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Participation with a Punch: Community Referenda on Dam Projects and the Right to Free, Prior, and Informed Consent to Development

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ABSTRACT: The 2000 Report of the World Commission on Dams (WCD) found that dams can threaten the resources that provide the basis for indigenous and other peoples' culture, religion, subsistence, social and family structure – and their very existence, through forced relocation – and lead to ecosystem impacts harmful to agriculture, animals and fish. The WCD recommended the effective participation of potentially impacted local people in decisions regarding dam construction. The international right to free, prior, and informed consent (FPIC) accorded to indigenous peoples promises not only the opportunity to participate in decisions affecting their lands and livelihoods but to stop unwanted development by refusing consent as well. The newly developed concept of community referenda, held in areas potentially impacted by development projects, provides an accurate measure of the position of local voters on the proposed project through a democratic process that discourages violence, promotes fair and informed debate, and provides an avenue for communities to express their consent or refusal of a specific project. The legal basis, practical and political implications, and Latin American examples of community referenda are explored as a means of implementing the critical goal of the principle of FPIC, the expression of community will and its conclusive impact on development decision-making.

KEYWORDS: Dams, referenda, free, prior, and informed consent (FPIC), indigenous rights

INTRODUCTION

Development projects, especially dam and mining ventures by large multinational corporations, are often the subject of sustained – and sometimes violent – controversy in Latin America and the world's other developing areas rich in natural resources. Such projects may have a devastating impact on the lives, health, resources, and culture of the local population. The World Commission on Dams (WCD) concluded in its 2000 report that the failure to both engage with the local population concerning such impacts and adhere to international human rights mandates had led to the "impoverishment and suffering of millions, giving rise to growing opposition to dams by communities worldwide" (WCD, 2000). Development projects, including dams, have often forcibly displaced indigenous communities from their ancestral lands, undermined their traditional cultures, and destroyed their natural resource-dependent livelihoods (ibid). The WCD Report also summarised international and national policies that increasingly recognise such wrongs committed against indigenous and tribal peoples. Building on these precedents it recommended measures to foster the meaningful participation of indigenous and tribal peoples in decision-making processes concerning developments that may affect their lands, livelihoods, and cultures (ibid). One such measure recommended by the WCD was the principle that decisions about projects affecting indigenous and tribal peoples be "guided by their free, prior and informed consent" (ibid), meaning that these communities have "the power to consent to projects and negotiate the conditions under which they can proceed" so that they can genuinely participate in good faith

negotiations and secure long-term benefits from projects that affect their rights to land and other resources (ibid).

Among the most promising ideas to reduce violence and promote informed participation by citizens, including indigenous and tribal peoples, is an entirely democratic form of ascertaining community sentiment and determining policy – the community referendum. The community referendum, or in Latin America, the *consulta popular* (which is sometimes translated as 'consultation'), allows residents in the potentially affected localities to register their agreement or opposition to a specific development project by voting in free and fair elections. Such referenda, which have only recently arisen as a means to oppose unwanted dam and resource extraction projects, represent a new and democratic measurement of whether a community has provided its free, prior, and informed consent (FPIC) to proposed development as required under international law.

This paper explores the use of community referenda as a means of ensuring the human rights of people whose communities are threatened by large development projects, and focuses specifically on the rights of indigenous peoples. The idea of holding elections where people can exercise a direct voice in planning the future of their communities must now be fully recognised as an exercise of FPIC, a fundamental human right with broad support in international law. However, because the right to FPIC remains under dispute in many countries and among important international organisations and multinational corporations, FPIC has rarely been implemented fully. In accordance with that right, potentially damaging development must face the test of participatory democracy.

This paper will address the application of the FPIC principle to the exploitation of indigenous lands and resources by third parties, as well as the use of community referenda as a means of measuring that consent. The first four sections will discuss the WCD findings and recommendations, the evolution of community referenda, and then outline the legal foundations of FPIC and describe the current issues involving the meaning and application of the international right. The fifth section will examine the use of community referenda on dam projects in Latin American nations as a means of expressing consent or opposition to development projects under local and national laws. The final section will describe the status of the right to FPIC and its expression through community referenda. Ultimately, this paper will demonstrate that the use of community referenda is a practical and politically powerful means for affected indigenous communities to express their level of public acceptance of a proposed development project. The outcomes of community referenda conducted in Latin America refute the common claim made by governments and multinational corporations devoted to dams and mining that a majority of the local citizens support their proposed projects, a claim typically made as part of their public relations efforts to gain legitimacy.[1] Based on the recent history of community referenda in Latin America presented below, formal election results are the best evidence of community sentiment and are the most likely to be given credence and legal weight by governments, national, regional, and international courts, and other international entities such as the United Nations and the World Bank.

THE WCD'S RECOMMENDATION FOR FREE, PRIOR, AND INFORMED CONSENT FOR DEVELOPMENT DECISIONS INVOLVING INDIGENOUS PEOPLES

Following an extensive survey of dam projects the WCD found: "In too many cases an unacceptable and often unnecessary price has been paid to secure the claimed benefits of dams, especially in social and environmental terms, by people displaced, by communities downstream, by taxpayers and by the natural environment" (WCD, 2000). The Commission concluded that the Core Values that should guide any decision-making process concerning a proposed dam are: "equity, efficiency, participatory decision-

[1] The results of community referenda in several states reveal that the 'lowest' level of opposition to a particular mine has been 81% of voters registering their disapproval with 94% to 99% opposition being more typical. See Part VI, infra, for descriptions of referenda on dams. For information on mine referenda, see Klein, 2003; Boyd, 2002; Americas Program, International Relations Center, 2002; Salazar, 2007; and Paley, 2007.

making, sustainability, and accountability" (ibid). These basic values "form the foundation of a rights-based approach to equitable decision-making about water and energy resources management" (ibid). The WCD Report concluded that large dam projects have recently engendered more "bitter conflict and deep feelings of resentment and injustice" (ibid).[2] Those whose rights are most affected by a dam project "have the greatest stake in the decisions that are taken", according to the Report (ibid). This simple fact remains unrecognised in the great majority of decisions on specific dam projects. The Report emphasises that the decision-making process must be inclusive, guarantee a full opportunity to participate, and result in the "demonstrable public acceptance that projects require if they are to achieve development" (ibid).

After emphasising the complexity of ecosystem impacts on dam sites, the WCD Report found that "the social and cultural implications of putting a dam into such a landscape are spatially significant, locally disruptive, lasting and often irreversible" (WCD, 2000). In the last 50 years tens of millions of people worldwide have been displaced by large dam construction (ibid). The WCD Report also found that inequities in the distribution of the benefits of dams raise questions about the ability of dams, as opposed to other alternatives, to meet water and energy needs; that negotiation among rights-holders and those who bear the risks of a particular proposed dam and other options can lead to positive resolutions of conflicts; and that negotiated settlements can improve the effectiveness of water and energy projects by eliminating destructive projects quickly and offering only those choices to which key stakeholders have agreed. In assessing the impact of large dams the Report cited cost overruns, failures to meet promised outcomes both for power generation and water services, extensive negative environmental impacts, and a "persistent and systematic failure" to consider a wide range of potential negative impacts, including the displacement and resettlement of affected people (ibid).

In relation to resettlement, the WCD found:

> Little or no meaningful participation of affected people in the planning and implementation of dam projects – including resettlement and rehabilitation – has taken place. Involuntary, traumatic, and delayed relocation, as well as the denial of development opportunities for years and often decades, has characterised the resettlement process. For millions of people on all continents, displacement has essentially occurred through official coercion.

Finally, surveys conducted by the WCD found that among projects funded by the World Bank the number of people who required resettlement was 47% higher than planned and that downstream communities, those without legal title to lands, which would include nearly all indigenous peoples, and those affected by the "project infrastructure" were not "considered as affected people at the time of design" (ibid).

These failures, according to the WCD, have led directly to transferring the risks, especially social and environmental harms, to the poor and vulnerable, who rarely receive the benefits of such projects. The Report found that injustices resulting from an unfair "distribution of costs and benefits" amount to violations of human rights and commitments to sustainable development (ibid). Respect for the right to FPIC would promote transparency, open a free discussion of impacts and alternatives, expand the parameters of assessments of social and environmental impacts, force government and corporate entities to promote their proposed project to those who will suffer its consequences and bear both its direct and inchoate costs, and promote negotiation over the types and locations of benefits.

The WCD Report left open questions about the meaning of 'consent', whether FPIC gives 'veto power' to indigenous communities, and the most effective methods for practical implementation of the right to FPIC.

[2] The WCD Report noted that the power of multinational corporations had increased in relation to that of the state and the concern in 2000 that citizens had little power to control corporations through local and national institutions.

THE EVOLUTION OF COMMUNITY REFERENDA AS MEANS OF ADDRESSING PROPOSED DEVELOPMENT PROJECTS

The right to FPIC remains under dispute in many countries and among important international organisations and is seen as a threat to the profit of multinational corporations and to government monopolies on resource decision-making and therefore is only rarely implemented (MacKay, 2004a). The right was most recently set out in the 2007 UN Declaration on the Rights of Indigenous Peoples (2007). The necessary consent of indigenous peoples under the declaration is a recognition that the "historic injustices" outlined in the preamble have allowed the exploitation of their lands in violation of their right to choose forms of development that best meet their needs and interests.[3]

The Environmental Law Institute, in an extensive study of its application to mining projects, defines FPIC as "the right of the local community to be informed about potential mining operations on a complete and timely basis and to approve the operation prior to the commencement of the operation" (Environmental Law Institute, 2004). This definition, equally applicable to dam construction, supports the proposition that the local population can withhold consent in order to stop a development project irrespective of its nature. This paper will demonstrate that a free and fair community referendum with formal and appropriate voting standards which guarantee an accurate count is the most democratic way to allow people to shape their futures.

Free, prior, and informed consent is based on the rights to participation and consultation, self-determination, and indigenous property rights. The right to FPIC is a central issue in dam and other development projects, whose impact, according to the UN Commission on Human Rights' Special Rapporteur on indigenous peoples' rights, has been "one of the major problems faced by [indigenous people] in recent decades" (Stavenhagen, 2001). The catastrophic consequences of unwanted and actively opposed development that stem from violations of the right to FPIC are often lost in academic discussions. Conflict sometimes brings violence in the form of killings and injuries inflicted by soldiers and corporate security firms. Villagers are subject to forced eviction from lands they have known for generations; roads, mines and dam sites destroy the habitat from which peoples derived their sustenance and bring crime, disease, and corruption; previous social norms disintegrate and the new cash economy brings divisiveness; reservoirs, pollution, and intermittent flows to downriver areas destroy game and fish populations that were crucial to subsistence; and traditional tribal and family authority is replaced by indifferent corporate and governmental entities.[4]

Conflict over dam and mining development is common, with the local population, often assisted by local, national, and international non-government organisations (NGOs) opposing multinational corporations and their governments.[5] Citizens who oppose dam construction in Latin America have faced violence and intimidation, including the horrific massacres by the Guatemalan army of indigenous

[3] The UN Working Group on Indigenous Populations sponsored a paper entitled *Legal Commentary on the Concept of Free, Prior and Informed Consent* which noted:

> The principle of Free, Prior and Informed Consent (FPIC) of indigenous peoples to policies, programs, projects and procedures affecting their rights and welfare is being discussed in a growing number of international, regional, and national processes. These processes cover a wide range of bodies and sectors ranging from the safeguard policies of the multilateral development banks and international financial institutions; practices of extractive industries; water and energy development; natural resources management; access to genetic resources and associated traditional knowledge and benefit-sharing arrangements; scientific and medical research; and indigenous cultural heritage (Commission on Human Rights, 2005).

[4] See also WCD, 2000. The Report notes that large irrigation projects that result from dam construction can lead to the production of cash crops by outsiders who use resources previously devoted to food crops, thus "those people who do not participate in the irrigation projects are otherwise marginalized due to dam construction, and may face higher food prices and decreased food security as a result".

[5] See generally Cavellos, 2006. A six-year dispute over the construction of the La Parota dam in Mexico led to the creation of the Council of Communal Lands and Communities Opposed to La Parota Dam (CECOP). From that successful struggle a national movement called The Mexican Movement of Dam-Affected People (MAPDER) grew into a formidable political force (Imhof, 2009b).

villagers who sought to stop dam development in the early 1990s.[6] Together, all these impacts are not unlike those of war.

Among the factors which contribute to the conflict over development projects is that typically all participants see the situation as a zero-sum conflict – there will be one winner and one loser; the project will either be stopped or it will be developed. In these high-stake, winner-takes-all conflicts there is inevitably little perceived room for compromise. National governments nearly universally side with corporate dam developers because of their interest in enhancing the energy supply, advancing the national economy, opening agricultural opportunities to corporate agribusiness, and securing more tax revenues. Small, rural, and often unsophisticated indigenous communities experience an imbalance of power compared to multinational corporations and high-level national governments, and thus regularly lose these high-stakes battles. The growth and ease of international communications engendered by the Internet is now allowing similarly situated communities around the world to access information about dams, their impacts, the practices of dam-building corporations, and to organisations experienced in the political strategy and tactics of resistance to unwanted development. These alliances have the potential to shift the balance of power.

Community referenda offer a solution to the problem of determining the consent of communities to development projects that will impact them, and represent a mechanism for community expression in the broader decision-making processes typically controlled by the powerful government and corporate interests. A full debate between the supporters and opponents of a specific project, followed by a free and fair election (typically conducted by village officials in a culturally appropriate manner or, as described herein, by municipal officials under strict legal requirements) offers an accurate measure of community opinion on a proposed project and a democratic solution to issues that are far more important to the lives of voters than the typical election of the next set of government officials.

The phenomenon of large community referenda on development projects that implicate human rights first arose in Tambogrande, a non-indigenous agricultural community, in Northwest Peru in 2002 (Boyd, 2002). Since then, communities in Peru, Argentina, Mexico, Guatemala, and several other countries have used national and local laws to hold elections that ask voters the single question of whether a project should go forward.[7] These elections have been held after periods of community debate between those who support a particular project and those who oppose it. In this way, informed citizens have played an active role in determining what types of development are most appropriate for their community.

Many more community referenda have been held over mining ventures than over dams.[8] Both types of development projects present the same kinds of legal issues, and the referenda are governed by the

[6] Local mining opponents have also faced death threats, intimidation, false criminal charges and imprisonment, and when they have organised and opposed specific mining projects, they have been assaulted, kidnapped, and even murdered. Violence against the opponents of mining projects is endemic in two of the countries that have held community referenda: Peru and Guatemala. In Peru, a former professor and leader of the opposition to a proposed mining project in Tambogrande, was shot to death in an ambush by a lone gunman just before a referendum in which citizens decisively rejected the mine (Boyd, 2007). Other mining opponents have been killed by both the National Police and security contractors and many have been injured during demonstrations (Front for the Sustainable Development of the Northern Frontier of Peru, 2006. Peru Support Group, 2007). In Guatemala demonstrators have also been shot to death and many have been injured and subjected to death threats (ibid). The mining referenda discussed in this paper were all, with the exception of one in Argentina, accompanied by violence (Patterson, 2005).

[7] By far the largest referendum was conducted in 33 municipalities of western Guatemala in February 2009 when some 500,000 mostly indigenous people voted against the possible granting of mining licenses in their communities. Milton Santos, a member of the Council of the Peoples of the West, said, "We don't want to see anybody in our communities, because the people's consent was not taken into account in granting the licenses" (Mines and Communities, 2009).

[8] However, dam construction plans in ten Latin American countries currently threaten both local communities and the environment. See World Rivers Review, 2009 which describes, for example, that Ecuador has proposed some 226 dam projects, mostly in the Amazon Basin and Brazil is planning more than 100 large dams in the next 20 years. Further, Paraguay and Brazil plan to dredge an industrial waterway through the world's largest tropical wetlands.

same local and national laws. The international right to FPIC, of course, applies to all types of development projects. In this paper, the experience with community referenda regarding mining projects is explored as an example of how this approach can be applied to decisions around large-scale development projects, including dams.

ORIGINS AND LEGAL EVOLUTION OF THE RIGHT TO FREE, PRIOR, AND INFORMED CONSENT

The establishment of the evolving right to FPIC, which preceded the WCD Report, stemmed from the right of self-determination and the land rights of indigenous peoples.

The post-colonial right to self-determination

The International Court of Justice recognised the principle of consent as the basis for relations with indigenous peoples in its 1975 advisory opinion in Western Sahara (International Court of Justice, 1975). In that celebrated case the Court quoted General Assembly Resolution 1541 (XV) on the issue of options for the people of Western Sahara and stated that " [t]he integration should be the result of the freely expressed wishes of the territory's people acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted" and supervised by the UN (ibid). The court later quoted another General Assembly Resolution, 2229 (XXI), which "invites the administering power to determine… the procedures for the holding of a referendum under the United Nations auspices with a view to enabling the indigenous population of the Territory to exercise freely its right to self-determination" (ibid). Thus, many years before the adoption of free, prior, and informed consent as a principle of international law on the use of indigenous lands, the UN General Assembly and the International Court of Justice had set out its foundations – the free and informed choice of the people as expressed through democratic processes – including the specific reference to referenda.

The FPIC principle is therefore partially derived from the right to self-determination, enshrined in Common Article 1 in both the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). The latter states, "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". No state recognises an unqualified right to self-determination, and many fear that the right could authorise claims of independent statehood for ethnic, minority, or religious groups (Huff, 2005). Such claims, however, would only be considered valid if arising from colonial or apartheid states or where a segment of the population is denied rights equal to those of the population holding political power and is not afforded "full and free participation in the life of the state" (ibid).

The application of the right of self-determination to peoples within existing states has been confirmed by UN entities and internationally recognised scholars.[9] In commenting on the right in 1984, the Human Rights Committee stated that it imposes "specific obligations on States parties, not only on their own peoples but vis-à-vis all peoples which have not been able to exercise or have been deprived of the possibility of exercising the right of self-determination" (UN Human Rights Committee, 1984).

The WCD Report acknowledges that affected people and NGOs have often created peoples' movements against dams (WCD, 2000). As this article demonstrates, organised opposition to dams has grown significantly since the report's publication in 2000.

[9] One commentator maintained:

> Just as a matter of ordinary treaty interpretation, one cannot interpret Article 1 as limited to the colonial case. Article 1 does not say that some peoples have the right to self-determination. Nor can the term 'peoples' be limited to colonial peoples. Article 1, section 3 deals expressly and non-exclusively with colonial territories. When a text says that 'all peoples' have a right – the term 'peoples' having a general connotation – and then in another paragraph of the same article, it says that the term 'peoples' includes peoples of colonial territories, it is perfectly clear that the term is being used in its general sense (Crawford, 2001).

More recently, the Committee on the Elimination of Racial Discrimination (CERD) referred to "the rights of all peoples within a state" (CERD, 1996). Finally, the Committee on Economic, Social and Cultural Rights (CESCR), in a report on Russia, has reiterated its concern about "the precarious situation of indigenous communities in the State party… recalling the right to self-determination enshrined in Article 1 of the Covenant, urges the State party to intensify its efforts to improve the situation of the indigenous people and to ensure that they are not deprived of their means of subsistence" (CESCR, 2003).

However, indigenous self-determination requires much more than equal rights. More recent international instruments addressing self-determination, such as the International Labour Organization's (ILO) Convention 169 and the recently adopted Declaration on the Rights of Indigenous Peoples, inherently reject any assimilatory approach to national inclusion of such peoples and accord specific rights regarding the propagation of a separate culture and language as well as the protection of the lands of indigenous peoples.

During the negotiations that led to the Declaration of Rights of Indigenous Peoples, where states expressed reservations regarding the possibility that such peoples might declare autonomy or try to create an independent state, the idea of 'internal self-determination' was introduced. In 2001, a US National Security memorandum indicated acceptance of that term in this context: "Indigenous peoples have a right of internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-State and are free to pursue their economic, social and cultural development" (Huff, 2005). However, the memorandum went on to state that the right did not include "permanent sovereignty over natural resources". Even with this qualification, the United States, Canada, Australia, and New Zealand (all countries with substantial indigenous populations) opposed the declaration while 143 nations supported it (ibid).

The US position undermines the second paragraph of common Article 1, which states, "All peoples may, for their own needs, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence". If indigenous peoples are 'peoples' having the right to self-determination within the meaning of Article 1, then its second paragraph would seem to mean that indigenous peoples must have sovereignty over their natural wealth and resources in order that they may "freely dispose" of them. These seemingly contradictory positions between state sovereignty and indigenous rights can be resolved through recognition of the principle of free, prior, and informed consent. Where states maintain ownership of resources on, under, or immediately adjacent to indigenous land – which is nearly always the case – they must obtain the free, prior and informed consent of indigenous peoples to access those resources whose development would impact indigenous lands. Indigenous peoples may then be said to be freely pursuing their own choice of economic development as required under Article 1.

A denial of FPIC or a reduction of it to mere consultation denies a people the right to control their lands and creates a potential threat to their very existence. For example, large dams require reservoirs that flood villages, destroy subsistence fisheries and animal habitat, and agricultural lands essential to a people's subsistence – thus potentially violating an absolute right that admits of no exceptions under the second paragraph of common Article 1. Additionally, waterways used by indigenous peoples for transportation are frequently impacted or eliminated by dam construction.

The right to land

The right to property and land-ownership is another foundation of FPIC. In its interpretation of the American Convention on Human Rights, the Inter-American Court of Human Rights has condemned the failure of states to demarcate indigenous lands and provide for the effective participation of indigenous people in development decisions (Case of Mayagno [Sumo] Awas Tingni Community v. Nicaragua, 2001). In a case involving indigenous people in Nicaragua where the government had granted

concessions to third parties, the court ordered that the "delimitation, demarcation and titling of the territory belonging to the Community" be accomplished before the state or third parties act to affect "the use or enjoyment" of lands where indigenous peoples live and subsist and should lead to official recognition (ibid). While Nicaraguan law recognised the communal property of indigenous peoples, the government had not engaged in an official titling process.

In a more recent case that reached the participation issue and thereby supported the right to FPIC, the Inter-American Court again found that a state, in that case, Belize, had violated important rights by failing to demarcate and title the lands of indigenous people before granting a concession to a multinational oil and gas corporation and "without effective consultations with and the informed consent of the Maya people" (Case of Maya Indigenous Communities of the Toledo District v. Belize, 2005). However, while the Court drew an important distinction between consultation and consent, it did not explicitly mandate FPIC or describe a process that would meet its requirements.

The United Nations Human Rights Committee, established by the terms of the International Covenant on Civil and Political Rights (ICCPR), has regularly adjudicated complaints of individuals and peoples against states alleged to have violated rights accorded under the ICCPR.[10] While the land rights of indigenous peoples are not the specific subject of Article 27, which protects a minority's right "in community with the other members of the group, to enjoy their own culture, profess and practice their own religion, or to use their own language", the Committee has ruled that the article protects economic and social rights, which are inevitably tied to the use of community lands (Huff, 2005). Moreover, the Committee has condemned a state's authorisation of the environmentally destructive actions of corporate third parties that undercut the ability of indigenous communities to carry out traditional economic and cultural activities (ibid).

In her 2001 final report, the special rapporteur on indigenous land rights, Erica-Irene Daes, described the "most fundamental and widespread problem" in two parts: "the failure of States to recognise the existence of indigenous use, occupancy and ownership, and the failure of States to assure appropriate legal status, juridical capacity, and other legal rights in connection with peoples' ownership of land" (Daes, 2001). Daes also attributed the rapid deterioration of indigenous societies in some countries to the denial of their rights to land and resources. She condemned the historic and continuing exploitation of indigenous peoples' lands:

> The legacy of colonialism is probably most acute in the area of expropriation of indigenous lands and resources for national economic and development interests. In every sector of the globe, indigenous peoples are being impeded in every conceivable way from proceeding with their own forms of development, consistent with their own values, perspectives and interests (ibid).

Much large-scale economic and industrial development has taken place without recognition of, and respect for, indigenous peoples' rights to lands, territories and resources. Economic development has been largely imposed from outside, with complete disregard for the right of indigenous peoples to participate in the control, implementation and benefits of development (ibid). As more dams are proposed and built to meet growing demands for water and power, the destructive results of unimpeded exploitation of indigenous lands, documented by Daes nine years ago, have only increased. The control of lands and resources by indigenous peoples, a right granted in numerous human rights instruments and court decisions, continues to remain largely theoretical and unimplemented.

In 2002, the Committee on Economic, Social and Cultural Rights, charged with the responsibility of assuring the implementation of the International Convention on Economic, Social and Cultural Rights (ICESR), linked the unlawful exploitation of indigenous lands to the failure of the state to obtain consent. Its description of the situation in Colombia, in the context of reviewing that country's mandated periodic report, could be applied to many other states' treatment of indigenous peoples: "the traditional lands of indigenous peoples have been reduced or occupied without their consent by

[10] The United Nations ICCPR Human Rights Committee was replaced by the Human Rights Council in 2006.

timbre, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem" (CESCR, 2002). The Committee established a clear line of causation between exploitation without consent, environmental destruction, and the violation of cultural and other rights.

The Committee's recommendations to Colombia included an admonition to ensure the participation of indigenous peoples in decisions that will affect their lives and urged the government to "consult and seek the consent of indigenous peoples concerned prior to the implementation of timbre, soil or subsoil mining projects, and on any public policy affecting them, in accordance with ILO Convention 169 (1989) [which mandates participation and, arguably, consent by indigenous peoples] concerning indigenous and tribal peoples in independent countries" (ibid). Both passages in the Committee's comments on Colombia suggest that mere consultation is insufficient and that actual consent by indigenous peoples to development projects is essential to their lawful initiation.

The same 2002 examination of country reports by the Committee identified serious concerns about the treatment of indigenous peoples with respect to their lands by the three other Latin American countries scheduled for review. The Committee "deplored" the failure of Honduras to address discrimination against indigenous peoples' lack of access to land-ownership and expressed concern about the adverse effects of natural resource exploitation on the "health, living environment, and way of life" in two mining regions (ibid). Regarding Bolivia, the Committee condemned marginalisation and discrimination against indigenous peoples and noted that the country did not acknowledge the economic, social and cultural rights of the indigenous population as a distinct group. The Committee also noted the "marked disparities in Panama between the majority and indigenous peoples in terms of poverty and access to education, employment, health, and water" (ibid). The land rights of indigenous peoples remained unresolved and were threatened by Panama's government-approved encroachments by mining and ranching interests which resulted in forced displacements of indigenous peoples from their "traditional, ancestral, and agricultural lands" (ibid). Several years later, the Committee stated that it was "deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities" (ibid). The criticism of the UN Committee had failed to stop, or even slow, development that clearly violated international law.

The UN Committee on the Elimination of Racial Discrimination, which is responsible for assuring progress in the implementation of the Convention on the Elimination of All Forms of Racial Discrimination, has recognised that the welfare, lands, resources, and very identity of indigenous peoples are threatened by discrimination (CERD, 1997). More specifically, the Committee has called upon states to recognise the rights of indigenous peoples to control and use their communal lands and resources. Where those lands and resources have been taken without "free and informed consent", they must be returned. If this is not possible, there must be fair compensation paid and, insofar as possible, in the form of other lands and territories (ibid). The Committee thus recognised that for indigenous peoples, land is much more valuable than any financial compensation and mandated a scheme under which past wrongs, that is, exploitation of land and resources without consent, can be addressed.

The UN reviews, court decisions, and scholarly studies have convincingly established that the rights of indigenous peoples to their land are rarely recognised, let alone implemented. The failure of states to seek their consent before authorising damaging incursions on lands essential to the well-being of those populations is routine. The key protective measures, mandated by both international and national law, are the formal recognition and titling of indigenous lands and the extension of the right to withhold consent to incursions by governments and corporate entities seeking to use lands belonging to indigenous peoples.

Mary Robinson, the former UN High Commissioner for Human Rights, noted the importance of land to the survival of all aspects of the lives of indigenous peoples when she told the World Bank, "Land and culture, development, spiritual values and knowledge are as one. To fail to recognise one is to fail on all" (Robinson, 2001). It is just that precious connection with the land, universally understood by all who grow crops by hand and hunt and gather food in order to survive, that escapes the comprehension and

recognition of modern 'developers' and state institutions. The right to control the development of their lands and resources by indigenous peoples and their right to choose or reject corporate and governmental activities on their land are thus the fundamental prerequisites to their survival as independent peoples with intact cultures and societies.

THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT

Convention 169 of the International Labour Organisation

The FPIC principle was first specifically established in binding international treaty law in the International Labour Organization's (ILO) Convention 169, adopted in 1989, which includes a compliance mechanism that requires a national government both to respond to complaints and enforce ILO decisions. The organisation's complaint and enforcement mechanism is not designed for use by indigenous peoples (in fact, the formal complainant must be a union or an employer) but, however slow, it offers the hope that an opinion by its Committee of Experts on an indigenous matter can embarrass a government sufficiently to assure at least a superficial effort at compliance with the law.

Convention 169 sets out several mandates involving consultation and participation that fall far short of 'free and informed consent', which is the explicit standard only in cases of forced relocation, a common facet of dam construction, under Article 16. Article 6 sets out the general requirement that any consultations with indigenous peoples regarding the subjects of the Convention shall be conducted in good faith "with the objective of achieving agreement or consent to the proposed measures". Unfortunately, the outcome of a failure to obtain the agreement or consent of the affected indigenous peoples is not described or even suggested in that or the other articles of the Convention.

The right most relevant to FPIC and community referenda is found in the strong language of Article 7(1): "The people 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". The empowering initial clauses of Article 7(1) cannot be fulfilled where indigenous peoples can only control development that has a direct impact on them "to the extent possible" and where that determination is made by other entities with a strong interest in the exploitation of their lands. Their rich resources in water, timbre, minerals, and oil and gas have rendered their lands subject to damaging and sometimes catastrophic incursions throughout the world.

The lands of indigenous peoples are the subject of Article 15 which first states that their rights to natural resources on their lands shall be "specially safeguarded" and that they have a right to participate in decisions regarding those resources. In a passage that addresses both dam construction and mining ventures, the second part of Article 15 describes the role of the state:

> In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall whenever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities (ILO 169, 1989).

This prescription for formal consultative procedures to be established by governments has not been subject to implementation by Latin American countries. Most consultation continues to take the form of one-sided information sessions conducted by the corporations or governments proposing a particular project with no input from the audience. While Article 15 does not specifically contemplate a process of seeking consent to use indigenous lands, mandate of Article 6 that consultations conducted in good faith with the goal of achieving 'agreement' would certainly apply where the subject was the

use of indigenous lands. But so long as mere 'consultation' and 'participation' remain the objective, the right to FPIC is effectively denied. (In another legal context, that of the criminal law, an accused perpetrator's claim of 'consent' by the victim is a defence to a charge of sexual assault. No lawyer in that arena believes that mere prior 'consultation' with a victim of an alleged sexual assault by a defendant is sufficient for a successful defence).

The consultative procedures mandated by Convention 169 could include community referenda where, as will be discussed later, voter turnouts are high and the election results are universally and emphatically negative toward proposed dam and other resource projects. Unfortunately, the signatory governments that are expected to follow the mandate of consultation in Article 6 have a decided interest in choosing to ignore it. After all, real consultation might well lead to an informed and involved population that is more likely to become politically organised and attempt to create barriers to the proposed project. So long as indigenous peoples remain politically powerless, it is easy for governments to continue to dismiss their obligations to them because there are few consequences to the government in power. Governments have a clear conflict of interest between their pursuit of energy production that stems from a national policy that promotes traditional forms of development and their legal obligations to protect indigenous rights.[11] The well-intentioned mandates of the ILO's Convention 169 are often sacrificed to the powerful economic forces that guide national resource policies. Effective legal mechanisms and enforceable remedies to ensure compliance with human rights obligations, which would include ready access to international grievance processes and to national procedures mandating local participation in water and resource development planning and decision-making, have not yet been implemented.

FPIC in national, regional, and international bodies

Over the last 15 years the right to FPIC has found increasing support, beyond that already described in UN Convention entities, in both regional and international bodies. In Latin America, the Inter-American Commission on Human Rights has repeatedly considered the FPIC principle. In its jurisprudence the Commission has stated that Inter-American human rights law mandates "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent" (MacKay, 2004b). In 2003, the Commission specifically addressed resource exploitation by concluding that FPIC is applicable to "decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories" (Case of Maya Indigenous Communities of the Toledo District v. Belize, 2005).

There is no question that the UN supports FPIC and a meaningful definition of 'consent'. The UN's Centre for Transnational Corporations concluded, in the final report of a series that examined the conduct of multinational corporations in indigenous lands, that companies' "performance was chiefly determined by the quantity and quality of indigenous peoples' participation in decision-making" and that this participation depended on "the extent to which the laws of the host country gave indigenous peoples the right to withhold consent to development" (Economic and Social Council, 1994). More recently, the Norms on Transnational Corporations, developed by the UN Sub-Commission on the Promotion and Protection of Human Rights emphasised FPIC:

> Transnational corporations and other business enterprises shall respect the rights on local communities affected by their activities and the rights of indigenous peoples and communities consistent with international human rights standards… They shall also respect the principle of free, prior and informed

[11] One commentator condemns Article 15 for legitimating state ownership of indigenous resources, a concept rooted in archaic, exploitative international law doctrines that rendered conquered or discovered lands part of the colonizing state, and assumed ultimate state authority over the lands of indigenous people (Huff, 2004).

consent of the indigenous peoples and communities to be affected by their development projects (Economic and Social Council, 2003).

Unfortunately, neither UN document explicitly designates FPIC as an essential process required by international law. However, definite progress was made from 1994, when reference was made to "indigenous peoples' participation in decision-making", to 2003, when another UN body called for "respect for the principle of free, prior and informed consent" by multinational corporations.[12]

In contrast, the European Community's Council of Ministers adopted a Resolution in 1998 entitled "Indigenous Peoples within the Framework of the Development Cooperation of the Community and Member States". The resolution provides that "indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas". This statement was reaffirmed in 2002 by the European Commission when it stated that the EU interpreted this language to be the equivalent of FPIC (Griffiths, 2003).

Free, Prior and Informed Consent: An unrealised mandate

In 2004 the United Nations Permanent Forum on Indigenous Issues sent questionnaires to eight UN agencies to gather information on "how the principle of [FPIC] is understood and applied by United Nations programmes, funds, agencies" (E/C.19/2004/11, para. 3). The agencies responded that they did not have an official, working definition of FPIC but they recognised it as part of the human rights structure and maintained that, while not without challenges, they "implemented [FPIC] on an ad hoc basis in line with the general guidelines, legal instruments and principles through which they work" (Ibid, para. 7). It may thus be concluded that the agencies, unless they encounter difficulties, will frequently apply a principle they cannot define. This less than reassuring response illustrates the politics involved in both protecting the rights of people who rarely have a voice and attempting to implement a right that most states and multinational corporations will either oppose or undermine at every opportunity in order to further their interests in economic growth and profit.

FPIC lacks a common definition accepted by private and public international entities. Participation and consultation are key (albeit vague) concepts and are universally recognised, but the implementation of the FPIC principle has been inconsistent and has, in the eyes of many indigenous groups, generally failed to provide for adequate protection of their interests. Nonetheless, many statements by international institutions such as the United Nations, the Organisation of American States, and the World Bank Group mention the legal principle of FPIC, and some countries have incorporated the principle into their domestic laws. Some scholars claim that the support for the concept of free, prior, and informed consent of "indigenous peoples and other local communities suggests that FPIC is not only central to enforce key rights, but is also emerging as a norm of customary international law" (Perrault et al., 2007).

The use of community referenda to engender open debate on the advantages and disadvantages of a dam project and to obtain a fair and democratic measure of public opinion would fulfil a central

[12] Beyond the support for FPIC found in numerous sources of international law, some states have adopted the principle in their national laws and jurisprudence. The Philippines Indigenous Peoples Rights Act of 1997 recognises the right to FPIC for any incursion on indigenous lands and specifically includes exploration and development of natural resources. The Act states that FPIC "shall mean the consensus of all members of the ICCs/IPs [Indigenous Cultural Communities/Indigenous Peoples] to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community".
The Canadian Supreme Court has created a proportionality test whereby the duty of the state to consult hinges on the anticipated impact of the intrusion on indigenous lands. Where the effect is minor there is a duty to consult but full consent is required for serious impacts (Delgamuukw v. British Columbia, 1997). Like the Canadian court, South Africa recognised collective indigenous ownership of the subsoil, under both indigenous law and continuous occupancy, so there are fewer issues regarding government issuance of permits or FPIC (Alexkor Ltd. and the Republic of South Africa v. The Richtersveld Community and Others, 2003).

requirement of FPIC, namely that communities express their free, informed consent prior to final decisions. The success of both mine and dam referenda in accurately reflecting an electorate's position on potentially unwanted development could be replicated through the adoption of transparent, formal, and consistent mechanisms to ascertain consent in affected communities.

FPIC has been generally described as a "consultative process where potentially affected communities engage in an open and informed dialogue with outsiders interested in areas occupied or traditionally used by the communities at issue" (ibid). The same authors who offer this definition describe 'consent' as the authority that representatives of an affected community can withhold at certain decision-making points in a project cycle whose legitimacy the project proponents must accept (ibid). The specific characteristics of the principle can be partly explained by an analysis of the adjectives modifying 'consent' – 'free', 'prior', and 'informed'.

That consent must be 'free' means that community decision-making and information-gathering must not be tainted by "coercion, threat, manipulation, or unequal bargaining power" (ibid). However, these obvious and ubiquitous manifestations of the inevitable and dramatic difference in political power between states and multinational corporations, on the one hand, and potentially affected communities on the other, describe factors that have been present in each of the cases where affected communities have proposed or held referenda. Fergus Mackay of the British Forest Peoples Programme and a long-time analyst of FPIC points out, "case studies show that consent is frequently engineered and indigenous institutions are out-manoeuvred by competing interests seeking access to indigenous peoples' common resources" (Colchester and MacKay, 2004). But even where such corruption compromised local leadership or brought about its replacement, mobilised communities have forced officials to take action. In an urban and non-indigenous setting, citizens opposed to mining in Esquel, Argentina refused to leave an assembly meeting until officials voted to hold a community referendum (Tucker, 2003). In many instances, especially where communities have held referenda, the mobilisation of the community and the well-organised campaigns of local, national, and international NGOs have proven effective in countering the inequality in initial political power between multinational corporations and governments and citizens who opposed their plans. Community referenda offer an effective means to assure that community decision-making is free and fair, but do not, of course, guarantee that the goal of FPIC, the recognition and honouring of a community's power to say 'yes' or 'no' to a proposed project, will be achieved.

The term 'prior' means that consent must be pursued "sufficiently in advance" of any decisions made by the relevant governments and before the proposed activity commences (Perrault et al., 2007). In practice, an 'FPIC' or 'consultation' process rarely begins before government decisions are taken, especially in dam and mining operations, because technical studies have usually generated positive results and governments have issued permits before it or the involved corporations even consider any consultation with local people. When government or dam project officials do undertake any consultations with the local population they do not generally enter such discussions open to the prospect of local interests overriding their plans. Officials supporting projects have an interest in delaying consultations as long as possible in order to organise any local allies, prepare the public relations campaign that now accompanies any presentation to potentially affected communities, and, most importantly, to defer as long as possible the potential formation of organised opposition to the planned exploitation.

'Informed' consent implies that government and project developers must provide full and accurate disclosure of the anticipated risks and benefits of a proposed development in a form that is accessible and understandable to the affected population (ibid). It is unlikely that a state or corporation with a strong interest in completing a particular development will make full disclosure regarding risks. Sharing accurate and comprehensive information with potentially affected communities is simply against their

interests.[13] However, because of the dramatic increase in the availability of specific and relevant information from the Internet and the growth of national and international organisations devoted to researching the impacts of various types of development projects, there is now a greater likelihood that local communities will have access to a broad range of information regarding the risks of a particular type of project.[14]

Confusion about 'consent'

The major focus of disputes over the meaning of FPIC is the definition of 'consent'. The dictionary definition, "capable, deliberate, and voluntary agreement or concurrence in some act or purpose…", also includes several synonyms – agreement, assent, and approval (Webster's Third New International Dictionary, 1993). The original treaty source of FPIC, Convention 169 of the ILO, does not state that FPIC gives communities absolute veto power over a proposed project. The ILO's manual on Convention 169 specifically concedes this point, but then further confuses the issue. The handbook's section on consultation states: "The objective of such consultation is to reach agreement (consensus) or full and informed consent" (ILO, 2003). However, the difference between 'agreement' and 'full consent', if there is any, is not explained. What can 'full' consent mean other than complete agreement? Further, how can a process be considered fair if the 'objective' is to "reach agreement or full and informed consent"? Has the process failed if the indigenous peoples refuse to reach agreement or provide consent? The assumption in the ILO handbook and in much of the institutional literature about FPIC seems to presuppose an outcome favourable to project proponents.

The ILO handbook's approach to 'consent' becomes even more ambiguous with the subsequent statement: "the Convention specifies that no measures should be taken against the wishes of indigenous and tribal peoples, but this does not mean that if they do not agree nothing will be done" (ibid). The last, and apparently qualifying, clause of the statement that begins unambiguously with "no measures should be taken" implies that measures can or will be taken against the wishes of indigenous peoples if they do not agree. Such contradictory language in a document designed to be a helpful guide to FPIC for potential complainants can only engender continued confusion about meaning of 'consent'.

As one commentator has concluded: "Consultation and participation ring hollow if the potentially affected communities can say anything except 'no'" (Goodland, 2004). Indigenous groups would have no bargaining power if their negotiating counterparts did not know that they could withhold consent on any issue or at any point in the process of negotiation. Without the ability to walk away from the bargaining table, indigenous groups would simply be participating in a relatively meaningless exchange of views designed to fulfil a legal requirement. There is no such thing as partial consent in this context. The proposed project may well be subject to negotiated conditions and modifications but, ultimately, it will either go forward or it will be stopped.

Six articles in the recently adopted Declaration on the Rights of Indigenous Peoples make explicit reference to FPIC, though only two, Article 10 on forced relocation (like Article 16.2 of the ILO's Convention 169) and Article 29 on the storage of hazardous materials, clearly prohibit any government action without the consent of the affected indigenous community.[15] Other articles, such as Article 32, require governments to obtain their 'free and informed consent' before approval of "any project affecting their lands or territories and other resources, particularly in connection with the development,

[13] The most common anti-mining sign in Ayabaca, Peru in the days before the 16 September 2007 referendum on the Rio Blanco mining project was "No Me Mientas" or "Don't Lie to Me" (Author's observation on 14 September 2007).

[14] The website www.internationalrivers.org is an excellent resource for information on dam controversies and impacts. The ultimate source for information helpful to anti-mining organizations is www.minesandcommunities.org, which collects articles (often in both English and Spanish) from many sources on mining projects throughout the world. Other sources, such as www.nodirtygold.org, focus on particular types of mines.

[15] Article 11 addresses the removal of cultural or religious property, Article 28 entitles indigenous people to avenues of redress when lands or resources have been used or taken without FPIC, and Article 30 bans military activities, except in emergencies, on indigenous lands without a free agreement.

utilisation or exploitation of mineral, water or other resources" (ILO 169, 1989). While this might seem to conclusively establish a right to FPIC in this critical context there is no mention of the consequences of withholding consent. As in other contexts, the language in Article 32 on development on indigenous lands is much weaker than that in Articles 10 and 29 but, most important, it does not clearly set out the right to prevent an activity by withholding consent (Perrault et al., 2007).

As has been seen, UN bodies have repeatedly supported the FPIC principle and have recognised its necessity in the context of development projects. In another example, the UN Committee on Economic, Social and Cultural Rights observed "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem" (CESCR, 2001). The Committee recommended that governments "ensure that indigenous peoples participate in decisions affecting their lives… and seek the consent of the indigenous peoples concerned…" (ibid). There can be little doubt that the UN convention body intended to give the common or dictionary meaning to 'consent' given the context of its repeated remarks on the concept. Surely the Committee's carefully considered concluding observations would employ the word 'consultation' if it intended to restrict its mandate to such limited and ultimately disempowering efforts.

The right to FPIC is certainly not fulfilled or upheld merely by the holding of a community referendum. This democratic process only determines the opinion of a community faced with the prospect of a potentially damaging development project. The fulfilment of the right depends ultimately on whether the responsible government entity acts in accordance with the election outcome. FPIC is violated when a project goes forward in the face of a refusal of consent represented by the outcome of a referendum.

'Consent' remains illusory

Another attempt at a definition describes 'consent' as an authority that can be withheld at certain decision-making points in a project cycle by representatives of an affected community whose legitimacy must be accepted by the project proponents (Perrault et al., 2007). Such a definition implies that FPIC is a process where the communities are consistently involved in a search for solutions to problems with project representatives. In fact, the "principles underlying the right to FPIC, including equity, sustainability, subsidiarity and peace and security, would be difficult to secure if communities were engaged only at the end of the process" (ibid). However, even where there is a process of consultation, one detailed case study of a mining project in San Marcos, Peru "suggests that, where community engagement does occur, corporate actors will seek to restrict the information and deliberative opportunities available to project-affected groups in order to avoid conceding control over matters that could affect timetables or budgetary allocations" (Szablowski, 2005). Obviously, where the fate of the entire proposed project is at stake, not just "timetables and budgetary allocations", the inclination of proponents, both corporate and governmental, to hide information and limit consultation is much greater.

In fact, the FPIC requirement is often ignored by both governments and multinational development corporations. According to some experts:

> Different communities report militarisation of isolated communities as a recurring element in engineering consent. Extractive industries have consciously manipulated communities, introducing factionalism, dividing communities and promoting individuals, who may have no traditional authority as leaders, to represent the communities. The illusion of free, prior and informed consent is achieved by the exclusion of the majority of community members from effective participation in decision-making (Colchester and MacKay, 2004).

One sure way to include a significant part of an affected area's population in decision-making is, of course, to hold an election. Community referenda offer a potentially effective means to overcome

efforts at the manipulation of information, avoid militarisation and violence, measure the authority and legitimacy of local leadership, and promote community discussion.

COMMUNITY REFERENDA: AN EFFECTIVE RESPONSE TO UNWANTED DEVELOPMENT

The most extensive use of community referenda as a means to accurately gauge public opinion on dam and resource extraction projects has been seen in Latin America in the last eight years. The following accounts describe referenda in several states, the political conditions that gave rise to them, and the flexibility of referenda as a tool of participatory democracy. This survey also includes an analysis of the practical and political obstacles to community referenda in a variety of social and legal contexts, and documents the extraordinary fear and resistance such elections engender in national governments and multinational corporate enterprises.

Referenda on dam projects in Guatemala

Early in this decade the electric authority of Guatemala (INDE) proposed to build the US$400 million Xalala dam project on the Chixoy river. The dam would directly displace, through the creation of a large reservoir, at least 2,300 indigenous peoples in 36 communities along 26 miles of the river (Bosshard, 2008). The dam would be constructed in the municipality of Ixcan in the Department of Quiche in northern Guatemala, an area of highly productive agricultural lands and unexploited mineral and oil resources. There are some 176 pueblos of Mayan indigenous people (population 75,000) who live a subsistence lifestyle based on agriculture in an isolated jungle region of Ixcan (ibid).

Including those living downstream of the dam, the livelihoods of some 8,000 Maya farmers would be impacted by the dam (ibid). Moreover, altogether 14,000 indigenous people would suffer the loss of land, crops, fisheries, and other resources to the reservoir and nearby construction projects (Imhof, 2009a). The Chixoy river, which is used for transportation, fishing, and water supply, is crucial to the region's survival, especially since its flood plain provides most of the corn produced in the area (ibid).

Local villagers started organising opposition to the dam after the national government began promoting it as a national priority (Aguirre, 2009). Some 80% of the population, which is 94% indigenous, live in poverty (Imhof, 2009a). The memory of the opponents includes the 1982 massacre of 177 women and children by the Guatemalan army in Rio Negro, a Chixoy river village only 30 miles from the proposed Xalala site, to facilitate the building of the nation's largest hydroelectric dam. The local Maya community had strongly opposed the construction of the dam. Later that year in three additional massacres 444 of the village's 791 residents killed, according to the Guatemala Truth Commission. The Chixoy dam ultimately flooded Rio Negro and 3,000 acres of crops.[16] The surviving villagers were forcibly evicted and moved to a militarised township four hours away from their former homes (McGahan, 2009).

The local Maya people have experienced a long civil war, genocidal massacres, and forced evictions. One leader explained their fear of the dam, "Money is like candy for us, the land is our wealth… that's why we don't want the dam. Water is our life" (Imhof, 2009 b).

As is common where development projects encounter determined opposition from local groups, opponents have suffered violence and their leadership has been threatened (EDLC website, n.d.). During the opposition campaign the local Mayor's office was the target of constant attacks, including an attempted kidnapping and arson of the municipal building, threats of violence and "assaults on municipal workers, surveillance by armed men… and libellous disinformation". Workers for the Catholic Church Social Ministry have been subject to similar threats as have many of the social organisations in

[16] The Chixoy dam has been called one of the biggest financial disasters in Guatemalan history. It cost US$1.2 billion and will have to shut down in less than 20 years due to erosion that was not foreseen in the inadequate environmental study (Mertz, 2007).

the region (Dewez, 2007). After the homicide of an INDE employee, the village leaders of areas that would be affected by the dam were subject to a defamation campaign (ibid).

Inspired by the success of other community referenda used to express local opposition to mining ventures in Guatemala, Ixcan held a consulta popular on 7 April 2007 (Kern, 2007). The date of the consulta was decided after the then-President Oscar Berger said that the government would seek bids for the construction of the dam and the Ministry of Energy and Mines announced that a license to explore for oil in the municipality had been approved (Rights Action, 2007). The consulta ballots asked the electorate to vote for or against the two proposed development projects. The first question was whether to support the construction of hydroelectric dams on the Chixoy river, such as the Xalala dam, and the second asked whether to support the exploration and exploitation of oil. The official results, which counted 21,155 ballots marked by adults and children from seven to 17, revealed that 89.7% voted against both projects (ibid).

The actual voting followed the customs and traditions of each community and included the raising of hands, the use of paper ballots, or the signing of a list drawn up by the local mayor. The voting was monitored by 384 national and international observers and delegates from the government's Human Rights Procurator's office were present at most voting sites (ibid). Guatemalan lawyer Carlos Loarca described the process: "Maya communities have ancestrally held popular consultations. Their decisions are legitimised through sharing of information, dialogue and consensus, which human rights documents call free, prior and informed consent" (Aguirre, 2009). So it was ever thus: a people discuss and decide on their own destiny.

The results of the overwhelming vote were delivered to the capital by 35 representatives of the Community Development Council and civil organisations who later met with government officials. The elected leaders emphasised that national and international law mandated the participation of local people in development decisions and insisted that the dam permits be suspended (ibid).

In November 2008, nine multinational corporations that had expressed interest in bidding refused to do so, even though INDE had estimated that the dam would generate US$100 to US$150 million in annual profits. A letter from the multinational corporation Odebrecht of Brazil stated that the company would not participate because of both the demonstrated local opposition to the dam and the global economic situation (Comer, 2009).

However, the government remains determined to construct the dam and expects the Inter-American Development Bank (IDB) to provide part of the US$350 to US$400 million initial investment (ibid). That process could be affected by other international organisations. President Colom received a letter from the United Nations Committee on the Elimination of Racial Discrimination (CERD) asking for an official response to complaints filed by a human rights group on three cases involving natural resources, including the Xalala dam project. The CERD committee cited the government's refusal to respect the outcome of the consulta and its support for large projects with negative social and environmental impacts as evidence of institutional racism (ibid).

Two years earlier, in July 2005, the non-indigenous communities of Rio Hondo voted strongly against the construction of three dams on the Colorado River by 2,735 out of 2,831 votes cast. Proposed by the mayor and municipal council, the referendum was conducted by the Supreme Electoral Tribunal (EDLC website, n.d.).

The US$100 million project had the support of the Guatemalan government, as well as national, Canadian and Italian corporations (Cevallos, 2006). Another dam on the Colorado, the Pasabien, operating since 2000, had caused poor water quality as well as occasional shortages, and had forced locals to purchase water from a Pepsi Cola plant (Botello, 2005).

One local resident, Delma Ardon, explained the vote against another dam: "We already have precedents of contamination and water shortage… Before the legislation did not allow us to have a consultation but now that they are giving us a chance to voice our opinion, this is what we think". She was referring to the 2002 Municipal code that was mandated by the 1996 Peace Accords under which

20% of the population must vote in the consultation for it to be considered valid where there is not an indigenous majority (ibid).

Referenda on dam projects in Costa Rica

The Pacuare dam, first proposed in 1996, drew the opposition of both indigenous and non-indigenous groups, including environmentalists, recreational users, and church leaders. A group called Friends of the Pacuare started a petition drive to demand a community referendum on the proposed dam (EDLC website, n.d.; InfoCostaRica, 2005).

The dam was proposed by Costa Rica's state-owned electric agency (ICE), the largest company in the country. It was opposed by the powerful ecotourism industry which argued that the river's corridor, heavily populated by exotic fauna, is first generation rainforest and should remain untouched. National Geographic had named the Pacuare one of the top 10 river trips in the world (Citizendia, n.d.).

The referendum was held in August 2005 and 97% of the 8,000 voters answered the question, "Do you agree with the Municipalidad of Turrialba granting construction permits to build hydroelectric plants on the Pacuare river"? with a resounding 'No'. Local indigenous people used a ballot in the Cabecar language (Froehling, 2005; EDLC website, n.d.).

The then leading presidential candidate Oscar Arias had supported the export of hydroelectric power for its economic benefits. The Friends of the Pacuare had sought the referendum in order to close off the legal avenues through which the Municipality or a new president could hypothetically award contracts to build the dam (Froehling, 2005).

The country's National Environmental Organisation (Setena) condemned the construction of the dam because ICE had not sufficiently analysed and reported on the environmental and social impact of the dam. Setena stated that ICE had not studied the downriver impact of sporadic water discharges and had made no effort to consult with the area's indigenous people. The Friends claimed that the Secretaria Técnica Nacional Ambiental's study of the potential environmental impact had led the Instituto Costarricense de Electricidad to cancel plans for construction of the dam but that did not preclude a future resurrection of another dam proposal (InfoCostaRica, 2005).

Less than three years later, in February 2008, the electrical authority proposed new plans to construct a dam on the Pacuare. Dam opponents again organised to submit draft statutes to the Legislative Assembly that would give the river a protected status that would preclude any dam construction. In addition, the government's failure to honour the results of the referendum was to be the basis for a legal challenge (EDLC website, n.d.).

Two smaller referenda on dams had preceded the Pacuare dam vote. Soon after the passage of statutes in Costa Rica that allowed community referenda on local issues, villages along the Sarapiqui river voted 2,036 to 218 in September 2000 to declare the entire drainage a Historic National Monument. Local indigenous people had already lost the natural flow of the river to eight dams. The use of the river for transportation had been severely curtailed and the fisheries upon which the locals depended for livelihood had been damaged (ibid). In 2001 4,639 referendum participants voted 93.3% against the construction of the Hidroverde dam on the Guacimo river in an election supervised by the Supreme Tribunal of Elections and held in 14 districts of the county (ibid).

CONCLUSION

In 2000 the World Commission on Dams stated that the foundation for its findings and recommendations was the "emerging global vision of equitable and sustainable development" (WCD, 2000). That vision and the Core Values were broadly embraced by many governments, institutions, and NGOs, despite disagreements on specific guidelines like FPIC. Ten years later, as the knowledge of the egregious impacts of some types of development has become widespread through the Internet, the vision is shared by many more citizens, but remains largely unimplemented with respect to

development projects by multinational corporations on the lands of indigenous peoples. The WCD's premise related directly to its appreciation of a rights-based approach to development that focused on risks as well as benefits (ibid).

Conflicts between governments and multinational corporations engaged in dam construction on one side, and indigenous and other local communities on the other, can be expected to increase as demands for water and energy continue to grow. Governments will continue to seek much-needed hydroelectric power, water for corporate agriculture, and tax revenues. Multinational development corporations engaged in dam construction and other activities will seek ever more venues and profits. And potentially affected indigenous communities, armed with more information on development impacts and the strategies to battle unwanted development, will become more effective defenders of their rights, cultures, environment and livelihoods.

The international right to free, prior and informed consent will play a critical role in these conflicts. Despite factors including national government claims of a monopoly on natural resource decision-making, the consensus of interests between governments and multinational corporations, and the violence, intimidation, and myriad human rights abuses suffered by opponents of traditional dam construction and extraction industry operations, it is clear that local communities will continue to refuse to remain silent in the face of unwanted, and often catastrophic, development. Local people will use demonstrations, blockades, marches and all the other well-developed tools of dissent. In addition, they now have recourse to a democratic and politically compelling means to formally register their opposition through community referenda. The cultural survival of hundreds of millions of indigenous peoples depends in large part on whether their right to consent to development that will change their existence is respected (IWGIA, 2007).

The right to free, prior and informed consent will become better known as a successful political and legal means to fight unwanted development. The tension between mere consultation and the measured consent or refusal of a majority of a local population cannot remain so long as the political difference is so great. The accepted international use of real 'consent' will win out eventually because 'consultation' is incapable of definition or measurement, has proven to be a highly corruptible 'process', and fails to grant any power to affected communities. The most difficult legal and political question is the consequence of a refusal to consent. As argued in this paper, the International Labour Organization and other international entities deny indigenous and other people the right to veto a proposed development project and thereby deprive them of an effective voice on an issue that directly affects their lives. Without the power to veto, indigenous communities will be denied the only important negotiating authority – the right to say 'No' and walk away. Consent must mean what it says. Daniel Pasqual, the director of the Committee for Peasant Union, a Guatemalan indigenous organisation, summed up the importance of community referenda, identified this primary issue, and warned of the consequences of the state's failure to implement the right to FPIC:

> We believe that community consultations [referenda][17] are the use of reason, the use of a people's word of honour, and a direct manifestation of local peoples' rejection of the plunder of their territory. When the State does not recognise such consultations [referenda] as binding, it only leaves the path to widespread disobedience. And such actions only precede other struggles, other uprisings, which are not going to be pacific. We are here to warn: the people are tired of declarations, tired of having their community consultations ignored, tired of dysfunctional dialogue roundtables and high level commissions (Rodriguez, 2008).

No government is likely to willingly give up its authority over natural resources, but there are developments in international law that could make it far more difficult for such governments to refuse to recognise the outcome of community referenda. It is highly probable that more international entities

[17] 'Consultations' in this context refers to 'consultas popular' in Spanish, which is translated as 'referenda', the English term employed in this article.

will recognise FPIC. Further, the political use of community referenda as an exercise of the right to FPIC will continue to grow rapidly as its effectiveness is further demonstrated and activists find legal authority for them in their country's constitutions and laws. The new Declaration on the Rights of Indigenous Peoples sets out rights and standards that will be impossible to ignore, and courts, as institutions that seek to clarify standards and principles in their application to particular cases, might specifically recognise community referenda as vehicles for determining both lack of consent and the future of a proposed development project.[18]

Just such a case has started its way through the judicial process in a widely respected forum. The indigenous people of Sipicapa, Guatemala, who voted overwhelmingly against a mining project in a formal referendum, have appealed the decision of the Constitutional Court of Guatemala, which recognised that their referendum was allowable under existing law but undercut its legal significance by ruling that the Ministry of Mines and Energy retained exclusive authority over the disposition of natural resources (Caso Sipicapa, 2007). The decision thus renders the referendum a mere opinion poll and grants no rights to the community to affect the decision of the ministry. The appeal has been filed with the Inter-American Commission on Human Rights.[19]

There is good reason, based on two previous cases cited in this paper, to hope for a positive outcome for the appeal. In the case involving the indigenous people of Nicaragua, the Inter-American Court of Human Rights held that a timbre concession had to be cancelled because the state had failed to demarcate indigenous lands and confer title and had not obtained the consent of the people (Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001). In a similar case in 2005, the Court ruled that Belize had also failed to demarcate indigenous lands before granting a concession to a multinational oil corporation and must obtain the 'informed consent' of the Maya people before any development on their lands (Case of Maya Indigenous Communities of the Toledo District v. Belize, 2005).

Thus the issue of consent, already recognised by the Court, could well run head on into the claimed state monopoly on resource decision-making in the Sipicapa case. In keeping with precedent, the Court cannot allow that monopoly to continue in the face of a refusal by an indigenous community to consent to a resource extraction project. The question then becomes how to determine or quantify consent. The one proven means of discovering the sentiment of a community, and implementing a critical element of the international right to free, prior, and informed consent, is a formal, democratic election – the community referendum.

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[18] Human rights enforcement mechanisms also have the ability to take immediate action to stop development projects that have commenced in violation of participation rights. Construction work on the Chan-75 dam in Panama, which began two years ago with the bulldozing of farms and houses, has been the subject of a precautionary measure adopted by the Inter-American Commission on Human Rights that ordered the government to immediately halt all action on three dams. The order, issued on 18 June 2009 at the request of the Ngobe indigenous communities, also requests that Panama "guarantee the free circulation as well as the life and physical integrity" of community members. The Ngobe allege rights violations, including the refusal to allow meaningful participation in the planning of the dams (Ngobe Indigenous Communities et al., v. Panama, 2009). The local people had been the subject of "beatings, arrests, and even paramilitary attacks" (Root Force, 2009).

[19] See Paley, 2008. The article states that the appeal was to the Inter-American Court of Human Rights but all such appeals are first considered by the Inter-American Commission on Human Rights.

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