of the Carajás Railway; ACP n. 3947-44.2012.4.01.3600 – the Federal Courts order suspension of the works in order for the Munduruku, Kayabi and Apiaká peoples to be consulted; ACP n. 3883-98.2012.4.01.3902 – the right to consultation was recognized various times over the course of this process, not only the right of the Munduruku and Sataré-Mawé indigenous peoples, but also the right of traditional communities; among others.

¹⁴ Resumé of Inter-Ministerial Directive 60, issued 24 March 2015.

and evaluation of the national and regional development plans and programs susceptible to being directly affected.”¹⁵

Thus none of the arguments alleged by the government are echoed on the legislation and case law found in Brazil, as was reiterated by the Federal Public Prosecution Service (MPF) in its declaration concerning the aforementioned plea, which formally recommended to the federal government:

That it **respects and guarantees the exercise of the right to Free, Prior and Informed Consultation and Consent of the interested peoples, under the terms of the domestic and international legislation and the consultation protocols already published**, as a prior and irrevocable condition for any administrative act relating to the implantation of the railway, including the realization of new public hearings. (Our emphasis.)¹⁶

The last session of the public hearings scheduled by the federal government to discuss the terms of the Ferrogrão concession was marked by protests from indigenous peoples and other populations set to be affected by the railway’s routing. This hearing, which took place on December 12, 2017, in Brasília, only took place after the director-general of the National Land Transport Agency (ANTT) recognized in writing the need to realize the FPICC processes, as foreseen under ILO Convention 169.¹⁷ The promise comes after various protests by indigenous peoples and public bodies demanding respect of the right to consultation, but is unlikely to be fulfilled due to incompatibility with the established and published schedule for tender of the project. Consequently, faced with the explicit demand of the peoples concerned and the legal requirement of the MPF, the government recognizes the absence of this consultation phase within its work plan.

Consultation on initiatives of this kind should mandatorily be made while still in the planning phase, so that the outcome of the consultation process can effectively influence the State’s final decision.¹⁸ For this reason, consultations should take place prior to any decision. From the foregoing, it can be concluded that the **most opportune and appropriate moment for undertaking consultation processes is when the public initiatives are still in the preliminary phases of planning and evaluating alternatives**. In the case in question, the definition of the Call for Tender is an administrative act that should be preceded by the FPICC, so as to safeguard the rights and interests of the affected traditional peoples and communities, in accordance with C/169-OIT.

¹⁵ ILO Convention 169 on Indigenous and Tribal Peoples. Article 7, 1. “The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, **they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.**”

¹⁶ The full text of the MPF recommendation can be accessed at:
<https://drive.google.com/file/d/1JqKqcw8aMu7UKnp8zIY6insPPBM4u5OU/view>

¹⁷ The full text of the government’s commitment to undertake FPICC can be accessed at:
<https://www.socioambiental.org/sites/blog.socioambiental.org/files/blog/pdfs/ata.pdf>

¹⁸ “Consultation should occur during the diagnostic or planning phase of the project or measure, a sufficient period before the execution activities begin. The consultation should be undertaken in the first staged of elaborating **or planning the project or measure so that indigenous peoples can truly participate and influence the decisions eventually adopted**” (Opinion n.4/2012 EMRIP, A/HRC/21/55 paragraph.14).

The autonomous consultation protocols published to date all demand that consultation processes should be convoked immediately during the first phases of planning public decisions, with the adequate allocation of resources for their execution and the estimation prevision of the time needed to introduce FPICC into the schedule of the decision-making process, so that the government has the real conditions to agree Consultation Plans with the interested peoples in each specific case.

The autonomous consultation protocol of the Wajãpi people, Amapá state, explicitly affirms that it is essential to guarantee consultation already early in the planning of any decision capable of affecting their rights and territory:

We believe that the government must listen to our concerns, hearing our priorities and opinions before making its plans. We do not think it is good when the government arrives with readymade projects for us, with money to spend on things that are not our priorities.
(...) We want to choose our own priorities and participate in the elaboration of the government's work plans before decisions are taken. Consultation must be undertaken when the decision to undertake a project can still be changed. The government cannot arrive with a project already decided and later want to consult the Wajãpi.¹⁹

Still on the matter of determining the kind of public decisions that should be consulted with the Wajãpi people, the protocol indicates the criteria for identifying the set of decisions that should be consulted with them beyond those to be executed within the territory demarcated by the Brazilian State as the Wajãpi Indigenous Land:

When the government wants to do something without consulting us, on our land, in the region surrounding our land or even outside our land, it can directly affect our life, the important places in the history of the creation of the world, the life of the animals, rivers, fish and forest. We think that the government should listen to our concerns, hearing our priorities and our opinions before making its plans.

The protocol of the Juruna people lists some clearly elaborated elements on what they expect to be contained in a Consultation Plan that respects the protocol and in practice translates the time and resources needed for realizing adequate consultations:

The Consultation Plan is a document proposed by ourselves that contains the detailing of the activities, time and resources needed to discuss the information indispensable to the consultation process. In order to elaborate the consultation plan we may ask for technical and legal assistance. Once the proposal for a consultation plan has been approved in an internal meeting, this will be sent to the government body interested in consultation, the MPF and FUNAI. The Consultation Plan to be executed should be agreed between ourselves and the government body interested in the consultation in a deliberative meeting with the government.

¹⁹ The full text of the Wajãpi consultation protocol can be accessed at:
http://www.institutoiepe.org.br/media/livros/2014_protocolo_consulta_consentimento_wajapi.pdf

There is still much space for the construction of true intercultural understandings between indigenous peoples, quilombolas and traditional communities and the different United Nations agencies. Nevertheless, the key to this understanding very likely resides in listening attentively to what these peoples have to say about the protocols of behaviour and minimal responsibility that should be respected to ensure a true dialogue with them.

Today the autonomous consultation protocols that are being elaborated in Brazil are the expression of the maturity of the comprehension of the content and scope of the right to consultation on the part of the interested peoples. The protocols are a key to understanding this relation and need to be carefully observed and valorised by States, companies and other actors that relate with indigenous peoples, quilombolas and traditional communities.

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