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Indigenous Peoples and International Law in the Ecuadorian Amazon

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Abstract: The adoption and ratification of new conventions and treaties under international law designed to protect both Indigenous peoples and the rights of nature have resulted in successful rulings by local, federal, and regional courts in favor of Indigenous groups engaged in class-action suits against their governments. In 2012 and 2019, respectively, the Sarayaku Kichwa and the Huaorani and Cofán peoples of the Ecuadorian Amazon won cases against the Ecuadorian government for its lack of consultation on planned oil exploration. Such cases upholding the correct application of the right to Free, Prior, and Informed Consent (FPIC) under international treaties are rare; more often, Western judicial systems and environmental impact assessments have been used to serve corporate interests, as exemplified by the *Aguinda v. Texaco* case initiated in 1993 and the planned operations of Andes Petroleum in Orellana province 2019–2020, respectively. Indigenous and non-Western epistemologies tend to be incompatible with state-driven liberal secular capitalism—hence Indigenous efforts to prevent land seizures and the expansion of the extractive frontier into Indigenous territories in the Amazon rainforest have been undermined by the imperatives of modernization/developmentalism. These same forces have stimulated demand for gold, the legal and illegal mining of which, along the Napo river, have caused the contamination of the waters of the Amazon, threatening the health of Indigenous and non-indigenous riverine communities.

Keywords: Indigenous peoples; international law; UNDRIP; self-determination; culture; sovereignty; land; natural resources

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1. Introduction

Indigenous peoples[1] have achieved historic victories in securing their rights over the last 30 years at the international level, with the adoption of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007 and through successful campaigns at state level to re-gain control of territories. This has become evident from the annual conference of the United Nations Permanent Forum on Indigenous Issues (UNPFII) held at the United Nations Secretariat, wherein laws pertaining to free, prior and informed consent (FPIC) have been presented as fundamental to secure Indigenous self-determination and cultural survival. At the ground level, on the frontline of conflicts between Indigenous communities and state forces, however, a different story emerges of divisions among and within Indigenous communities, accompanied by threats and violence, as well as the

[1] "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system" (United Nations PFII/2004/WS.1/3). With regard to Ecuadorian indigenous communities, it should be noted that they defend the rights of Ecuadorians of African descent, with whom they engage in alliances. Special legal status equal to that of indigenous peoples has been granted to peoples of African descent in the Americas. They have succeeded in securing those rights in the international courts, including those of the 55,000 "maroon" Afro-descendant Saramakan people of Suriname at the Inter-American Court of Human Rights in 2007 (IACtHR).

repression and imprisonment of Indigenous environment defenders (Global Witness 2021). Using concrete examples of past and present struggles of Indigenous communities in the Ecuadorian Amazon region to protect their cultures, lives, and livelihoods, this article examines the ways in which global market forces and consumer demand, combined with state and individual interest, affect state policy and local government decision-making to the detriment of Indigenous wellbeing, in violation of the purported norms of international law.

The victory of the A'i Cofán Sinangoe people in the Constitutional Court of Ecuador against the Ecuadorian government on 4 February 2022 (Brown 2022; Einhorn 2022), through which they achieved the right of veto against the extraction of minerals on their territory, was a step forward in achieving the implementation of Indigenous peoples' rights under law in the Amazon region. The Cofán of Sinangoe live along the banks of the Aguarico river, a tributary of the Amazon in Sucumbíos province.

The Court decision was hailed as a victory for Indigenous peoples (IPs) throughout the continent, as it was believed to have overruled ambiguities in the phrasing and execution of rights established under ILO Convention 169 of 1989 and the UNDRIP of 2007. These ambiguities are reflected in the Ecuadorian Constitution, which gives rights to Indigenous peoples but, notably, with the proviso that national security is not endangered by the granting of those rights.

The 2022 ruling by the Ecuadorian Constitutional Court conforms to articles under the American Declaration on the Rights of Indigenous Peoples of 2016, clauses of the Ecuadorian Constitution of 2008, as well as with the Ecuadorian government's adoption and ratification of international treaties and conventions that protect Indigenous peoples' rights. It has given hope to Indigenous communities throughout the Amazon region who are engaged in existential struggles to protect Indigenous nations and the environment from damage caused by the activities of industries in logging, mining, agri-business, and fossil fuel extraction. The intimidation and displacement of Indigenous peoples who are stewards of rainforests and wild places across the planet leave those areas more vulnerable to external forces that threaten their survival and which endanger biodiversity and entire ecosystems.

Indigenous peoples in the Andes and the Amazon in Abya Yala (the South American continent) have been struggling to uphold their rights to their lives, lands, and territories for more than 500 years. Under Spanish rule, Ecuadorian Andean and Amazonian peoples suffered expropriation of their land, exploitation, and attempts at genocide, against which they used tactics, such as violent resistance, flight, and various degrees of compliance (Newson 1995; Becker 2008). Under the Spanish crown, Indigenous peoples did enjoy protection under colonial law but as there was little surveillance, this remained largely nominal. Some isolated communities were able to practice the art of not being governed (Scott 2009), and a few small groups have been able to keep themselves isolated through into the twenty-first century. Generally, however, after the independence of the Spanish colonies in the early nineteenth century, conditions worsened when previously marginalized communities and those still attempting to live in voluntary isolation were gradually incorporated as citizens (Wearne 1996), a process that withdrew land rights at the same time as drawing them into the jurisdiction of a modernizing state within a positivist teleological worldview of bounded sovereign nations that was alien to them (Al Kassimi 2021).

Even before the independence of the Spanish colonies, the Indigenous peoples of Abya Yala were regarded as being under the jurisdiction of "international" law; indeed, "international" law had been created precisely to justify the conquest and colonization of the Americas by Europeans in the early sixteenth century (Blanco and Delgado 2019). Once it had been established by the Catholic juridical theorists that Amerindians were to be considered humans capable of rational thought, international law, which they did not play a part in constructing, could be applied to them, regardless of their beliefs and customs. At the same time, while designated as human, Amerindians had to be portrayed by Europeans as being different and inferior, first as pagans to be converted to Christianity and later as pre-modern barbarians to be "civilized" (Al Kassimi 2021). The concept of modernity itself is predicated upon colonization. Mignolo argues that modernity and coloniality are

co-constitutive: "[M]odernity" is a European narrative, but the historical events that sustain [it] are not only constituted by the internal history of Europe but of Europe and its colonial world since 1500" (Mignolo 2010, p. 12).

In terms of Amazonian Indigenous traditions, cultures and epistemologies, the delineation of boundaries and territories under the Westphalian nation-state system was alien to them, as were individual property rights and individual modes of production. For many Indigenous communities in Ecuador, however, even from the early sixteenth century, choices were not available to them: some accommodation with the colonizers was unavoidable. By the twenty-first century, moreover, strategic integration into the global economy and polity was the wisest move for many communities: a trade-off in terms of costs and benefits. This was partly due to the gradual shift that had occurred through the last quarter of the twentieth century that made integration into the Westphalian state system more conducive to their interests, as will be seen in the following section.

In the 1960s, oil drilling began in the Ecuadorian Amazon that caused disruption to the lives and cultures of Indigenous communities living in isolation, among whom were small communities of the hunter–gatherer Huaorani, who were forced into settlements (Rival 2016). From 1972 to 1992, during Texaco's involvement in the country, more than 16 million gallons of oil were spilled in the Northern Ecuadorian Amazonian province of Sucumbíos, poisoning the rivers upon which humans and animals depended for sustenance. Among the 30,000 people affected were the Indigenous Kichwa, Secoya, Huaorani, Kofán (Cofán), and Siona, some of whom became engaged in the class-action lawsuit against the oil company Texaco, which had been bought out by Chevron in 2001 (*Aguinda v. Texaco* [1993] 850 F Supp. 282 (S.D.N.Y 1994), *Aguinda v. Texaco Inc* 2002, 303 F.3d 470 (2d Cir 2002) (Kimerling 2006, p. 476).

In the case of the oil exploration of the 1960s, the failure to consult local Indigenous groups affected by oil exploration and extraction was already in contravention of International Labour Organization (ILO) Convention 107 of 1957 1(1), whereby (article 4):

"States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

Even at that time, although the right of Indigenous peoples to veto government plans for extraction was implied by this Convention, in the case of the Huaorani in the 1960s, and subsequent encounters with Indigenous communities in the expansion of the oil frontier in Ecuador, the health, wellbeing, and survival of the local Indigenous and non-indigenous people affected by these extractive activities had been disregarded. In 1972, the Ecuadorian government had passed legislation to protect the environment, in view of the oil exploration and drilling that was already taking place, but this too appears not to have been applied (Etchart 2022). The implications of the outcome of the *Aguinda v. Texaco* case for the potential future prosecutions of multinational companies will be discussed later.

It was during the period of the Texaco oil spill, from the early 1970s, that, within the United Nations, Indigenous representatives worked to create the United Nations Working Group on Indigenous Peoples, finally constituted in 1982, the purpose of which was to draft articles of international law to protect Indigenous peoples' rights. Finally, after more than 20 years of negotiations, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted in 2007, leading to the subsequent emergence of a discrete body of law around IP human rights. UNDRIP was based around the ILO Convention 169 of 1989, which itself had reinforced ILO Convention 107. ILO Convention 169 differed significantly from ILO Convention 107 of 1957, in that it omitted references to the assimilation of Indigenous peoples into the wider society.

This gave Indigenous peoples the option of staying outside of modernity, that is, the right not to be governed.

In this regard, the subsequent American Declaration on the Rights of Indigenous Peoples of 2016 of the Organization of American States went further than the UNDRIP: it stated that Indigenous peoples have a right to live in harmony with nature and established the right of Indigenous peoples to live in voluntary isolation and to be protected in that isolation. The relevant elements of the American Declaration on the Rights of Indigenous Peoples are encapsulated in the following excerpts:

Section ONE: Indigenous Peoples. Scope of application
Article I.

2. Self-identification as indigenous peoples will be a fundamental criteria for determining to whom this Declaration applies. The states shall respect the right to such self identification as indigenous, individually or collectively, in keeping with the practices and institutions of each indigenous people.

Article XIX. Right to protection of a healthy environment

1. Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, worldview and to collective well-being.
4. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

Article XXVI. Indigenous peoples in voluntary isolation or initial contact:

1. Indigenous peoples in voluntary isolation or initial contact have the right to remain in that condition and to live freely and in accordance with their cultures.

Building upon the UNDRIP, the American Declaration on the Rights of Indigenous Peoples represents an advance in the recognition of Indigenous peoples as subjects of international law. Unlike the UNDRIP, it is not merely a declaration that expresses shared expectations; it is binding under law (Anaya 2009). This has given additional weight to indigenous peoples' claims of violations of their rights; in practice, however, its power may be ephemeral in the face of forces beyond its control, as will be argued here.

2. Materials and Methods

The materials that provide the basis of this research were gathered between 2016 and 2022, first, in the form of primary data derived from interviews among Indigenous communities in the Ecuadorian Amazon; secondly, with Indigenous representatives in Quito and at the United Nations Secretariat in New York. Primary Data gathered from interviews conducted within Indigenous communities enhance mediated perspectives and reduce risks of overinterpretation. Other sources were scholarly articles, United Nations agency websites, Ecuadorian government websites, company reports, and court documents. Data surrounding events in late 2021/early 2022 were obtained through local Spanish-language Ecuadorian news media, Facebook posts, tweets, YouTube videos, and personal communications.

3. Results

Ecuador's new Constitution of 2008 protects Indigenous rights and the rights of nature, each of these elements working to reinforce the other, to provide what should be double protection. Chapter 4, Article 57.7, ensures free, prior, and informed consultation for Indigenous peoples, and Chapter 7, Articles 71–74, protects the rights of nature, with special reference to the adverse environmental impact of the exploitation of non-renewable resources. It is notable, however, that interpretations of international law that imply free, prior, and informed *consent*, that is, veto power, have not been accepted by a series of Ecuadorian government administrations, from those of President Rafael Correa (2007–2017)

onwards, which have sought mechanisms to reinterpret or constrain elements of the Constitution that might limit economic expansion.

The Ecuadorian government under President Correa lauded the country's transition to "plurinationalism" under the Constitution, which included the rights of Indigenous peoples to participate in government as equal partners; in practice, however, the Correa administration maintained the authority of the central state. Plurinationalism—a plurality of legal systems—ensured rights of self-government for indigenous nations but not the right to supersede the authority of the state, which remained in ultimate control. The result was more of a separate but unequal hierarchy of authority: subsidiarity, with disputed rights over territory, constituting "weak" legal pluralism (Wheatley 2009).

Even as Ecuador's new Constitution was being adopted, new laws introduced in 2008 allowed for mining in protected areas, such that the Correa administration, having initially extended laws protecting Indigenous rights, and having introduced laws to protect the rights of nature, subsequently found ways to eliminate the possibility of veto by communities objecting to mineral extraction. New laws established only post hoc consultation after a concession for exploration had been agreed. In 2015–2016, the Ecuadorian government went further, by relaxing regulations over mining concessions and mining practices; taxes were reduced to encourage foreign investors. Finally, local government was given authority to allow mineral exploration and development, even if communal access to water and food supplies were to be interrupted (Mestanza Ramón et al. 2022). Moreover, new mining laws allowed for sanctions against protestors. It is clear that for all the fanfare around the rights of Indigenous peoples and nature in the Constitution, most of those rights were deliberately eroded over time.

Overall, despite the new Constitution, during the Correa administrations 2007–2017, large-scale mining and oil exploration and drilling increased in Ecuador in both the northern and southern Amazon regions. By 2021, it was evident that the three Amazon river sub-basins, Napo, Aguarico, and Sucumbíos, had been contaminated by mining, as well as by oil extraction, and high levels of mercury had been detected in the food chain (Mestanza Ramón et al. 2022). In the southern province of Zamora Chínchipe, there was evidence that gold mining, both legal and illegal, had adversely impacted the environment, including wildlife, and there was continuous resistance to mineral extraction on the part of Indigenous communities, who were those most adversely affected in terms of health and livelihoods. Gold mining brought short-term economic benefits to local communities living closest to the mines, but only at the cost of their health in the long term; Indigenous communities living further away benefited the least (Mestanza Ramón et al. 2022; Svampa 2019). Furthermore, in Zamora Chínchipe and the Napo region, some Indigenous communities found themselves excluded from Ecuador's SocioBosque programme, which was associated with the United Nations Reducing Emissions from Deforestation and Forest Degradation (REDD+) schemes that provide an income in return for the stewardship of communal forest areas. This additional absence of protection for both people and nature created greater Indigenous vulnerability to the effects of environmental damage.

Even if Ecuador's laws to protect Indigenous peoples and nature had not been altered to undermine the protection of communities and the environment for the purpose of increasing government revenue, there was still the ongoing presence of *illegal* mining, which accounted for up to 77 per cent of the mining of gold in 2016. The percentage increased subsequently, not least because of a rise in the price of gold. Illegal gold mining affects indigenous communities disproportionately. A scenario has been created, therefore, within which indigenous communities find themselves constantly at a disadvantage, in the era of what Svampa (2019) calls the "commodity consensus". Their plight is compounded by the expansion of illegal logging and the hunting of wild animals for the wildlife trade, both of which activities threaten Indigenous survival.

In view of the profits derived from illegal logging and the wildlife trade worldwide, with the value of the combined trade in illegal fishing, logging, and wildlife estimated at around US$1 trillion in 2019 by the World Bank (World Wildlife Fund 2019), the existence

of 3600 International Environmental Agreements in force by 2020 (Etchart 2022) may not have had as much impact as might have been anticipated. On the other hand, the gradual advances in the drafting and application of international law as it applies to the protection of Indigenous rights, which are closely connected with environmental protection, provide one avenue for improvement. This can be seen by the few Indigenous communities' class-action lawsuits that have resulted in the successful prosecutions of governments for violation of Indigenous rights. (Other potential legal cases tend to pass by undetected: Indigenous groups are spread out over large areas of rainforest and remain hidden from view.) Section 3 takes three examples of Ecuadorian Indigenous communities' legislative interactions with extractive industries.

3.1. The Success of the Sarayaku Kichwa Litigation against the Ecuadorian Government

The case of the Sarayaku Kichwa's 20-year lawsuit against the Ecuadorian government for violation of their rights is one example wherein a failure to comply with international law in a local court has been rectified by means of a judicial process in an international court.

The class-action suit, *Kichwa Indigenous People of Sarayaku v. Ecuador*, which was resolved by a ruling of the Inter-American Court of Human Rights (IACtHR) in Costa Rica in 2012, is an illustration of a situation wherein the failure of a local court (in Ecuador) to uphold a verdict led to the subsequent successful convergence of domestic, regional, and international law in the implementation of articles pertaining to Indigenous peoples' rights (IACtHR 2011).

The Inter-American Court of Human Rights (IACtHR) ruled that the Ecuadorian government had violated the Sarayaku Kichwa's right to prior consultation, communal property, and cultural identity when, in 1996, it had approved a project allowing the Argentinian oil company CGC (Compañia General de Combustibles) and La Petrolera Ecuador San Jorge SA, to prospect for and extract oil in territory belonging to a number of Indigenous communities that included the Sarayaku Kichwa along the Bobonaza river—a tributary of the Amazon—in Pastaza province.

Initially, it was reported that CGC offered the community US$60,000 for development projects, as well as medical care and 500 jobs, in order to circumvent the obligation to consult with Sarayaku Kichwa leaders. Neighboring communities had agreed to similar offers, but the Sarayaku Kichwa held out against the proposals. The oil consortium employed a company to divide the Sarayaku community, as part of a plan to secure the concession, which they failed to achieve. They did succeed in dividing the Sarayaku from their neighbors, however. The project became militarized; furthermore, retribution against the Sarayaku by the government took the form of the denial of medical assistance (IACtHR 2011).

There were violent confrontations; death threats against Marlon Santi, a Sarayaku leader; and arrests. Following the involvement of the United Nations after the Sarayaku's lawyer had been attacked, the CGC project in Sarayaku territory was halted in 2009 (IACtHR 2011). By 2003, a petition had been submitted to the Inter-American Commission for Human Rights with the support of the Centro de Derechos Económicos y Sociales (CDES), and the Center for Justice and International Law (CEJIL). The Sarayaku also benefited from amicus briefs from the International Human Rights Clinic of Seattle University Law School, the Legal Clinic at the Universidad de San Francisco Quito School, the Human Rights Centre at the Catholic Pontifical University of Ecuador, Amnesty International, the Regional Alliance for Freedom of Expression and Information, Allard K Lowestein International Human Rights Clinic of Yale University, and the Forest Peoples Programme (IACtHR 2011).

The final outcome was an acknowledgement by the state of wrongdoing; a ceremony—publicly broadcast—compensation of US$1,404,344.62, including expenses; and commitment to adopt measures to ensure rights to compensation (IACtHR 2011). Although the case has been held as a model of successful implementation of international law designed to protect Indigenous peoples, the length of time for the case to be decided, the number

of international institutions and resources involved, and the machinations required even to bring the case to the Inter-American Court of Human Rights would suggest that this particular route is not an option available for most Indigenous struggles for veto rights against governments intent on development projects in Indigenous territories.

Indeed, the details, as elaborated above and elsewhere, that have emerged from the Sarayaku Kichwa's battle to reach the Inter-American Court verdict of 2012, illustrate the fragility of Indigenous peoples' cultural existence and the pitfalls of free, prior and informed consent (FPIC), in the way the latter has been incorporated into, and implemented within, state and international law. The Sarayaku appear to have been alone among their neighbors in resisting the approaches of the oil consortium: they were subjected to violence inflicted by a number of individuals, to anonymous threats, and to maltreatment by the state and by state forces (Melo Cevallos 2016).

In the case of the Sarayaku victory against the Ecuadorian government, their success can be attributed to a combination of their own experience in resistance, that is, their having been aware of their rights; their knowledge of international law; the persistence of their leaders; support from their lawyers, in particular, from Professor Mario Melo Cevallos; and support from Ecuadorian and international NGOs. Such conditions do not often pertain to the majority of Indigenous communities. Additionally, the hostility directed towards the Sarayaku by their immediate neighbors was an indication of further challenges facing those Indigenous communities who wish to resist extractive projects on their territory. In their case, the existence of international law was a key factor in achieving a successful outcome, as it has been in subsequent successful prosecutions of states by other Indigenous groups. On the other hand, one of the unintended consequences was that the IACtHR ruling led the Ecuadorian state to institute changes to national laws in an attempt to prevent future setbacks to state interests. At the international and state level, moreover, it is becoming evident that environmental protection laws are being harnessed to legitimize the expansion of the extractive frontier into protected areas, as will be seen in the next section.

3.2. Andes Petroleum, Environmental Impact Assessments, and the Risks of Multiple Accountability

One particular case of the legitimization, through state and international law, of the expansion of oil wells in a biologically diverse area of the Amazon, provides an example wherein the signing of international conventions and treaties, combined with a lack of oversight of environmental regulations, appears to have failed to protect Indigenous communities who wish to resist the extraction of minerals from their territories.

The purpose of the environmental impact assessment (EIA) and management plan conducted by Malacatus Consulting and Training, Quito, for Andes Petroleum Ecuador Ltd./PetroOriental, which was completed in 2019 and published in 2020 (Andes Petroleum/Malacatus 2020), was to ensure that the drilling of six exploratory wells, the construction of Platform (Pozo) Kupi D, and the corresponding access road, in the parish of Dayuma, canton of Francisco de Orellana in Orellana Province, in concession Block 14, complied with state and international law. Its 999 pages include detailed plans for ongoing work with a description of water sources in the area, vegetation, and fauna. The license for the operation by Andes Petroleum was initially granted in 2010, when access roads were built. The environmental impact assessment was conducted when licensed works had already been completed, in that photographs within the report indicate deforestation had resulted from the building of existing access roads and there was evidence of expansion of road construction in 2019 (Chapter II: 73–74). Although the EIA report acknowledged that scientific studies had demonstrated that road construction can cause the extinction of species, incurring damage to ecosystems, and can contribute to climate change, it claimed that in the area under review the forest cover had been maintained, and that the pressure on game had not been intense (Andes Petroleum/Malacatus 2020, chp. III, pp. 122, 184).

The report refers to the International Union for the Conservation of Nature (IUCN); Convention on Wetlands of International Importance, also known as the Ramsar Convention; the 1973 Convention on International Trade in Endangered Species of Wild Fauna

and Flora (CITES) (Andes Petroleum/Malacatus 2020, p. 242); the 1983 Convention on the Conservation of Migratory Species of Wild Animals (also known as CMS or Bonn Convention); United Nations Framework Convention on Climate Change, adopted 9 May 1992, Convention on Biological Diversity (CBD) (1993) (Andes Petroleum/Malacatus 2020, p. 15), and the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, among others. It was claimed that the project complied with the relevant international treaties and conventions.

Chapter IV of the EIA listed the project's compliance with articles of the Ecuadorian Constitution, namely 3, 12, 14, 15, 57, 71, 72, 73, 74, 317, 318, 323, 395, 396, 398, 406, 407, 411, 425 (Andes Petroleum/Malacatus 2020, Chapter IV, Section 2: pp. 5–9). Under Ecuadorian Constitution Article 14, the right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and the good way of living (*sumak kawsay*) is recognized. Moreover, under Article 57.7, there is a right "To free prior informed consultation, within a reasonable period of time, on the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them; to participate in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them. The consultation that must be conducted by the competent authorities shall be mandatory and in due time. If consent of the consulted community is not obtained, steps provided for by the Constitution and the law shall be taken".[2]

The EIA (Chp. 4: 12–20) cites the project's compliance with ILO Convention 169 (1989) that refers to the rights of indigenous peoples to free and informed consent. Yet, in a consultation with local indigenous people of one community, the name of which was 12 de Octubre (p.351), consisting mainly of those of Kichwa nationality (126), two Huaorani, and five Shuar, 50 percent said that they were against oil exploitation in their territory; 54 per cent stated that they thought that contamination was the problem (p. 351). When the same group was asked about what they perceived to be the benefits of oil exploitation, 13 percent identified infrastructure and 48 percent road construction. Those who thought there were no benefits at all constituted 13 percent. The conclusion of the company that conducted the consultation was that there was acceptance on the part of those consulted. Those who declined to answer (29 percent) were considered neutral, that is, not having an opinion. From the interviews with representatives of institutions, of local government and community leaders in the area, the EIA concluded that overall there was a positive response, mainly as a result of the improvement in the access road to the well (Pozo Kupi D) and the employment potential. In terms of fulfilling legal requirements, it was stated that all human rights legislative requirements had been respected, in accordance with the Ecuadorian constitution and international law, in the areas of education, health, food security, social security, and water for the inhabitants (Table 4.1: article 3) (Andes Petroleum/Malacatus 2020).

From the perspective of the EIA and management plan, all of the relevant articles of the Ecuadorian Constitution had been respected, in terms of national development, poverty eradication, the promotion of sustainable development and redistribution of wealth in order to achieve the goal of "buen vivir" (abundance living in harmony with nature) and to strengthen autonomy and decentralization, and the right to live in a democratic society without corruption (Article 8 of the Constitution).

It is notable, however, that in December of the same year that the environmental impact assessment was published (2020), a group of Huaorani from the nearby Huaorani village of Miwaguno, south of the village of 12 de Octubre where the consultation had taken place, had filed a lawsuit against PetroOriental for the flaring of oil wells in the province, which they alleged had contaminated their water sources over many years. The village is close to several PetroOriental wells, where smoke from the gas burners, estimated to number 159 in Orellana province in 2020, had contaminated the rain, damaging crops of yucca and plantain and affecting river water, from which the people drank (France 24 2020).

[2] Article 57.7 Ecuadorian Constitution.

The EIA's detailed study of the area's ecosystem, the assessment of the environmental impact of the existing roads and oil well, and the consultation with affected stakeholders, together with the comprehensive list of local and international laws with which compliance had apparently been ensured, are an indication of the pressure on multinational companies to be seen to be acting within the law and conforming to international norms. The EIA also highlights the mechanisms by which extractive industries are able to continue to operate in areas where their activities threaten the health, lives, and livelihoods of indigenous peoples and the environment in which they live.

3.3. Success for Kofán and Huaorani Indigenous Communities 2018–2019

Even in a period when the entire Amazon region of Ecuador had been divided into blocks for extractive purposes, and with a government determined to expand the extractive frontier, there were cases wherein Indigenous struggles to maintain control of land and resources succeeded.

In 2018, the aforementioned Indigenous A'i Kofán community in the north of Ecuador won a legal case against the Ecuadorian government for granting mining concessions in Indigenous territory without free, prior, and informed consent. Judges in the regional and provincial courts of Sucumbíos ruled in favor of the community, the result of which was the cancellation of 52 mining concessions along the Aguarico River (Brown 2019).

Then in early 2019, a coalition of 16 Huaorani communities, together with the Ecuadorian Human Rights Ombudsman, embarked upon a lawsuit against the Ecuadorian Ministry of Energy and Non-Renewable Natural Resources, the Secretary of Hydrocarbons, and the Ministry of Environment for conducting a flawed consultation process with the communities in 2012 (Brown 2019). The inadequate consultation had enabled the government to auction a large part of Huaorani territory for oil prospecting.

In April 2019, a panel of three judges in a regional court ruled that the consultation had been flawed and had violated the Huaorani community's rights of free, prior, and informed consent. They concluded that the Indigenous people consulted had not been informed of the consequences of oil drilling, that the consultations were not conducted in good faith as evidenced by government documents, and that the communities' right to self-determination had been violated (Brown 2019).

The ruling was considered a precedent, as Ecuadorean law had previously been interpreted as recognizing indigenous jurisdiction over ancestral territory but at the same time maintaining state ownership of the subsoil. The ruling was a victory for the communities in the short-term, but it left open the possibility of conducting a second consultation process that would be conducted in the correct manner. The outcome of repeated consultation is not a guaranteed ruling in favor of the original litigants: it could go either way. As has been seen, it is not unusual for Indigenous and non-indigenous communities to vote for development projects that may bring communications and services in the form of roads, schools, and medical centers; moreover, local people stand to benefit from training and employment opportunities, and a range of spin-offs which bring in an income, as well as opportunities for gaining a stake in the extractive projects themselves.

Notwithstanding these caveats, one of the consequences of the successful outcome of the Huaorani litigation of 2019 was that it encouraged other Ecuadorian Indigenous communities faced with the prospect of the expansion of the extractive frontier into their territories to embark upon resistance struggles, through direct action on the ground, demonstrations, and social media campaigns at the local and global level. The threat to Indigenous cultural survival in the Amazon was heightened with the accession to the Ecuadorian presidency of the former CEO of the Bank of Guayaquil, Guillermo Lasso, in May 2021. On taking office, President Lasso immediately moved to promote the expansion of oil drilling and mining, issuing decrees 95 and 151 in July and August 2021, respectively, to expand the extractive frontiers and remove controls in order to encourage foreign investment. In response, in October 2021, Ecuador's Indigenous federations, the A'i Kofan community of Singangoe and the Shuar Arutam people, embarked upon lawsuits to challenge the executive orders;

Indigenous movements marched from the Amazon to the capital in protest. The protesters argued that the decrees were issued without the consent of Indigenous peoples, which was required under the country's Constitution (Brown 2019; Amazon Frontlines 2021).

As a further development, on 4 February, 2022, Ecuador's Constitutional Court reaffirmed the provincial judges' 2018 ruling in favor of the community of Sinangoe (see above), which was read by observers as a reaffirmation of Indigenous communities' right of veto of extractive projects on their territory. The Constitutional Court's review of the case confirmed that the community's rights to consultation had initially not been observed and established that Indigenous communities had a right to be consulted before extractive projects planned for their lands could commence (Brown 2022).

Yet, according to the ruling, if an Indigenous community rejects a project, the government could still proceed in "exceptional cases", which suggests that the ruling was not as transformational as was being claimed by the communities and their allies. The Court also stated, however, that "under no circumstances can a project be carried out that generates excessive sacrifices to the collective rights of communities and nature" (Einhorn 2022), which itself is significant, as it adds a positive dimension for environment defenders, in that it links Indigenous and other communities' rights with the rights of nature, the latter also being enshrined in the Constitution, giving greater scope for resistance to development projects. The use of the word "excessive", however, introduces an element of uncertainty, as it is subjective: it can be interpreted differently by actors according to their interests. There were fears that more wrangling with the Lasso government would ensue.

The frequent mobilizations, acts of resistance–both non-violent and violent—campaigns, prosecutions and court cases; conflict at different levels, and state repression have taken their toll on Indigenous resisters to ongoing colonization, as well as invigorating them and giving new hope to their struggle for self-government, autonomy, and cultural survival. The effectiveness of direct action was illustrated by the conclusion of an 18-day Indigenous-led protest and general strike in Ecuador, on 30 June 2022. The government under President Lasso acceded to most of the protestors' demands, including setting a limit to oil exploration, and limits to mining in protected areas, national parks and indigenous territories, including those inhabited by communities living in voluntary isolation. While this was a victory for Indigenous rights, challenges remain, as there is one futher dimension that has generally been neglected in the literature. In the last three years, Indigenous rights have been threatened by the advance of the criminal frontier into Ecuador. In neighboring countries, in Colombia, Peru, and Brazil, and further away in Mexico, there has been an expansion of the regional criminal economy, accompanied by an increasing blurring of the boundaries between the legal and the illegal, creating an alternative shadow para-governmental structure that has resulted in adverse consequences for Indigenous rights defenders and the environment. This is illustrated by the events surrounding the destruction of the riverbanks of tributaries of the Amazon in Napo province, Ecuador, that began in July 2021 and reached a peak before it was brought under some control in February 2022. The unfolding of this story is summarized in the following section.

3.4. The Napo Gold Rush 2021–2022

Efforts to control illegal extractive activities in Ecuador during the Correa administrations, then President Lenin Moreno (2017–2021) and again under the presidency of Guillermo Lasso, from May 2021, were limited, partly because of a lack of state resources for law enforcement in this area. For example, it was reported that there were only ten officials engaged in illegal mining regulation in each province affected in 2021 (Mestanza Ramón et al. 2022).

In the case of the province of Napo, a Chinese company, TerraEarth, was granted gold mining concessions covering 7125 hectares in 2010; the company operated in the area until 2017. Information arising from different sources was contradictory, but, according to a 2018 government report, TerraEarth's concessions relating to Confluencia, Talag, El Icho, and Anzu Norte did not have environmental clearance, which meant that the company

was not able to exploit the mines in Yutzupino, El Ceibo, Naranjalito, and Pioculin, after 2017—inadvertently opening the door to illegal mining, from which the company may or may not have benefited (Periodismo de Investigación 2022). Reports and photographic evidence that emerged from the area indicated that once the word was out that gold was available for mining, actors from outside the area appeared with heavy machinery to dig for gold along the banks of the Jatun Yaku river.

The mining frenzy began in June 2021, when a Colombian miner brought in an excavator and found 1.5 kilos of gold, according to one source. It was not clear to observers at the time, where the excavators came from (Cerda 2022), but, within four months, there were more than 100 excavators operating—one source estimated 200—over an area of 70 hectares. Those behind the hiring of the excavators used middle-men who operated on their behalf: the profiteers remained in the shadows. It was reported that some of the machinery and equipment belonged to local government; one of the local prefects, as well as the brother of a local mayor, were allegedly involved, as well as the governor. Local government trucks were seen providing diesel for the excavators. In the early stages, local family leaders were apparently charging each machine operator US$500 to operate in the zone, a fee which rose to US$2000. This was in the daytime. At night, the alluvial miners, local individuals practicing what was called "ancestral" mining, arrived to pan for gold, for which they were charged US$1 dollar per night. By the end, there were 2000–3000 miners working in the daytime; at night, there were up to 5000 (Periodismo de Investigación 2022).

It was surprising to protestors on the ground that the highly visible excavators were allowed to continue operating for so long (Cerda 2022); there were documents demonstrating that TerraEarth had informed the government of the illegal mining in July 2021; they issued further reports in November and December 2021 and again in January and February 2022, including naming some of the perpetrators of illegal activity, but no action was taken until 13 February 2022, when the government sent in 1500 troops. The armed contingent decommissioned 124 excavators, 79 water suction machines, 3375 gallons of fuel, and chemical supplies. Thereafter, on 20 February, 2022, the government ordered a moratorium on all gold mining in the province, with the Minister of Energy and Non-Renewable Resources declaring that he had never seen such environmental devastation as that caused by the illegal gold miners in the area (El Universo 2022a).

Local people, Indigenous and non-indigenous, had been protesting the gold mining operation since 2020, as they had been doing against mining activities over the six Ecuadorian Amazon provinces for more than 20 years. In this particular zone, there had been 121 official denunciations of illegal mining 2020–2022, with 14 convictions. Prosecutions had ceased in 2020 (Periodismo de Investigación 2022). Local people have been engaged in ancestral alluvial mining for centuries (Cerda 2022), but events surrounding the Napo gold rush presaged an uncertain future for Indigenous communities—both for those living in voluntary isolation and those engaged with the wider society—in areas rich in natural resources. The Napo resistance movements were composed of Indigenous and non-indigenous individuals—supported by Indigenous federations, such as the Confederation of Indigenous Nationalities of Ecuador (CONAIE), and Ecuadorian environmental groups—but it was the Indigenous communities who had least to gain from the gold rush. For other disadvantaged local people living on the river banks of Amazon tributaries, there was a price to pay for resistance to extractive activities. Hence in the time of the COVID-19 pandemic, 2020–2022, with the decline of income from tourism, local families felt they had no option but to pan for gold as a source of income (Mestanza Ramón et al. 2022), an example of bitter choices facing those living on the margins of global economies.

4. Discussion

Indigenous peoples' resistance to incursions, occupation, and exploitation by outsiders is centuries old, as are attempts to protect their interests by law. The difference in the twenty-first century is that the greater the number of state, regional, and international human rights legal instruments accumulated to empower indigenous communities, the greater

the financial resources employed to undermine them. This is illustrated by Chevron's response to the class-action suit, mentioned earlier, filed against the company by affected Indigenous and non-indigenous communities for the contamination of 1700 square miles of Amazon rainforest between 1972 and 1992, the effects of which are still felt today. Attribution of responsibility for what was called the "Amazon Chernobyl" was legally difficult to determine, hence the length of the case and the shifting of blame (Kimerling 2006; Langewiesche 2007; Etchart 2018, 2022). The significance of the case for future prosecutions against multinational companies is that Chevron employed 60 legal firms and 2000 lawyers to pursue the case (Marr 2017), at a cost to Chevron of US$1 million, according to Chevron's own records. The case ended with one of the lawyers defending the rights of the 30,000 indigenous and non-indigenous plaintiffs against Chevron, Steven Donziger, being committed to prison in New York in 2021 (Lerner 2020). Donziger was under house arrest until mid-2022 and was banned indefinitely from practicing as a lawyer,. The immensity of Chevron's countercase against Steven Donziger, conducted to avoid precedent, was a warning to all communities—Indigenous or non-indigenous who might be considering litigation against private companies engaged in "legal" resource extraction on their land.

In the case of the Napo goldmining phenomenon, the results from a study of the effects of legal mining in the areas of Tena, Puerto Napo, and Archidona show that concentrations of heavy metals in 2020 exceeded permissible limits by 200 to 700 percent; local communities reported illness and high levels of cancer. Mercury continued to be used in legal mining in Ecuador in 2021–2022, despite prior government declarations that it would be eliminated (Mestanza Ramón et al. 2022); illegal mining would be expected to have similar if not worse consequences for the local environment and the health of communities, as well as adverse effects on the health of mine workers.

In the Yutzupino area along the Jatun Yaku river, Indigenous and non-indigenous communities affected can no longer bathe in the river or fish; they have to dig wells for water and find alternative means of sustenance to replace the fish they cannot eat (Mestanza Ramón et al. 2022). In this area, abundant with water at the headwaters of the Amazon river, local people have been forced to drink bottled water in order to avoid illness. The additional expense of not being able to use the river as a source of sustenance drives them further into seeking employment in the extractive sector (see Ofrias 2017).

Local communities' reliance on the extractive sector for survival was seen as reinforcing the Ecuadorian government's hand in its long-term plans to expand the legal mining sector, which provides essential revenue for the state. It is notable also that, in 2022, the Ecuadorian government declared its intention to devote 60 percent of mining royalties to local government for communities affected by mining, 50 percent of which was to be distributed to Indigenous governments where these were present. Such sweeteners could be regarded as a mechanism to deter the activities of Indigenous and non-indigenous environment defenders. The value of mineral exports from Ecuador in 2021 was just over US$2 billion, a 99 percent increase over the previous year, a figure the government planned to double by 2025 (El Universo 2022b).

5. Conclusions

In view of the multiple scientific studies conducted between 2000 and 2020 detailing the widespread contamination of rivers caused by legal gold mining in the Amazon region, the Ecuadorian government's plan—modified by the events of June 2022–to expand gold mining operations would be expected to lead to violation of the rights of Indigenous Peoples and the Rights of Nature as enshrined in the country's Constitution. At the same time, when local and Indigenous and non-indigenous communities continue to find their means of survival endangered by loss of forests and water sources, over the longer term they may have no other choice but to sign up to agreements with the extractive industries under contracts that fulfill the requirements of free, prior, and informed consent, thereby creating the conditions for what Lindsay Ofrias (2017) describes as an "incentive

to contaminate", on the part of the extractive industries. This bleak view of an uncertain future for the implementation of free, prior, and informed consent (FPIC) as a strategy to protect Indigenous communities is reflected in a research survey conducted in Ecuador in May 2021, which indicated that most of the Indigenous communities affected by extractive activities in the area under investigation opposed government-approved free, prior, and informed consent (FPIC) negotiations. Interviewees alleged that the consultations were manipulated in the government's favor and that Indigenous environment defender leaders had been persecuted for their opposition to development projects (Mestanza Ramón et al. 2022, pp. 12, 13).

These examples of the lived experiences of Indigenous peoples in the Ecuadorian Amazon demonstrate some of the obstacles to the promotion and protection of Indigenous peoples' rights that were promised by country signings of international declarations, treaties, and conventions beginning in the twentieth century and continuing in the first two decades of the twenty-first century.

From the cases outlined above, it is evident that Indigenous rights' defenders, in particular Indigenous environment defenders, have found themselves under siege from a range of actors. Primarily, their rights are at risk from the state expansion of the mineral frontier in collaboration with foreign mining companies, in the context of pressure from foreign debt obligations.

In this regard, collaborative development projects among government agencies and the private sector—domestic and international—carry their own dangers for Indigenous peoples, in that no single actor is responsible for their welfare; there are often jurisdictional lacunae across state borders that contribute to an absence of meaningful international law. Where there are effective international courts in place, the backlog of cases is so large that most cases will never be addressed. Indigenous peoples also confront the hindrance of the "multiple accountabilities disorder" of the proliferation and duplication of regulations governing institutions (Koppell 2005), which have been discussed elsewhere in relation to the protection of Indigenous rights in the Amazon (Etchart 2022).

Moreover, notwithstanding the existence of laws and of law enforcement agencies, even if they were able to function effectively, evidence is mounting of a growing capture of elements of the extractive and agricultural sectors in certain countries by criminal groups, with or without connections within government departments.

In Ecuador, as has been seen, Indigenous peoples' wellbeing is threatened by the expansion into illegal mining by what appear to be "organized crime networks", as they were described by a local Napo government official. As in neighboring countries in the Amazon region, the enforcement of government regulations to protect the overall environment in Ecuador has been undermined by criminal gangs which operate where profits can be made from illegal logging, the trafficking of protected animal species, and the narcotics trade. The use of Ecuadorian ports for the export of narcotics deriving from Colombia grew exponentially in Ecuador in the COVID-19 era, straining Ecuador's already fragile judicial system. In view of the profits to be gained from illegal mining, it was not long before Ecuador's gold deposits attracted the attention and involvement of transnational organized crime networks (MacDonald and Zagaris 2022). More detailed discussion of the role of organized crime in Ecuador is beyond the scope of this paper. It has become evident, however, that rising levels of crime associated with the extractive industries in Ecuador have been detrimental to the environment and the wellbeing of Indigenous communities. It is also clear that small country governments are limited in their capacity to combat external forces, in both the legal and illegal spheres, as a result of legacies of the past, economic dependency, the debt burden, and their exposure to the vulnerabilities of the market. For this reason there has to be greater vigilance on the part of the private sector investors and governments in the global North—with regard to their own policies and activities—to ensure not only that the spirit of international law as it pertains to Indigenous peoples and environment defenders is respected, but that greater efforts are made to reduce transborder crime and markets for illicitly produced commodities.

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Abbreviations

CGC	Compañia General de Combustibles
CONAIE	Confederation of Indigenous Nationalities of Ecuador
IEA	Environmental Impact Assessment
FPIC	Free, Prior and Informed Consent
IACtHR	Inter-American Court of Human Rights (IACtHR)
ILO	International Labour Organization
IP	Indigenous Peoples
IUCN	International Union for the Conservation of Nature
REDD+	United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNPFII	United Nations Permanent Forum on Indigenous Issues

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