



**IWGIA**

INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS

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## IWGIA's Submission

# EMRIP's Report on Self-Determination under the UN Declaration on the Rights of Indigenous Peoples

IWGIA's submission responds to the call issued by EMRIP regarding the preparation of a thematic report on self-determination under the UN Declaration on the Rights of Indigenous Peoples.

### **Introduction**

The rights, well-being, and survival of indigenous peoples throughout the world are at grave risk because of extractive, energy, agri-business, and tourism industries. To protect them against these threats, international law recognizes the self-determination right of indigenous peoples to decide what happens in their own territories. This right is implemented through the requirement for governments to obtain indigenous peoples' free prior and informed consent (FPIC). In contradiction to their original purpose, private companies and the state are conducting consultations once the decision to intervene in indigenous territory has already been taken. In this way, the right to prior consultation is ceasing to be a right of indigenous peoples and becoming a mere bureaucratic transaction.

Because of this context, autonomous protocols have emerged from Indigenous Peoples as legal instruments that are strongly rooted in their traditions, practices, customs, and traditional laws, and which inscribe themselves within their rights to self-determination and autonomy that have been recognized by UNDRIP.

### **Indigenous Peoples Protocols**

During the last two decades, a series of autonomous protocols have emerged in Latin America. These protocols were drafted by indigenous peoples establishing principles and rules for the exercise of collective rights as regards their internal organization and their relationship with the State and other actors. Mainly, the instruments are to be applied in the process of free, prior, and informed consent of projects that may affect their territories, natural resources, and way of life. The name, content and scope of these protocols vary according to each people. Likewise, the impact on the guarantee of their rights and the relationship with the domestic and international legal background vary according to their social, political, cultural, and economic context.

Protocols have been elaborated in Argentina, Honduras, Brazil, Canada, Costa Rica, Belize, Suriname, Colombia, Guatemala, Paraguay, Bolivia and Chile. In Peru, the protocols are in the process of being drafted. In Mexico and Bolivia, there are no protocols. However, self-determined mechanisms related to indigenous autonomy and already acknowledged by the State have been adopted. The experience in the continent takes place in a global context that led indigenous peoples, to prioritize autonomous strategies in their struggle for self-determination and the respect of their rights. Additionally, these instruments have stricken the attention of international



organizations, States and Indigenous Peoples themselves, diversifying the approaches and multiplying the experiences to be analysed.

### **From indigenous self-determination to legal pluralism**

The UNDRIP recognize self-determination and autonomy of Indigenous Peoples as the pillars of their collective human rights. Consequently, the indigenous autonomies have adopted treaties, agreements, and peace processes as an acknowledgement of their autonomy: by means of local administration structures, functional autonomies, or permanent collaboration instances.

As regards Latin America, this right has been greatly developed. The Political Constitutions of Mexico (2001) and Bolivia (2009) expressly recognize self-determination. Others grant special political autonomy to the indigenous peoples and other ethnic groups, such as Nicaragua (1987), Colombia (1991), Ecuador (1998 and 2008), México (2001) and Bolivia (2009). Moreover, many laws have been enacted in Nicaragua (Statute of Autonomy of the Atlantic Coast Regions, Act No. 28, 1987), Bolivia (Autonomy Framework Act No. 031, 2010), Colombia (various laws that regulate participation in shelters). In the case of Colombia, we also need to highlight case law by the Constitutional Court, which reaffirms their autonomous nature when threatened by State actions. Additionally, legislation in Panamá has established five indigenous regions with high levels of autonomy during the 50s.

### **From the weakening of indigenous consultation to the development of their own autonomous protocols as an expression of their right to self-determination**

Protocols are the result of a long process of land and political vindication: they imply a debate within indigenous communities; the internal articulation of their governance structures with the political and social organization; and the search for strategies to control and manage their territories from a social and environmental perspective. This has happened in Brazil, Peru, Honduras, Mexico and Bolivia; and in land demarcation processes as took place in Brazil and Honduras.

They all explain the conflict among indigenous people, the State and private actors who are threatening their territories and way of life. In Brazil, the case of the Munduruku people the protocol was developed due to the delay in land demarcation; while the case of the Juruna people is related to a mining project proposal in their lands. In Chile, the protocol of the Yaghán people originated by the increasing impact of scientific tourism within their territories.

As mentioned above, a key factor in the emergence of protocols is related to the weakening of the consultation processes as an effective participation mechanism used by indigenous peoples regarding matters that affect them, either because there is an insufficient national legal framework or due to factual gaps to implement the law. In some cases, they are created as a response to consultation bills that could be regressive in guaranteeing this right (Honduras, Brazil, Mexico or Colombia). Generally, they coexist along with other strategies, such as land self-demarcation, strategic litigation, and interethnic political relations.



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As regards the elaboration process, protocols are created according to each people's own mechanisms: their stages, methods and length of discussion and deliberation; while the adoption and promotion will depend on the social, political and legal organization, as well as the context. Sometimes, they are assisted by non-governmental organizations. After elaboration, protocols are presented before national government organizations as an official communication act and then, socialized internationally and regionally, depending on whether they are public or bilateral.

Concerning their collective rights, they refer to the identity, principles, and fundamental rules of their people, and they provide a framework as to their application context and the conflict covered by the protocol. Each instrument establishes the people's development priorities and their main concerns and threats. Indigenous consultations, on the other hand, address topics such as: duties and subjects of consultations; matters to be consulted and consented; rules related to the internal decision-making processes; regulations that guide their communication with the State and their relationship with non-state agents (companies); financing; technical, academic and government support; risks and threats; assessing and closing methods of the consultation process; the protocols' reference to land rights of indigenous peoples.

As such, protocols should be invoked as an expression to the right to self-determination of Indigenous Peoples and in this context a crucial tool to regulate a situation or solve a particular conflict collaboratively and legitimately. This approach could increase the protocols' purposes, which will contribute to the articulation and harmonization of the relationship between the indigenous people and the State. These considerations could allow them to create a more complex and plural law that contributes to the pacific coexistence of the State, Indigenous Peoples, society and the environment

Indigenous Peoples own protocols have normative purposes since they are invoked as legal rules used in conflicts or situations included in the protocol itself in order to solve them legitimately. However, there are non-legal aspects involved such as the strengthening of indigenous self-determination and land governance; the knowledge of the diverse political and social organization methods of the peoples; and the mediation tools when proposing an intercultural dialogue to improve their position when facing external actors.

Many case studies carried out shed light on the emergence and development of autonomous protocols and other self-determined management instruments used to enforce Indigenous Peoples collective rights. They are the expression of the indigenous people's own law and its content is notoriously influenced by international law and state legal frameworks. Nevertheless, protocols do exist notwithstanding the state or international recognition or lack States in which indigenous peoples reside should:

Based on the above, IWGIA is hereby submitting the following recommendations and we hope that they can be considered by the EMRIP in the preparation of its thematic report on Self-Determination under the UN Declaration on the Rights of Indigenous Peoples

### To EMRIP



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- Through its thematic studies and the technical assistance to be provided to States, EMRIP should be instrumental in sharing and examining experiences of Indigenous Peoples own protocol development and implementation as an expression of Indigenous Peoples right to self-determination.
- Encourage States to engage in dialogues with Indigenous Peoples on the development and implementation of protocols.
- Promote that as rights-based normative self-governance tools, Indigenous Peoples own protocols must serve as educational instruments for all actors engaging with indigenous peoples.
- Engage in a dialogue with the Interamerican Commission on Human Rights to discuss the findings and recommendations of EMRIP's report to strengthen synergies with the report that the InterAmerican Commission is currently preparing a study on Indigenous Peoples Right to Self-Determination in the Americas.

### To States

- Respect the self-determination-based right of indigenous peoples to define their own development paths and the associated protocols including the duty to obtain FPIC;
- Recognize and commit to respecting Indigenous peoples own protocols as a pro-active exercise of the right to self-determination and as living self-government instruments that form an integral part of the law governing State actions in relation to indigenous peoples
- Afford Indigenous peoples the necessary time and space to formulate their own protocols, free from external pressure, and refrain from holding consultations processes while FPIC protocols are being developed.
- Recognize the development of Indigenous Peoples own FPIC protocols, are rights that indigenous peoples are free to exercise, not obligations with which they must comply of it.
- Recognize that Indigenous Peoples protocols are the result of internal articulation processes that include Indigenous Peoples customs, practices, rules, and institutions, which are revived with these instruments.

### Relevant sources:

See "***The Force of Self-Determination of Indigenous Peoples in Colombia***" published by Debates Indígenas and IWGIA at: <https://debatesindigenas.org/ENG/ns/72-force-self-determination-colombia.html>

See "***Legal pluralism and autonomous protocols***" published by Debates Indígenas and IWGIA at: <https://debatesindigenas.org/ENG/ns/74-legal-pluralism-autonomous-protocols.html>

See "***Failure to comply with autonomous consultation protocols during the COVID-19 in Brazil***" published by Debates Indígenas and IWGIA at: <https://debatesindigenas.org/ENG/ns/73-autonomous-consultation-brazil.html>



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See “ *Peru- Consultation or non-consultation- Herein lies the dilemma*” published by Debates Indígenas and IWGIA at: <https://debatesindigenas.org/ENG/ns/71-consultation-or-non-consultation.html>