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Date: May 23, 2023

To: Women's Earth & Climate Action Network – WECAN International

From: Camila Jimenez
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Re: **Analysis regarding Colombian laws from the perspective of international legal standards applicable to free, prior and Informed consent**

1. Introduction

As a development of the Colombian Political Constitution, the Colombian legal framework provides that prior consultation is a fundamental right of ethnic groups (Indigenous and Afro-descendant peoples). The right to prior consultation allows ethnic communities to participate in decisions (either legislative or administrative) that affect these communities and works, projects and activities developed in their territories.

Since the issuance of the constitutional reform in 1991 and Colombia's ratification of the International Labor Organization Convention 169 ("ILO Convention 169"), the fundamental right to prior consultation has been under development in order to protect and ensure the subsistence of the cultures of Indigenous peoples.

In August 2022, the first-leftist candidate Gustavo Petro, was elected president of Colombia. Two of his main proposals, which have triggered significant uncertainty, have been related to the tax reform and restrictions associated with the extractive industry. With respect to the first of these, the new government proposed a tax reform that would increase collection (about 1.8% of the GDP), which has given rise to concern considering the high inflation during the last months. The second decision is related to some statements associated with certain prohibitions/restrictions about the development of extractive projects in Colombia as well as the tax increase on companies in the financial sector, extractive industries, unhealthy foods, among others.

So far, there have been no regulatory or formal modifications by the current Colombian government in terms of prior consultation. However, in the national development plan (which must be approved by Congress), prior consultation is established as a fundamental pillar of the current government framework and it is indicated that this right will be strengthened. Likewise, this government has strongly supported the Escazú Agreement, which could broaden the scope of prior consultation.

In Colombia, the Escazú Agreement is currently under review by the Constitutional Court, given that the law that approved this agreement requires a constitutional ruling before its entry into force.

If declared constitutional, the new government would have to tackle the implementation of the Escazú Agreement in a way that does not negatively affect the economic development, while also guaranteeing the fundamental right to participation.

2. Executive Summary

2.1 Has the country ratified ILO Convention 169?

Yes. Colombia ratified ILO Convention 169 by means of Law 21, 1991. ILO Convention 169 is a fundamental cornerstone of FPIC in Colombia.

2.2 Does the country have any domestic laws and/or regulations regarding FPIC?

Colombia does not have a statutory law specifically regulating prior consultation. However, the normative framework surrounding the constitution and the constitution itself establish principles that shape this right.

According to the Ministry of the Interior (the authority on prior consultation matters), FPIC's Colombian normative framework can be seen fundamentally in three articles of the Political Constitution:

> *"Based on Article 1 of the Political Charter, which states that Colombia is a pluralist State, Article 2, which guarantees participation, and Article 7, which establishes that ethnic and cultural diversity shall be recognized and protected, the fundamental right to prior consultation is born."*

With this constitutional basis, the Colombian State has understood prior consultation: (i) as a fundamental right of ethnic communities, and (ii) as an obligation of public entities when making administrative decisions or issuing regulations. This has been stated through Law 1437 of 2011, in its Article 46, which is one of the examples of some of the existing isolated legal stipulations of this right.

Taking into account the above, it is not the law itself that has developed the FPIC right in Colombia. Today we have ample case law that regulates the right to prior consultation based on the principles established by the constitution and some legal provisions that seek to guarantee this right even though they do not fully develop it.

Thus, in Colombia, prior consultation is considered a fundamental right, that is, a right that is treated as a "priority" and which is to be guaranteed to the greatest extent possible. Furthermore, prior consultation is also considered an obligation for public entities that make administrative decisions or issue regulations, under penalty of rendering their decision invalid.

2.3 If yes, how do the laws and/or regulations meet FPIC's standards and requirements under the relevant international legal instruments? What are the specific elements required to comply with FPIC under the domestic law's consultation requirements? Who (governments, private businesses, financial institutions, NGOs) is covered by the laws?

As previously established, the Colombian government has not issued a law on this issue. However, case law has defined steps required to comply with FPIC.

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According to judgment SU 123 of 2018 issued by the Constitutional Court ("**Judgment SU-123**"), which brings together the principles established in previous judgments, the aspects to be taken into account to understand the prior consultation are: effectiveness, equality, flexibility, impact and proportionality.

2.4 Do the laws provide for a right to veto under any circumstances or is the right limited?

In the Colombian legal system, prior consent does not grant the communities a veto right. This means that, if no agreement is reached after the prior consultation, the project may continue to be developed in exceptional cases where the decision to continue with the project, despite the refusal of the specific community, is more beneficial to the general interest. This justification is called the proportionality test (see section 3.4).

Of course, in these scenarios there must be a very clear justification as to why the project was continued despite the refusal of the community.

In Judgment SU-123, it is recalled that, in order for a determined project to continue to be implemented in a situation of disagreement, the decision to continue the project must: (i) be devoid of arbitrariness and authoritarianism, (ii) be based on criteria of reasonableness, proportionality and objectivity with respect to the duty of recognition and protection of the ethnic and cultural diversity of the Nation; (iii) take into consideration, to the extent possible, the positions expressed by the parties, especially the ethnic people, during the consultation; (iv) respect the substantive rights recognized in ILO Convention 169; and (v) provide effective, suitable and efficient mechanisms to mitigate the negative effects of the measure.

In summary, the Colombian government considers it of utmost importance to respect prior consultation and seeks the ideal scenario to reach an agreement with the communities on its projects. However, it also recognizes the possibility of continuing and/or developing projects on which there was no agreement, even when prior consultation was carried out as required by law.

It is important to clarify that although there is no right of veto, this does not entitle any public or private entity to omit prior consultation as a requirement for a project. The analysis presented above and to be developed in section 3.4 refers to the situation when a consultation is carried out in accordance with the requirements of the law, but an agreement is not reached with the community.

2.5 Is there a government ministry or agency responsible for ensuring compliance with the domestic laws and/or regulations? Have any guidance documents on FPIC been issued by that entity?

(a) Yes, the Directorate for Prior Consultation of the Ministry of the Interior is the entity in charge of stating whether or not prior consultation must be conducted, following

up on compliance with the agreements and verifying if all consultation requirements have been fully complied with. [1]

(b) Likewise, since prior consultation is a fundamental right, Colombia has a very effective judicial protection mechanism that has been widely used in prior consultations, and that is the *tutela* action (constitutional protection action for fundamental rights). The tutela is an action through which a judge can be informed of the non-compliance with any requirement of the consultation, the failure to carry out the consultation, among other things. The judge must rule in first instance within 10 days and their order must be complied with within 48 hours at the most., Therefore, it is a very important means for the protection of the right.

3. Legal Analysis

3.1 International and National applicable legislation

Colombia ratified ILO Convention 169 by means of Law 21, of 1991. ILO Convention 169 is a fundamental cornerstone of FPIC in Colombia. Today this agreement is treated as a national law and is part of the block of constitutionality, which means that it has a primary position in the regulatory hierarchy. This agreement has been the basis of the case law for prior consultation, which makes it one of the main references for the development and guarantee of this right in the country.

Likewise, the Escazú Agreement is currently under constitutional review. If approved, this could mean a strengthening of prior consultation (due to the emphasis the agreement places on the communities' right to participate) as well as a broadening of the spectrum of free, prior and informed consent. This is taking into account that the agreement does not refer exclusively to the participation of Indigenous peoples, but to the nation in general.

3.2 Domestic laws and/or regulations applicable to FPIC´s

Although the Colombian government has not yet issued a statutory law regulating prior consultation, certain legal provisions and case law have been relevant in establishing how the competent entities and operators (title holders) must guarantee the fundamental right to prior consultation in accordance with the Colombian Constitution.

The current regulatory framework applicable to prior consultation can be seen fundamentally in the following articles of the Colombian Political Constitution:

(a) Article 1 of the Political Charter, which states that Colombia is a pluralist State;

(b) Article 2, which guarantees public participation;

[1] Guide issued by the Ministry of the Interior https://www.mininterior.gov.co/wp-content/uploads/2022/09/1._guia_para_ejecutores_proceso_de_consulta_previa_para_instrumentos_ambientales.pdf

(c) Article 7, which establishes that ethnic and cultural diversity shall be recognized and protected.

Also, the Escazú Agreement is under constitutional approval and, as a country party to the ILO Convention 169, Colombia has committed to guarantee the free participation of ethnic communities on matters which may affect them.

In addition to the constitutionand international agreements that are part of the constitutional block, the right to prior consultation can be found in presidential directives. The directives are part of the regulatory power of the president, which seeks to develop the necessary details to implement a law.

In this case, the Colombian government has issued certain presidential directives with the purpose of providing guidance on the process to be followed during the prior consultation with ethnic communities. Therefore, the procedural details of prior consultation were defined based on the rights established in the constitution.

Thus, it is important to understand that although the presidential directives do not have the rank of law, they are legally binding.

Currently, Directive No. 8 of 2020 is in force, which modified the prior consultation procedure. This presidential directive establishes new stages for the consultation and requires a more rigorous concept of direct impact, giving the DANCP (the National Authority for Prior Consultation of the Ministry of the Interior) the responsibility of issuing an administrative act stating whether or not this impact exists. Likewise, the directive implements the proportionality test in the events of (i) non-agreement, (ii) non-attendance of the authority and (iii) lack of resolution of the conflict of representativeness in the ethnic community, which is established in order to prevent and mitigate the direct impact that may occur in these scenarios.

The new stages for prior consultation are:

(A) Determination of the applicability of prior consultation: stage in which it is determined whether prior consultation is required due to the concept of direct impact.

(B) Pre-consultation: prior dialogue with the community authorities to define the methodological route (logistical aspects).

(C) Prior consultation: dialogue between the State, the entity promoting or executing the project and the ethnic communities, so that the authority ensures compliance with the duty to guarantee real, timely and effective participation in the project's decision making process.

(D) Monitoring of agreements: to ensure compliance with the measures.

3.3 Relevant authority and *tutela* action

(a) Relevant authority

The Ministry of the Interior is the authority in charge of the prior consultation procedures in Colombia..

By means of Decree 2353 of 2019, a special division of the Ministry of the Interior was created. This division was named Directorate of the National Authority for Prior Consultation and assumed all the functions of the ministry in matters of prior consultation. Therefore, the directorate is in charge of certifying the existence or not of Indigenous communities in a given territory and is in charge of issuing an administrative act stating whether or not prior consultation is required due to the possible direct impact on ethnic communities. In addition to the functions previously mentioned, the Decree assigns the following functions to the directorate:

(i) To impart guidelines for the determination of the appropriateness of prior consultation for the issuance of legislative or administrative measures or the execution of projects, works or activities, which may directly impact ethnic communities.

(ii) To lead, direct and coordinate the exercise of the right to prior consultation, through adequate procedures, guaranteeing the participation of the communities through their representative institutions, in order to protect their ethnic and cultural integrity.

(iii) To adopt the criteria for providing training, advice and technical assistance on prior consultation, to direct the consolidation, updating and custody of information on the processes of prior consultation, as well as to promote knowledge and dissemination of the same and their legal framework.

(b) Tutela action

The tutela action is a mechanism established by the Colombian Political Constitution, by means of which any person may have access to justice for the protection of their rights in an immediate manner. The ruling must be issued within 10 days, which makes it an extremely effective and fast means for the defense of fundamental rights.

The Constitutional Court has established in multiple rulings that this is the ideal means to protect the fundamental right to prior consultation, not only when this procedure is not complied with prior to the development of the project, but also when the agreements established by the consultation are not complied with afterwards.

Tutela action has been widely used for the protection of the prior consultation right and it has been clear for the Indigenous communities and their authorities that through this mechanism they will obtain a quick and effective response to their rights.

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3.4 FPIC Rules. Definition and application in Colombia

In the absence of a statutory law, the definition of FPIC in Colombia has been established by the Constitutional Court by means of the Judgment SU-123, in the following terms:

> "*The fundamental right to prior consultation is based on the defense of Indigenous and tribal communities and the elimination of the historical exclusions they have suffered. It establishes a model of governance, in which participation is an indispensable prerequisite for guaranteeing the other rights and interests of the communities, such as cultural integrity, self-determination, territory, and the use of natural resources, etc., which is why it is inalienable and implies obligations for both the State and private parties. This right implies that Indigenous and tribal communities must be consulted on any decision that directly affects them, so that they can express their opinion on the form and reasons on which a certain measure is based, since it clearly affects or will affect their lives*."

According to Judgment SU 123, which brings together the principles established in previous judgments, the aspects to be taken into account to understand the prior consultation are:

(a) **Effectiveness**: Prior consultation seeks to ensure that the participation of Indigenous or Afro-descendant communities is effective, which means that a simple notification or notice is not enough. Prior consultation seeks to ensure that the communities can have a direct influence on the decision.

(b) **Equality**: The Constitutional Court has established that prior consultation must be carried out on the basis of equality of the parties, which means that neither the Indigenous communities have the power to veto the decisions of the State, nor the State can make decisions that directly affect them in an arbitrary manner.

(c) **Flexibility**: Prior consultation must adapt to the needs of each issue, without this being disregarded with the simple allusion to the general interest, since the diversity of Indigenous peoples and Afro-descendant communities must be taken into account.

(d) **Theory of direct impact**: Prior consultation must be carried out when the communities may be directly affected. As this is a very wide concept, the Constitutional Court has established that direct impact is considered to be *"the positive or negative impact that a measure may have on the social, economic, environmental or cultural conditions that constitute the basis of the social cohesion of a given ethnic community*." Prior consultation is appropriate when there is reasonable evidence that a measure is likely to directly affect Indigenous people or Afro-descendant community.

There is a direct impact on the social, economic, environmental or cultural conditions that constitute the basis of the social cohesion of certain ethnic community when:

(i) the social, spiritual, cultural, health and occupational structures are disturbed;

(ii) there is an impact on the sources of livelihood located within the territory of the ethnic minority;

(iii) a resettlement of the community in another place different from its territory is necessary to perform certain project.

Likewise, according to Judgment SU-123, prior consultation is also required when:

(i) a policy, plan or project affects any of the rights of Indigenous or tribal peoples;

(ii) the measure is aimed at implementing ILO Convention 169;

(iii) burdens are imposed or benefits are attributed to a community in such a way as to modify its legal situation or position;

(iv) interference in the defining elements of the identity or culture;

(v) interference in the identity or culture of the people concerned;

(vi) when the measure is aimed at implementing ILO Convention 169.

(e) **Proportionality**: The participation of the communities will depend on the "size" of the impact, i.e., there is always a right to participate, however, depending on the intensity of the impact, participation will change:

> *"In all cases, there is a certain right of participation of Indigenous peoples regardless of the impact, as a manifestation of the right to participation, but, in accordance with the principle of proportionality, international human rights law and constitutional jurisprudence have understood that the types of participation are diverse."*

Notwithstanding the above, it is necessary to take into account that the Colombian regulation does not provide for a right to veto. As explained, the Judgment SU-123 and Presidential Directive 8 of 2020 establish non-agreement scenarios, which demonstrates that the Colombian legal system does not grant communities a veto right, since project implementation scenarios are foreseen even when there is no agreement with the communities.

However, taking into account that prior consultation is considered a fundamental right, the State seeks to protect it to the greatest extent possible and therefore, the implementation of a project in the scenario of a disagreement implies a proportionality test.

The proportionality test consists of the justification that the project must be carried out even in spite of not having reached an agreement with the community, which must be based on the supremacy of the general interest:

"that it is a necessary measure to safeguard an interest of higher hierarchy and that it is the least burdensome measure for the autonomy recognized to the ethnic communities."[2]

Additionally, whoever is in charge of implementing the project must demonstrate that they considered the proposals made by the communities and that the disagreement did not derive from their arbitrariness or some form of authoritarianism, as well as that the person in charge (whether public or private entity) of the project made every effort to guarantee the rights of the ethnic group in matters of prior consultation.

In the same way, other mechanisms must be proposed to guarantee the rights of the community (especially the rights to life and personal integrity, to the free development of personality, to security and health) and to continue preserving ethnic and cultural diversity, while giving priority to the general interest.

In summary, the Constitutional Court has established that in case of disagreement, the decision must meet the following requirements: *"(i) is devoid of arbitrariness and authoritarianism, (ii) is based on criteria of reasonableness, proportionality and objectivity with respect to the duty to recognize and protect the ethnic and cultural diversity of the Nation; (iii) takes into consideration, to the extent possible, the positions expressed by the parties, and especially the ethnic people, during the consultation; (iv) respects the substantive rights recognized in ILO Convention 169; and (v) provides for effective, suitable and efficient mechanisms to mitigate the negative effects of the measure.*"

Recently, the Colombian Council of State (supreme authority of the administrative law matters) ruled[3] that certain articles of a presidential directive regarding prior consultation issued in 2010 (currently replaced by Presidential Directive 8 of 2020) were null and void because the administrative authority exceeded its powers and also because certain articles required a prior consultation. This judgment may cause impacts in the current regulation of prior consultation in Colombia.

3.5 Prior Consultation vs FPIC

The Colombian Constitutional Court has recognized and applied rules on the difference between prior consultation and FPIC as follows:

	Prior consultation	FPIC
Concept	Is the right granted to the ethnic communities to be consulted about legislative or administrative measures, which directly affect them. It is a dialogue instrument between	It is a right granted to the ethnic communities when the implementation of a certain measure (legislative or administrative) which directly affects them, requires their prior, free and informed consent.

[2] Judgment SU-123

[3] Colombian Council of State *(Consejo de Estado)*. Judgment number 11001-03-24-000-2012-00025-00 of November 24, 2022.

	the ethnic communities, government, society and project agents.	
Purpose	A genuine effort to achieve an agreement with ethnic communities with respect to measures which directly affect them, and obtain their consent.	To guarantee the fundamental rights and subsistence (physical and cultural) of the diverse ethnic communities.
Players involved	Ancestral authority, representatives of the competent authorities as well as the project agent.	Ancestral authority, representatives of the competent authorities as well as the project agent.
Minimum criteria	Good faith, active participation, open dialogue, flexible and proper participation procedure.	Good faith, active participation, open dialogue, flexible and proper participation procedure.
Activation measures	Administrative and legislative measures which directly affect an ethnic community.	Is triggered when the following situations are met: (i) resettlement; (ii) measures which imply a high social, cultural and environmental impact which puts at risk its subsistence; (iii) storage or disposal of toxic waste/substances in their territories
Enforceability of the decision	If an agreement is reached, the government and projectagent have the obligation to comply with such agreement. If there is no agreement, the government can adopt the measure provided that its decision: (i) is not arbitrary; (ii) is based on the principles of reasonability; proportionality; impartiality, with respect to the duty of recognition and protection of the ethnic communities as diverse and cultural groups; (iii) take into consideration to the maximum possible the opinions provided by the parties, specially the ethnic community, during the consultation; (iv) respects the substantive rights recognized in the ILO Convention 169; v) establish mechanisms to mitigate the negative effects of the measure.	The government can only implement the measure, in theory, if obtains the prior, free and informed consent of the ethnic community. The approval of the community is, in theory, enforceable, since, without it, the implementation of the measure would violate a fundamental right. Only in exceptional cases, the measure can be implemented without the consent of the communities, but the government must, to maximum extent, guarantee the fundamental rights and subsistence (physical and cultural) of the ethnic communities and must compensate them as a result of the implemented measure.

Note that, with the ratification of the Escazú Agreement, it is very likely that the scope of prior consultation will be extended beyond ethnic communities. This will depend on how the government regulates the Escazú Agreement within domestic regulations.

3.6 Indigenous/customary laws (explain here if Indigenous territory has sovereignty or not)

There is sovereignty over Indigenous territory. The Constitutional Court has recognized the importance of the territory for Indigenous communities, and identified the connection between territory and Indigenous people as a pillar of Indigenous identity and culture. Therefore, everything that affects Indigenous territory is subject to prior consultation.

The court has also established a particular notion of property for Indigenous communities, taking into account that land is not only a material possession for these specific communities but a cultural, spiritual and complex connection:

> "*The territory is linked to the concept of direct impact and consequently to the application of prior consultation. There is no doubt or dispute about the rule specified. The difficulty of application is because the notion of ethnic territory goes beyond a formally demarcated physical space, such as a resguardo, and is linked to cultural, ancestral and spiritual elements (article 14 of ILO Convention 169)*".

Likewise, it is considered that the communities DO have property rights, however this is not perceived in the traditional way:

> "T*he ownership of this right arises from the occupation of a given space by the ethnic minority and not from the formalization of the property right recognized by the administration, such as a registry. Traditional possession replaces the title granted by the State. The cultural vision of possession and occupation of land does not correspond to the western concept of property, since it has a collective and cultural significance, which deserves to be safeguarded, in accordance with Article 21 of the American Convention*".

In conclusion, although Indigenous peoples are not considered titleholders in the same sense of the civil code (land property), they do have ownership and some sort of sovereignty over their territories and any affectation to this territory must be protected by the State.

In matters of prior consultation, it is important to consider that the Colombian State does not only guarantee this fundamental right in the territory itself, so it is not applicable only to the lands that the Indigenous people consider their own. Case-law has established that the consent of the communities must be requested when the project affects the area of influence of the community, that is, the area where the community carries out its daily life, where its religious and cultural activities are developed, which demonstrate a link between the community and that area.

This particular issue has been identified as a criterion of difficult determination, since it is not fully developed in the law and depends, to a certain extent, on the criteria of the National Authority for Prior Consultation.

4. Domestic legal cases regarding compliance with FPIC in Colombia

(a) SU-039-1997: This is the first judgment in which the characteristics of prior consultation are discussed. The particular case deals with an environmental permitting process, in which the Ministry of the Environment did not properly comply with the requirement of prior consultation. The Ministry issued the environmental permit after simply holding a meeting with some representatives of the U'wa Indigenous community, located in the departments of Boyacá, Norte de Santander, Santander, Arauca and Casanare. Taking this into account, the People's Defender (*defensor del pueblo*) filed a *tutela action* aiming to protect the right of prior consultation and the dismissal of the issued permit. In this ruling the Constitutional Court established that the meetings with the community could not be equated to prior consultation and that the environmental permit was irregularly issued.

(b) SU 383-2003: The Organization of Indigenous Peoples of the Colombian Amazon (OPIAC) filed a lawsuit arguing against the fumigation of legal and illegal crops in the Amazonian territory, which was justified in the eradication of narcotics. In this case the Court established that the State must comply with the prior consultation procedure despite its international commitments. This means that the international commitment to eradicate illicit crops is not a justification for bypassing the prior consultation process. In this ruling, the Constitutional Court reiterates that the *tutela action* is the ideal mechanism for the defense of the right to prior consultation.

(c) SU-097-2017: In this ruling, the issue is the implementation of a program for the recovery of San Andres culture. The Indigenous people allege that their criteria regarding how the program should be developed were not taken into account when the project itself sought to strengthen their own culture. In this case, the Constitutional Court states that prior consultation is a mandatory fundamental right for any project that may affect communities' culture directly. The Court also states that "*the autonomy of Indigenous and tribal peoples, respect for cultural difference, the defense of territories and participation are all important for its interpretation*".

5. Conclusions

5.1 As a development of the Colombian Political Constitution, the Colombian legal framework provides that prior consultation is a fundamental right of ethnic groups (Indigenous and Afro-descendant peoples). The right to prior consultation allows ethnic communities to participate in the decisions (either legislative or administrative) that affect these communities, and works, projects and activities developed in their territories.

5.2 Colombia has a strong protection for Indigenous and other marginalized communities in matters of prior consultation, as it seeks to guarantee their consent as a fundamental right and as such, has multiple requirements and means to protect it.

5.3 Judges and the Constitutional Court have been very strict in protecting this right, trying to maximize its effectiveness. Additionally, since there are no laws of any kind, the rules of prior consultation have been given by means of jurisprudence, which makes them evolve very quickly and according to the changes in society.

5.4 Prior consultation in Colombia is: (i) a fundamental right of ethnic communities; and (ii) an obligation of public entities when making administrative decisions or issuing regulations. This has been stated through Law 1437 of 2011, in Article 46, which is one of the examples of some of the existing isolated legal stipulations of this right.

5.5 The tutela action has been ratified by the Constitutional Court as a means to defend the right to prior consultation through a fast and effective legal mechanism. The tutela action is an action established in the constitution that seeks to protect fundamental rights in the shortest time possible.

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