GUIDELINES FOR IMPLEMENTING THE RIGHT OF INDIGENOUS PEOPLES TO FREE, PRIOR AND INFORMED CONSENT

Document for consultation

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"Given that the right of Indigenous Peoples to free, prior and informed consent is recognized and affirmed in the United Nations Declaration on the Rights of Indigenous Peoples, questions have arisen concerning its implementation. In the light of such fundamental concerns, the Permanent Forum has decided to prioritize free, prior and informed consent. Therefore, in the context of future work, the Permanent Forum will explore the potential for the development of guidelines on the implementation of free, prior and informed consent. The Permanent Forum will endeavour to do so in collaboration with the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the rights of Indigenous Peoples, who are specifically mandated to address the human rights of Indigenous Peoples. This initiative, as well as those referred to immediately below, are fully consistent with articles 38, 41 and 42 of the Declaration." This is the 37th recommendation of the Tenth Session of United Permanent Forum on Indigenous Issues. 2011.

Acknowledgements

Supported by the Regional Program of IBIS Denmark “Latin America against Poverty and Inequity”.
Elaborated by Amazon Lawyers Network (RAMA).

Special thanks to team leader of the consultants, Mr. Mario Melo.

Contribution from external readers: Cathal Doyle, Elsa Stomatopulou and Carlos Camacho, who volunteered with comments and suggestions.

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Edited by: IBIS Denmark
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Web: http://www.ibisbolivia.org
Printed in Bolivia

Index

Third Section

Fundamental Elements of consultation Processes

Fourth Section

Requirements of consent: that it be free, prior informed and obtained in good faith.

Fifth Section

Phases or stages of consultations leading to consent

Executive Summary

This document consists of a series of guidelines aimed at promoting the right of Indigenous Peoples to be consulted and to give or withhold free, prior and informed consent.

It consists of five sections. The first section, an introduction, outlines the objectives of the document, as well as the basic definitions on which it is premised: Indigenous Peoples, consultation and consent, and collective ownership of indigenous territories. The second section analyses the legal grounds of the right to consultation and free, prior and informed consent. The third section establishes the fundamental elements of consultation, based on some guiding questions: under what circumstances is it necessary to consult Indigenous Peoples?; in what cases is their consent required?; who are the subjects to be consulted?; who is the entity consulting? The fourth section also offers a reflection on the requirements of consent: that it be free, prior, informed and obtained in good faith. Finally, the fifth section presents the phases or stages of the consultation process.

These guidelines are based on the view that the legal foundation of a State's duty to carry out a consultation in order to obtain the consent of Indigenous Peoples on decisions affecting them ultimately lies in the right of peoples to self-determination, which is established in the corpus juris of International Human Rights Law. Therefore, consultations carried out with Indigenous Peoples must be effective in the sense that their results should influence decisions of the state that are the subject of scrutiny.

In order to elaborate these guidelines the principal standards pertaining to consultation and free, prior and informed consent were considered. These standards have been

established by the mechanisms of the United Nations System which are specialized in Indigenous Peoples and Human Rights (the Special Rapporteur on the Rights of Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples, the United Nations Permanent Forum on Indigenous Issues, the Committee on the Elimination of Racial Discrimination, the Committee on Economic, Social and Cultural Rights, and the Human Rights Committee). They are also embodied in the ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, the jurisprudence of the Inter-American Court of Human Rights, and the International Convention on the Elimination of all forms of Racial Discrimination. The standards are also derived from the legislation, public policy, and jurisprudence of several Latin American countries, as well as pertinent case studies involving the application of the consultation standard with regard to Indigenous Peoples in Latin American countries.

First Section

Outlines of the objectives of the document

1. Introduction

1.1 Objective of the Guidelines

The fundamental aim of the guidelines is to promote the full exercise of the right of Indigenous Peoples to consultation and to free, prior and informed consent on State decisions that affect them.

To this end, the guidelines establish criteria and standards to guide Indigenous Peoples in demanding their rights to be consulted and the requirement to obtain their consent. The guidelines also seek to be of use to state decision-makers and operators in fulfilling their obligations to respect, to guarantee and to protect the rights of Indigenous Peoples.

1.2 Basic Definitions

1.2.1 Who are Indigenous Peoples? Understanding the term Indigenous Peoples

Defining Indigenous Peoples is a complex issue. In order to do so, a generally accepted method is to follow the standards incorporated into instruments of international law for identifying the subjects of indigenous rights.

Thus, according to the ILO Convention 169, its regulations apply to peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to

which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions (Art 1, number 1, letter b). They also apply to tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations (Art 1, number 1, letter a).

In the Guide to Applying Convention 169[1], the ILO indicates that there are subjective as well as objective elements that define an indigenous people. Amongst the latter are (1) historical continuity in terms of societies that are descended from pre-conquest or pre-colonisation groups; (2) territorial connection in the sense that their ancestors inhabited the country or region; and (3) distinct and specific social, economic, cultural and political institutions, which are particular to the group and are retained in whole or in part.

For its part, the Inter-American Court of Human Rights has defined a tribal people as a people that is not indigenous to the region, but that share similar characteristics with Indigenous Peoples, such as having social, cultural and economic traditions different from other sections of the national community, identifying themselves with their ancestral territories, and regulating themselves, at least partially, by their own norms, customs, and traditions.[2]

In any case, the fundamental criterion that guides entitlement to the rights included in Convention 169 is self-identification as indigenous or tribal (Art. 1, number 2). Currently, the opinion prevails that an official universal definition of this term is not necessary, but rather the understanding of the term Indigenous Peoples. For practical purposes, the commonly accepted definition in this respect is that contained in the study by Martínez Cobo. [3]

“Indigenous communities, peoples and nations are those that have a historic continuity with pre-colonial, pre-invasion societies, who flourished in their territories. They consider themselves to be different from other sectors of the societies that

1 ILO. Programme to Promote ILO Convention No. 169. 2009. Available at ‹http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf›.

2 Inter-American Court of Human Rights. Judgment in the case of the Saramaka People v. Suriname. 28 of November 2007. Paragraph 79.

3 United Nations Document E/CN.4/Sub.2/1986/7 and Add. 1 - 4 (translated here by Hillary Voth). The conclusions and recommendations of the study appear in Addendum 4, and they are also available as a United Nations Publication (United Nations document, sales number: E.86.XIV.3). This study began in 1972 and ended in 1986, at which point it became the most voluminous study of its kind, based on 37 case studies.

currently exist in their territories or on a part of them. Presently, they make up non-dominant sectors of society and are determined to "preserve, develop and transmit to future generations their ancestral lands and their ethnic identity, as the basis of their on-going existence as peoples, according to their own cultural standards, social institutions and legal systems.

This historic continuity may consist of the continuation, during a prolonged period of time up to the present, of one or more of the following factors:

a) the occupation of ancestral lands or at least a portion of them;
b) common ancestry with the native occupants of those lands;
c) culture in general or in certain specific manifestations (such as religion, living under the same tribal system, belonging to an indigenous community, dress, means of living, lifestyle, etc.);
d) language (whether it be the only language spoken, the mother tongue, the customary means of communication at home or in family, or the principal, preferred, habitual, common or normal language spoken);
e) residence in certain parts of the country or in certain regions of the world;
f) other relevant factors.

From the point of view of the individual, an indigenous person is understood to be anyone belonging to such indigenous populations by way of self-identification as indigenous (group consciousness) and recognised and accepted by those populations as one of its members (group acceptance).

These communities thereby reserve the sovereign right and power to decide who belongs to them, without outside influence."

1.2.2 Consultation and consent

The United Nations Declaration on the Rights of Indigenous Peoples states that "States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them" (Art. 19); and "1. Indigenous Peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. 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, utilisation or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact" (Art. 32).

Full achievement of the goal of consulting Indigenous Peoples is reflected in the consent of those consulted. Article 6, number 2 of ILO Convention 169 expresses it in this way: The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

While acknowledging the different legal significance of International Conventions and Declarations, there nevertheless is a distinction between the ILO requirement of consultations 'with the objective of achieving agreement or consent' and the Declaration's requirement for consultations 'in order to obtain consent' - the obligation under the former is realized if a good faith consultation aimed at achieving consent is conducted, regardless of whether or not consent is obtained, provided the rights affirmed under the Convention are respected. The obligation implied under the latter is different in that the State is consulting in order to obtain consent. If it fails to obtain consent it is not clear from the wording that it has met with the intent of the provision, and that it can consequently precede irrespective of the outcome of the consultation.

The framing of the requirement in light of the right to self-determination recognized in the Declaration adds additional weight to the requirement for respect for the outcomes of consultations held 'in order to obtain consent'.

The legitimate outcome of a thorough, good faith, effective, consultation and consent seeking exercise could be a failure to obtain consent. In other words the measure of a successfully completed consultation process is that Indigenous Peoples have freely reached a final informed decision through their own procedures and representative institutions.

The word consent is defined as the action and effect of consenting; from the Latin "consentiré", from cum, with, and sentiré, to feel; to share the same sentiment, idea. To allow something or agree that it be done. It is the manifestation of approving will between the offer and the act of acceptance, and one of the essential requirements set by the codes for contracts (Cabanellas, 2006).[4]

4 Cabanellas, Guillermo. Diccionario Jurídico Elemental. Editorial Heliasta. Buenos Aires. 1 April 2006. (in Spanish)

Therefore, as Convention 169 states that consultations should seek consent, it means that they should attempt to obtain a shared sentiment or idea between those consulting and those consulted, in other words find some middle ground and reach an agreement. Therefore, there must be spaces for transparent and sincere dialogue, in which effective agreements are genuinely sought. A legitimate result of a good consultation, conducted effectively and in good faith, is when Indigenous Peoples arrive at a freely informed final decision using their own methods and representative institutions.

Free, prior and informed consent has been defined as the collective right of Indigenous Peoples to participate in decision making and to give or withhold their consent to activities affecting their lands, territories and resources or rights in general.[5] This definition is consistent with that laid out by the United Nations Permanent Forum on Indigenous Issues, with respect to the fact that [a]s a crucial dimension of the right of self-determination, the right of Indigenous Peoples to free, prior and informed consent is also relevant to a wide range of circumstances.[6]

1.2.3 Collective ownership of indigenous territories

ILO Convention 169 dictates that States should recognise the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy... In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities... (Art. 14, number 1)

The Convention stresses the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. (Art. 13, number 1)

For its part, the Inter-American Court of Human Rights has interpreted the right to property established in the American Convention on Human Rights in the sense that article 21[7] of the Convention protects the right to property in a sense which

5 UN-REDD Programme Guidelines on Free, Prior and Informed Consent (2011), citing Colchester, M. and MacKay, F. (2004). In Search of Middle Ground: Indigenous Peoples, Collective Representation and the Right to Free, Prior and Informed Consent, Forest Peoples Programme, pp. 8-14.

6 Permanent Forum on Indigenous Issues. Report on the tenth session (16-27 May 2011) E/C.19/2011/14

7 Article 21. Right to Property

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.

includes, among others, the rights of members of the indigenous communities within the framework of communal property.[8]

With its evolutionary interpretation of Article 21 of the American Convention, the Court has embraced the indigenous concept of property, giving that right a scope that includes a diversity of valid ways of life worthy of protection and guarantee. Thus, the judgment of the Awas Tingni Case recognises that [a]mong Indigenous Peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community,[9] and assumes that this form of ownership also requires protection.

The Inter-American Court has defined that the close relationship between indigenous communities and their traditional territories, including the natural resources found therein and the intangible components derived from them, are also subject to protection under article 21 of the American Convention.[10] It has interpreted article 21 of the American Convention in the sense that it guarantees enjoyment of an intangible good, such as the special relationship that ties Indigenous Peoples to their territory. It does not merely refer to material possession and use, but rather indigenous relations to the land are a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[11]

8 Inter-American Court. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Judgment of August 31, 2001. Paragraph 148.

9 Paragraph 149. Judgment in the Awas Tingni Case

10 Inter-American Court. Case of the Yakye Axa Indigenous Community v. Paraguay. Judgment of June 17, 2005. Paragraph 137.

11 Paragraph 149. Judgment in the Awas Tingni Case

Second Section

Analysis of the legal grounds of the right to consultation and free, prior and informed consent

2. Legal Framework

2.1 Self-determination as a foundation

The rights of indigenous peoples to the respect and guarantee of self-determination established in International Law help safeguard the ability of said peoples to control their own destinies and exercise their rights fully.[12]

The United Nations Declaration on the Rights of Indigenous Peoples expresses that Indigenous 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 (Art. 3). Additionally, it indicates that Indigenous Peoples, in exercising their right to self-determination, have the right to autonomy or self-

12 The right of peoples to self-determination has been recognised by the International Law of Human Rights in several instruments. Here, it is important to point to article 1 shared by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), (Article 1, number 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.) The Committee on Economic, Social and Cultural Rights, an organisation of independent experts that supervises compliance with the ICESCR, has interpreted this as being applicable to Indigenous Peoples. (UN, Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States Parties under Articles 16 and 17 of the Covenant. Concluding Observations on the Russian Federation (thirty-first session). UN Doc. E/C.12/1/Add.94, 12 December 2003).

government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. (Art. 4)

In the same vein, the ILO Convention 169 recognises as collective rights of the Indigenous Peoples, respect for their well-being according to their vision of development as well as the right to decide their own priorities for the process of development (Art. 7, number 1). Self-determination implies that the consultations conducted with Indigenous Peoples regarding state decisions that might affect them, should have the realization of their rights as their goal.

The United Nations Special Rapporteur on the rights of Indigenous Peoples has indicated that the duty of States to conduct effective consultations with Indigenous Peoples is based on myriad of universally accepted human rights, and is principally derived from the fundamental right of Indigenous Peoples to self-determination and related principles of democracy and popular sovereignty. The right of self-determination is a foundational right, without which Indigenous Peoples' human rights, both collective and individual, cannot be fully enjoyed. Related principles of popular sovereignty and democracy join in opposition to government by imposition and uphold the imperative of government by consent.[13]

2.2 Community ownership by Indigenous Peoples and the right to free, prior and informed consent

The Inter-American Court of Human Rights has, in the context of indigenous and tribal peoples, linked the right to property recognised in Article 21 of the American Convention of Human Rights (see above Note 3) with the right to self-determination recognised in Article 1 shared by ICCPR and ICESCR (see above Note 1).

In the Saramaka v. Suriname judgement[14], the Inter-American Court considered that the granting of concessions by the State for extractive activities within indigenous or tribal territories, constitutes a restriction on the right to private collective ownership of said peoples. It recognises, however, that the right to collective ownership of a people over their territory may be restricted to the extent that this restriction does not amount to a denial of their survival as a tribal people. In order to ensure this, the State must guarantee the people whose ownership is being restricted: a) effective participation … in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter "development or investment plan")within [their] territory; b) a reasonable

13 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. 15 July 2009. A/HRC/12/34.

14 Inter-American Court. Saramaka v. Suriname case. Judgment of November 28, 2007.

benefit from any such plan within their territory; c) that no concession will be issued within [the peoples'] territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.[15]

With respect to the first of the guarantees mentioned, that of effective participation, the State has a duty to actively consult with said community according to its customs and traditions... at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. The consultations must be in good faith, through culturally appropriate procedures, and they must have the objective of reaching an agreement.[16]

In this sense, the duty to consult the Peoples before adopting a decision that restricts their rights emerges as a guarantee that what is to be decided does not imply a denial of their life as Peoples. The foundation of this duty lies in the right of Indigenous Peoples to effective participation in the decisions that affect them.[17]

According to the Court, the participation of a People in the decision making of a public authority in relation to something that could present a threat to their potential to continue their life as a People, can only be effective in protecting against such an eventuality if the consent of the consulted people is a determining factor in the final decision.

Therefore, the Court has resolved that regarding large-scale development or investment projects that would have a major impact within the Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[18]

In the Sarayaku case, the Court has been very clear and reiterative with regard to the idea that consultations should be in good faith and must have the objective of reaching an agreement (paragraph 177 of the Judgment). The Court is also firm that the consultation should not be limited merely to a formal process, but rather it should be viewed as “a true instrument for participation”, “which should respond to the ultimate purpose of establishing a dialogue between the parties based on principles of trust and mutual respect, and aimed at reaching a consensus between

15 Paragraph 129. Saramaka v. Suriname case.

16 Paragraph 133. Saramaka v. Suriname case.

17 On this point the Court appears to agree with the Committee Against all Forms of Racial Discrimination, which recommended that States: d) Ensure that members of Indigenous Peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent (General recommendation 23).

18 Paragraph 134. Saramaka v. Suriname case.

the parties" (paragraph 186 of the Judgment).[19] As a result of requiring that consultation be carried out in compliance with international standards, the judgment in the Sarayaku case follows the standard established in the Saramaka judgment with regard to consent.[20]

19 Inter-American Court. Case of Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012.

20 Mario Melo, 2012.

Third Section

Fundamental elements of consultation processes

3. Fundamental elements of consultation processes

3.1 Under what circumstances is it necessary to consult Indigenous Peoples?

States have the duty to consult Indigenous Peoples before taking any action that might affect them (see above 1.2.2).

The ILO Convention 169 specifies some cases in which it is necessary to consult Indigenous Peoples. For example, Article 15, paragraph 2 affirms that 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. Similarly, Art. 17, paragraph 2 states that: The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

This specification of cases does not restrict the general principle established in Article 6 of Convention 169 and in Article 19 of the United Nations Declaration that consultations must be conducted with Indigenous Peoples any time administrative and legislative measures are expected to affect them.

Nor does this mandate mean that States must consult Indigenous Peoples on almost any decision that affects both indigenous and non-Indigenous People. Special Rapporteur Anaya has said that the obligation to consult Indigenous Peoples applies whenever a State's decision might affect said peoples in ways not felt by others in society.[21]

In this regard, the Colombian Constitutional Court has declared that before the obligation to move forward with prior consultation on a legislative or administrative measure can be enforceable, one condition must be met: the corresponding policy must directly affect differentiated communities. This direct influence can be verified through three scenarios: (i) when the measure is intended to regulate an issue that, by express constitutional provision, must be subjected to decision-making processes that involve the participation of ethnic communities, as occurs with the exploitation of natural resources; (ii) when, although it does not deal with those matters, the issue regulated by the measure is linked to elements that define the particular identity of differentiated communities; and (iii) when, although a general measure is involved, it systematically regulates areas that define the identity of traditional communities, which could very well create a possible impact, a deficit in the protection of the rights of these communities, or a related legislative omission that discriminates against them.[22]

In article 6, the convention establishes guidelines on how Indigenous and Tribal Peoples should be consulted:

In article 6, the Convention establishes guidelines on how indigenous and tribal peoples should be consulted:

Indigenous Peoples should be consulted through appropriate procedures, in good faith, and through their representative institutions;

The peoples involved should have the opportunity to freely participate at all levels in the formulation, implementation and evaluation of measures and programmes that directly concern them;

Another important component for the concept of consultation is that of representativeness. If an appropriate consultation process is not developed with the indigenous and tribal institutions or organisations that are truly representative of those people, then the consultation will not comply with the requirements of the Convention;

21 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. 15 July 2009. A/HRC/12/34.

22 Constitutional Court of Colombia. CASO C-366/11 (11.05.2011).

"Measures shall be taken to ensure that members of these peoples can understand and be understood in legal proceedings, where necessary through the provision of interpretation or by other effective means", keeping in mind their linguistic diversity, particularly in those areas where the official language is not spoken.

3.2 Under what circumstances is the consent of those consulted required?

Having established the need to consult Indigenous Peoples with regard to state decisions that would affect them in a special and differentiated way in comparison with the general population, said consultations must necessarily be oriented towards obtaining free, prior and informed consent.

The obligation to respect the self-determination of Indigenous Peoples prevents States from adopting decisions that affect the exercise of that right by a People, without their consent. In other words, whenever a state decision may affect the self-determination of an indigenous people, the State must obtain their free, prior and informed consent.

According to the United Nations Declaration on the Rights of Indigenous Peoples, the right of peoples to self-determination includes, among other aspects: (a) the right to freely determine their political status; (b) the right to freely pursue their economic, social and cultural development (Art. 3); (c) the right to autonomy or self-government in matters relating to their internal and local affairs; (d) the right to have ways and means for financing their autonomous functions (Art. 4).

The declaration indicates several cases in which the consent of the affected Peoples is required. They do not present an exhaustive list, but for Indigenous Peoples imply a minimum standard for an implementation of free prior informed consent. For example, Article 10 mentions that Indigenous Peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the Indigenous Peoples concerned; Article 29, number 2 guarantees that no storage or disposal of hazardous materials shall take place in the lands or territories of Indigenous Peoples without their free, prior and informed consent; furthermore, Article 28, number 1 indicates that Indigenous Peoples have the right to readress for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Cases requiring consent	Source
In cases that present a risk to subsistence conditions	Convention 169, art. 2; IACHR report, Saramaka vs. Suriname Case.
Population transfers	Convention 169, art. 16, 2; Declaration, art. 10; Saramaka vs. Suriname Case, IACHR report, para. 334, 1.
Megaprojects, investment or development plans that could affect subsistence conditions	Saramaka vs. Suriname, IACHR report, para. 334, 2
Storage or depositing, elimination or discard of hazardous or toxic materials	Declaration, art. 29; IACHR report, para. 334, 3
Any decision that could affect, modify, reduce or extinguish the rights of indigenous ownership	IACHR report, para. 281
Military activities	Declaration, art. 30
When adopting special measures to safeguard persons, goods, employment, culture and the environment.	Convention 169, art. 4

Source: *Document elaborated by the International Institute on Law and Society-IILS.*

These cases address a group of relevant situations for Indigenous Peoples and do not constitute an exhaustive and exclusive list. To the contrary, they show that the consent of Indigenous Peoples is indispensable in situations, such as those indicated which clearly affect their self-determination.

Cases requiring suspension due to their impact on the life, integrity or full development of peoples, when certainty exists that the impact would be serious, or in the cases established in constitutional and international law	**Source**
When the historic-cultural heritage of Indigenous Peoples will be damaged	Declaration, art. 11
When the life or physical or cultural integrity of a people will be affected	Convention 169, art. 2
When the use of force or coercion is implied, which violates the human rights and freedoms of peoples	Convention 169, art. 3,2
When subsistence conditions, such as water or food security, will be impacted	IACHR, para. 332.
When discrimination in the exercise of rights is implied	Convention 169, art. 3,1
When cultural integrity or the integrity of values, practices and institutions will be damaged	Convention 169, art. 5,b
In cases involving highly-vulnerable peoples, such as peoples in isolation and initial contact	Project: Guidelines for the protection of Indigenous Peoples in isolation and initial contact in the Amazon region, Gran Chaco and the Eastern Region of Paraguay.
The following are specifically not allowed: - Concessions for extractive activities at headwaters, on glaciers, tundra, wetlands, waterholes, rivers, or forests, which are consider untouchable for such purposes. - Measures that provoke the loss of lands, territories or resources; or the accumulation of land by third parties. - Measures that impact or eliminate biodiversity	

In the judgment on the Saramaka v. Suriname case (see above Note 11), the Inter-American Court of Human Rights used a logical line of legal reasoning to link the rights of self-determination, community ownership, effective participation, and dignified life, which in the case of Indigenous Peoples implies a life as peoples, to arrive at the right to free, informed and prior consent.

This suggests that the Court's reasoning in the Saramaka decision could support the recognition of the consent requirement in contexts other than major impacts of large scale projects. For example, in the context of mining operations in or near Indigenous Peoples' territories the following may be worth considering:

a) Large scale operations should always be presumed to require consent as the impacts associated with them are invariably major. This position could be read into paragraph 17 of the Court's interpretation of the Saramaka judgement.

b) While the 'extent of impact' trigger could be applied to small scale mining operations, in practice major impacts to indigenous communities are inevitable with small scale mining for a range of reasons. These include the fact that these projects represent a particular, and generally irreversible, development trajectory which has intergenerational effects. They have to be considered in the context of cumulative effects which they give rise to, such as the infrastructure developments, migration and potential security concerns that they are frequently associated with, and the fact that they are very frequently a precursor for large scale mining.

c) If the requirement for FPIC flows from the right to self-determination then the people themselves should be the ones to determine if the impact is significant or not, and hence triggers the FPIC requirement. In practice the impacted peoples are the only ones capable of determining the extent of the cultural, social and spiritual impacts, as well as the impact on their development plans and priorities. Therefore it appears to be implicit in the position that consent is triggered by the significance of the impacts that Indigenous Peoples should determine when consent is required. This in effect leads to a scenario where consent will generally be required for small scale mining.

d) The exercise of the right to self-determination is not qualified based on the presumed insignificance of impacts of externally imposed developments in or near indigenous territories. In other words the imposition of a small scale project, even if deemed by external entities not to have a major impact, is a direct infringement on an Indigenous Peoples' exercise of their right to self-determination.

e) In cases where impacts are minor, recognition of the requirement for consent should not be problematic, given that in contexts where benefits outweigh impacts consent will in general be forthcoming.

The Philippines' experience with implementing FPIC is illustrative of this approach. In the FPIC implementing guidelines, both large and small scale mining are treated in the same manner with both requiring a full blown FPIC process. All mining was recognized as inevitably having major impacts from the perspective of the impacted Indigenous Peoples as it represented a direct limitation on their control over lands and resources and their social, cultural and economic development options.

In the concrete case of the Saramakas, according to the Court's decision, the guarantee of their life as a tribal people would be satisfied by requiring their consent before undertaking plans for large-scale investment that would consequently have a major impact on their territory. We should note, however that the precedent established by this judgment leaves out an infinite number of situations that seriously threaten the self-determination of indigenous and tribal peoples, their community ownership, their effective participation and their life as peoples, arising from decisions that may be made about investment projects and other activities that cannot be qualified as large-scale. Consequently, the parameter for establishing the need for consent from a people should not be the size or scale of the investment of the projects to be carried out in a territory, but rather the seriousness of the potential impacts that said activities, regardless of their size or their budget, would have on their rights.

Moreover, when the Court finds that the duty to consult emerges as a guarantee linked to the restriction on the right of the Saramaka People to land ownership, imposed by the State's decision to implement a large-scale project or investment in said territory; it does so in light of its analysis of the concrete case. Nevertheless and as indicated before, international instruments consider diverse situations in which States must consult Indigenous Peoples to obtain their consent on administrative and legislative measures that are not necessarily linked to activities being carried out in their territories. These measures may be related to several areas of life for Indigenous Peoples: education, health, religion, work, justice, culture, human mobility, etc., and they may apply beyond and outside of the territory of said peoples.

Investment projects can even seriously impact the rights of peoples who, due to historic circumstances, live outside of their ancestral territory, in urban areas or distant lands, but who maintain their identity as peoples. In such cases, public

authority decisions that affect them should also be consulted on to obtain their consent.

As the Court understands it, the duty to consult and obtain consent, is ultimately founded on the right of peoples to self-determination, linked to the right to effective participation in decisions that affect them and to the right to their life as Peoples. In many cases, these rights are closely linked to community ownership of territory. However, the duty to consult does not necessarily, in all cases, come from a restriction on the right to ownership; rather it necessarily comes from a restriction on the right to self-determination.

States must consult Indigenous Peoples on decisions that might affect their self-determination, not only because they are the owners of a territory, but specifically due to the fact that they are peoples.

In the same vein: The Special Rapporteur notes with concern that some States have effectively or purposefully taken the position that direct consultation with Indigenous Peoples regarding natural resource extraction activity or other projects with significant environmental impacts, such as dams, is required only when the lands within which the activities at issue take place have been recognised under domestic law as indigenous lands. Such a position is misplaced since, commensurate with the right to self-determination and democratic principles, and because of the typically vulnerable conditions of Indigenous Peoples, the duty to consult with them arises whenever their particular interests are at stake, even when those interests do not correspond to a recognised right to land or other legal entitlement. (Ob. Cit.)

3.3 Who are the subjects to be consulted

Those entitled to the rights established in International Human Rights Law favouring Indigenous Peoples are precisely those peoples, defined according to the stipulations in Art. 1 of ILO Convention 169 (see above 2.2).

Under the criteria established in Convention 169, the application of indigenous rights to determined human groups who correspond to the standards outlined in Article 1 should not be restrictive with respect to the diverse names adopted by traditional peoples in different countries.

Thus, the Ecuadorian Constitution recognises indigenous communes, communities, peoples and nations, the Afro-Ecuadorian people and the Montubio people as the

holders of the collective rights established therein, in pacts, conventions, declarations and other international instruments of human rights (Articles 57, 58 and 59).

In Brazil, the Federal Constitution recognises Indians as the subjects of collective rights, without referring to Peoples as such, although it does mention communities and organisations (Art. 231). The Transitional Constitutional Provisions Act, a constitutional legal instrument, also recognises the rights of Afro-Brazilian communities, descendants of the Quilombos. According to Brazilian legislation, quilombo communities are those racial ethnic groups, according to criteria of self-identification, with their own historic trajectory and specific territorial relations, with presumed black ancestry related to their resistance of experienced oppression.[23]

Meanwhile, the Constitution of the Plurinational State of Bolivia recognises the pre-colonial existence of indigenous first-peoples peasant nations and Peoples and their ancestral dominion over their territories (Art. 2). The Bolivia Constitution conceptualises indigenous first-peoples peasant nations and Peoples as the entire human group that shares a cultural identity, language, historic tradition, institutions, territoriality and worldview, whose existence is prior to the Spanish colonial invasion.

In Peru, on the other hand, the current Constitution does not recognise Indigenous Peoples, but rather peasant communities and native communities. However, the term First Peoples is used in Art. 191 along with the category of communities, in the section referring to regional governments. This term has also been introduced into the Law on the right of first peoples to prior consultation, recognised in ILO Convention 169 of August 31, 2011 (Art. 2).

The principle of respect for self-identification established by Article 1 of ILO Convention 169 does not prevent the internal legislation of countries from broadening the scope of protection of the right to be consulted and to give free, prior and informed consent to other groups, to the extent that the intention in doing so is to further guarantee human dignity.

Colombian constitutional jurisprudence says that the Court has treated prior consultation as a fundamental right, to which the ethnic groups of countries are entitled, as well as indigenous, black, Afro-Colombia, Raizal, Palenquera and gypsy communities. In related jurisprudence, in the face of the seriousness of the problems studied, the Court has generally ordered the suspension of projects or works with the potential to impact the territories of ethnic communities unless

23 Decree 4.887, 20 November 2003. Art. 2.

the right to prior consultation is guaranteed. Similarly, the Court has recently ordered the pursuit of free, prior and informed consent.[24]

The Inter-American Court has indicated that the criterion of self-identification is the principal one for determining the condition of Indigenous People, both individually and collectively. At the collective level, the identification of each indigenous community is a social and historical fact that is part of its autonomy and therefore, the Court and the State must restrict themselves to respecting the corresponding decision made by the Community; in other words, the way in which it identifies itself.[25]

Peoples who will be impacted should be consulted on the administrative or legislative measure in question (see above 2.1 and 2.2) through their representative institutions. With respect to the representativeness of the institutions of Indigenous Peoples, the ILO's Governing Body accepted a report from the Tripartite Committee, created to examine a complaint regarding a violation of ILO Convention 169[26]which indicated that: "In view of the diversity of the Indigenous Peoples, the Convention does not impose a model of what a representative institution should involve, the important thing is that they should be the result of a process carried out by the Indigenous Peoples themselves. But it is essential to ensure that the consultations are held with the institutions that are truly representative of the peoples concerned..." and "the principle of representativity is a vital component of the obligation of consultation.... it could be difficult in many circumstances to determine who represents any given community. However, if an appropriate consultation process is not developed with the indigenous and tribal institutions or organisations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention."

On the other hand, in Costa Rica, the subjects of consultation and consent are the traditional communities and community structures.[27] Nevertheless, one regulation[28] of the Indigenous Law in article 5 establishes that structures representing indigenous communities legally and extra legally are "Associations of Indigenous Development"

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24 Constitutional Court of Colombia. CASO T-129/11 (03.03.2011).

25 Inter-American Court. Case of the Xákmok Kásek Indigenous Community v. Paraguay. Judgment of August 24, 2010. Paragraph 37. Cited in Indigenous and tribal peoples' rights over their ancestral lands and natural resources. IACHR. 2010.

26 REPRESENTATION (article 24) - ARGENTINA - C169 - 2008 ---- Report of the Committee set up to examine the representation alleging non-observance by Argentina of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Education Workers Union of Río Negro (UNTER), local section affiliated with the Confederation of Education Workers of Argentina (CTERA).

27 Indigenous Law, 4

28 Regulation of Ley Indígena, Decree N° 8489-G of 1978

(AID), which are guided by Law Nº3859 of 1968, and are not traditional community structures. Thus, paradoxically, a structure provided for in a regulation but not mentioned in the Indigenous Law supersedes traditional community structures, which could create serious confusion, manipulation and governance problems in indigenous territories.

3.4 Who is the entity responsible for consulting

States have the duty to respect, guarantee and protect the rights established in International Human Rights Law. Consequently, States have the responsibility to consult Indigenous Peoples in compliance with the provisions of Article 19 of the United Nations Declaration (States shall consult…) and Article 6, paragraph 1 of the ILO Convention 169 (In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned…).

International instruments would not be able to define which body within each State is designated to comply with the duty to consult; that is subject to the internal legal regulations of each State. Nevertheless, this definition should also be a matter of consultation with Indigenous Peoples since the regulatory or administrative provision that establishes it, whenever it directly affects the exercise of rights by Indigenous Peoples, should be subject to pre-legislative consultation as outlined in international instruments.

The state body or entity with authority to carry out consultation processes, should not delegate the performance of its role to any other entity, public or private: much less to private actors such as the companies interested in the development of the project or measure to be consulted on.

Nevertheless project proponents also have an obligation, which exists in parallel with, but independent of, the State duty, to obtain the FPIC of indigenous communities prior to the commencement of project activities in their territories. As a result when the State fails to comply with its obligations to consult and obtain FPIC there still remains a corporate responsibility to respect human rights and not to proceed with extractive operations in the absence of consent.

Recent studies referring to the Colombian situation confirm that in spite of shared interests between the investor and the State, at the moment of undertaking a project to explore for non-renewable natural resources, the State relegates a good part of its obligations to the specific interests of private transnational actors. To that extent, the State takes on a passive role, which translates to a disarticulation between what

should be assumed by the State according to the ILO Convention and the Constitution and what occurs in practice, which implies an institutionalism that does little to guarantee the rights of Indigenous Peoples, constituting an institutional neglect of them.[29]

This situation, which can also be observed in other countries, represents one of the greatest obstacles to the complete fulfilment of the State's duty to consult Indigenous Peoples.

29 Castillo, Yadira. El rol de la empresa transnacional extractiva de petróleo en la consulta previa con los indígenas. La experiencia de Colombia. Revista de Derecho. Universidad del Norte. Barranquilla, 2012. (in Spanish)

Fourth Section

Requirements of consent: that it be free, prior informed and obtained in good faith.

Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples defines the consent that must be sought from Indigenous Peoples via consultations as free, prior and informed and obtained in good faith.

4.1 Free

The United Nations Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism) and the Permanent Forum understand that: The element of "free" implies no coercion, intimidation or manipulation.[30]

The Special Rapporteur considers in this sense that States should make every effort to allow Indigenous Peoples to organise themselves and freely determine their representatives for consultation proceedings, and should provide a climate of respect and support for the authority of those representatives. For their part, Indigenous Peoples should work, when needed, to clarify and consolidate their representative organisations and structures in order that they may function effectively in relation to consultation procedures.

The potential for Indigenous Peoples to grant their consent freely, without coercion, intimidation or manipulation is dependent on their own organisational and

30 (A/HRC/18/42; page 22; paragraph 25) /(E/C.19/2005/3; page 13; paragraph 46)

representative structures being recognised and respected. These structures conform and function according to their own customs and traditions.

This requirement is linked with two important elements of the consultation process: time and format. Consultations that seek the consent of Indigenous Peoples must run according to the mechanisms of these peoples for the adoption of important decisions. If extremely short timelines are imposed for conducting the consultation, it could limit the possibility of the consulted peoples to give their free consent. The requirement that consultations be carried out according to times and rhythms imposed by the urgency to approve a decision of interest to the State or third parties can often result in coercion, corrupting the consent of those consulted.

Additionally, the method adopted for consultations must respond to the traditional models of each people for making important decisions. The procedures for processes of consultation with Indigenous Peoples must be flexible in order to incorporate the particularities of each People. The format for consultation must be agreed upon a priori between the consulting State and the consulted subjects. If methods are imposed that are different from those of the peoples concerned, the spirit of the consultation could be corrupted by intimidation and manipulation. Furthermore, the imposition of processes that are not consistent with the peoples' own decision-making processes and agreed by them is inconsistent with the exercise of their right to self-determination.

Frequently, Indigenous Peoples make their decisions in assemblies with broad and equal participation by their members. On other occasions, important decisions are reserved, for cultural reasons, to specialised bodies, such as Elder Councils. Sometimes, decisions are preceded by rituals or ceremonies, which are indispensable for them to be valid and legitimate.

If Indigenous Peoples are obligated by rules imposed from without to adopt decisions through consultations conducted in a rigid format, which is foreign to the culture of those consulted, it limits the possibilities that an eventual consent given under such conditions will fulfil the requirement that it be free.[31]

31 The Municipal Code of Guatemala (Decree 12-2002 of April 2, 2002) is an interesting case, establishing a consultation with indigenous communities and authorities (Art. 65) that can be conducted using a form designed technically and specifically for the case, determining in the notification the topic, date and place where the consultation will be held using the criteria of the concerned communities' own legal system. Nevertheless, in order for the results to be binding, at least fifty (50) per cent of the registered community members must participate, and the majority must vote in favour of the matter being consulted on. In contrast, for the consultation of community members described in Art. 64 to be binding, only a minimum of twenty (20) per cent of the registered community members are required to participate, with the majority voting in favour of the matter being consulted on.

This is what Convention 169 refers to when it says that consultations of Indigenous Peoples should be conducted in a form appropriate to the circumstances (Art. 6, number 2).

The element of "free" should make it possible for the subjects of the consultation to decide not to participate, thereby exercising their right to self-determination. It would be contradictory to autonomy and self-government, elements that make up self-determination, for peoples to be legally or materially compelled to submit to consultation processes in which they had decided not to participate.

The requirement to consult in good faith exists in order to obtain the free, prior and informed consent of Indigenous Peoples, and this should be consider a right to self-determination to give or withhold their consent, instead of an obligation imposed upon Indigenous Peoples. Indigenous Peoples are not obligated to participate in the process of free, prior and informed consultation, but the State is required to undertake it in good faith.

The requirement to consult in good faith with Indigenous Peoples in order to obtain their FPIC should be regarded a self-determination right to give or withhold consent as opposed to an obligation which is imposed on Indigenous Peoples. If they choose to engage in an FPIC process there is an obligation on both Indigenous Peoples and the State to do so in good faith.

This should be observed with even greater emphasis in the case of Indigenous Peoples in isolation. In this respect, the Guidelines for the protection of Indigenous Peoples in isolation and initial contact in the Amazon region, Gran Chaco and the Eastern Region of Paraguay[32] mention that in the case of Indigenous Peoples in voluntary isolation, the right to consultation with the goal of obtaining their prior, free and informed consent should be interpreted keeping in mind their decision to stay isolated and the need for greater protection of Indigenous Peoples in voluntary isolation given their vulnerable situation, which may be reflected in their decision to not use this type of participation and consultation mechanisms (Paragraph 68).

4.1.2 Community self-consultations

On occasions, local communities affected by state decisions choose the option of organising self-consultations to make a declaration, of their own initiative, on these decisions, which they have not been consulted on.

32 Office of the United Nations High Commissioner for Human Rights. Geneva. February 2012. (in Spanish)

Self-consultation has been defined as a legitimate process, in which a people discusses its principal problems and takes a stand on them as an Indigenous People, not as a board of directors or a representative assembly, but as a people, men and women, youth, adults and the elderly.[33] It is a mechanism communities resort to in the face of States' omission or reticence to fully comply with their obligation to consult.

Community self-consultations undertaken in Latin America in recent years regarding extractive projects in their territories have followed diverse procedures. For example, in Peru, on June 6, 2010, the National Achuar Federation of Peru (FENUP) conducted a process of self-consultation in 37 Achuar communities near the river basins of Pastaza, Huituyacu, Manchari, Huasaga and Setuchi, regarding three transcendental questions: (i) if the community wished to force the Peruvian State to recognise their ownership over their ancestral territory, considering the integrity of their natural resources, including soil, sub-soil and forest canopy resources, and over water resources or sources in the indigenous territory; (ii) if the community wished to ban the operation of oil and mining concessions that impact the life, health and peace of the Achuar People, in ancestral Achuar territory, located around the basins of the Pastaza, Morona, Huasaga, Huituyacu, Manchari, Setuchi and Anas rivers; and (iii) if the community supports the withdrawal of the Talisman oil company from Achuar ancestral territory, which spans oil blocks 64 and 101.

Community members over the age of 14 were consulted and the result was that, in the basins of the Huasaga, Manchari and Pastaza rivers, the population supported the three propositions unanimously, with 707 votes against 0 on each proposition. Meanwhile, in the Huituyacu and Setuchi basins, the vote was, on average, 722 votes in favour of the three propositions and 2 votes against (Racimos de Ungurahui, 2010).

In this case, the decision to conduct a self-consultation came from the representative organisation of the Achuar of Peru, and the format comes from their own assembly proceedings, which have been adopted by this people to discuss, analyse and make internal decisions.

In contrast, in the municipal community consultation conducted on June 18, 2005 by the community authorities of the Sipacapa municipality in Guatemala, regarding the open-pit mining exploitation of the Marlin mine, the procedure was regulated by consultation rules that even established that the result of the consultation was obligatory for the municipality, according to the Political Constitution, ILO

33 http://racimosdeungurahui.com/page16.html

Convention 169, the Law of Urban and Rural Development Councils and the Municipal Code. Around 50 community consultations have been held in Guatemala under this legal framework.

Another example is that of the communities of the Victoria del Portete and Tarqui parishes of the Azuay province in Ecuador, which on October 29, 2011, conducted a popular self-consultation to find out if the residents of these two parishes supported the mining activity planned in the Quimsacocha zone, where the Canadian company, IAMGOLD, intended to exploit 3.3 million ounces of gold, 10 million ounces of silver and 79 million ounces of copper. After a five-hour popular referendum, the residents of the Tarqui and Victoria del Portete parishes said No to the mining exploitation in Quimsacocha. In total 958 voters (92.38%) voted No and 47 (4.53%) voted Yes. The process was followed by national and international observers.[34] In this experience, the local communities involved in the self-consultation adopted an electoral mechanism, using four urns in which the residents, exercising their political rights, deposited their direct, secret vote. However, the self-consultation does not conform to the mechanisms established in the Constitution and state electoral laws for popular referendums.

In all of these cases and in many others that have occurred in different Latin American countries, community self-consultation have proven to be a powerful tool for communities to make a statement through the exercise of their right to self-determination.

In this regard, during a recent visit to Guatemala, the Special Rapporteur remarked that self-consultations or consultations of good faith, independent of the national legal framework, are valid and relevant as far as they reflect the legitimate aspirations of the Indigenous Peoples and communities to express their points of view surrounding those projects that have the potential to impact their traditional territories.[35] The Rapporteur specifies that although such consultations have been made in good faith, the State still has the obligation to consult the communities in accordance with international standards and to seek to establish a genuine process of dialogue between the communities and the State.[36]

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34 http://www4.elcomercio.com/pais/consulta-decidir-mineria_0_565143514.html

35 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Addendum: Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories A/HRC/16. Unedited version, 4 March 2011, para. 32. (in Spanish)

36 Office of the United Nations High Commissioner for Human Rights. El derecho a la consulta de los Pueblos Indígenas: la importancia de su implementación en el contexto de los proyectos de desarrollo a gran escala. Mexico City, 2011. (in Spanish)

Another example of Indigenous Peoples determining what a 'free' consultation and consent seeking process should entail is the practice of developing their FPIC protocols or policies.

4.2 Prior

The Expert Mechanism has indicated that "prior" implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow Indigenous Peoples to undertake their own decision-making processes.[37] Similarly, the Permanent Forum states that: Prior should imply that consent has been sought sufficiently in advance of any authorisation or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes.[38]

It is clear that if the objective of consent is to protect the effective enjoyment of the right to self-determination, effective participation and other rights of Indigenous Peoples, it is untimely and of little use to request their consent on decisions that have already been made, which are immovable and have already caused impacts. However, it is preferable that, in cases where decisions have already been made in violation of the duty to conduct consultations to obtain the consent of the affected peoples, consultations are undertaken, the sooner the better, in order to correct the omission as much as possible.

In this sense and in reference to the El Diquís hydroelectric project in Costa Rica, the Special Rapporteur believes that: The design of the project is now at an advanced stage, however, and the Government has taken various decisions which commit it to researching and developing the project, without adequate consultation beforehand. It is clear to the Special Rapporteur that, although the hydroelectric project has not yet received final approval, the ability of the Indigenous Peoples to exercise their right to self-determination and establish their own priorities for development has been infringed… Nevertheless, the Special Rapporteur considers that it would be possible to remedy the lack of indigenous participation in the development of the project if a proper consultation process were launched now that met international standards and addressed the particular challenges posed in this case.[39]

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37 A/HRC/18/42; page 22; paragraph 25.

38 E/C.19/2005/3; page 13; paragraph 46.

39 Report of the Special Rapporteur on the rights of Indigenous Peoples, James Anaya. Addendum: The situation of the Indigenous Peoples affected by the El Diquís hydroelectric project in Costa Rica. 11 July 2011

Furthermore, the Special Rapporteur has stated that as is the case in other contexts, consultations on extractive or other development activities affecting Indigenous Peoples should take place at the earliest opportunity and in all phases of decision-making, such that consultations should occur before concessions to private companies are granted.[40]

Colombian constitutional jurisprudence indicates: The determined moment at which prior consultation should be conducted is of crucial importance. In this regard, based on the principle of good faith that guides the consulting process, the Court says that the consultation should be timely, which means that it should be done in advance of the adoption of the measure since, once the measure is adopted, the participation of ethnic communities is of no use insofar that it cannot influence the decision-making process. It would not be a consultation process, but simply a notification of something that had already been decided.[41]

Additionally, the Court says that the procedure for consultation is, before all else, an instrument to guarantee the effective participation of traditional communities in matters that affect them in a setting aimed at guaranteeing their fundamental rights. In this sense, mere administrative formalities that tend to allow communities to exercise their right to defence with respect to adopted measures, or untimely efforts by the National Government to comply with procedures, do not satisfy the duty of prior consultation. For constitutional jurisprudence, the prior consultation is untimely, in the case of legislative measures, when it is undertaken after debate and approval proceedings have begun in Congress.[42]

Consent as an on-going process:

In the context of resource extraction processes FPIC must be understood as an on-going and iterative process to be obtained at each phase in the project lifecycle. Consent is consequently required prior to the issuance of a concession, prior to the commencement of both exploration and exploitation and also prior to any subsequent significant changes to project plans which may cause impact on Indigenous Peoples.

Capacity building:

As noted below the informed component of the requirement for FPIC goes beyond information provision and extends to ensuing that the community have the capacity

40 A/HRC/12/34; page 20; paragraph 54.

41 Constitutional Court of Colombia. CASO T-116/11 (24.02.2011). (in Spanish)

42 Constitutional Court of Colombia. CASO C-366/11 (11.05.2011). (in Spanish)

to understand the information provided. This capacity building aspect also related to the 'free' component of FPIC as, in the context of resource development projects in or near their territories, it implies that communities must be equipped with the capacity to engage in negotiations with the State and third parties in context of significant power asymmetries. Therefore, for consent to be freely given significant upfront investment in capacity building may be required. As part of the negotiation process communities must be free to choose negotiators who can effectively represent their interests. Mechanisms must be established to provide communities with the financial resources to cover the costs associated with engaging these experts, in a manner which avoids the potential for undue influence from the entity providing the funding.

4.3 Informed

The Expert Mechanism sustains that "informed" implies that Indigenous Peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to Indigenous Peoples.[43]

The Special Rapporteur points out that in order for the Indigenous Peoples concerned to make free and informed decisions about the project under consideration, it is necessary that they are provided with full and objective information about all aspects of the project that will affect them, including the impact of the project on their lives and environment. To this end he believes it is essential for the State to carry out environmental and social impact studies so that the full expected consequences of the project can be known. These studies must be presented to the indigenous groups concerned at the early stages of the consultation, allowing them time to understand the results of the impact studies and to present their observations and receive information addressing any concerns.[44]

The Permanent Forum is more specific, detailing: Informed should imply that information is provided that covers (at least) the following aspects: a. The nature, size, pace, reversibility and scope of any proposed project or activity; b. The reason(s) for or purpose(s) of the project and/or activity; c. The duration of the above; d. The locality of areas that will be affected; e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle; f. Personnel likely to be involved in the execution of the proposed project

43 A/HRC/18/42; page 22; paragraph 25.
44 A/HRC/12/34; page 20; paragraph 53.

(including Indigenous Peoples, private sector staff, research institutions, government employees and others); g. Procedures that the project may entail.

We stress that in order for the consent of Indigenous Peoples to effectively be informed, the State must necessarily provide them with complete and reliable information on the scope of the project to be consulted on, including its expected impact; this information must be provided in the language of those consulted, in an accessible format and in a culturally appropriate manner; those consulted must be allowed the time necessary to freely analyse the information they have been given and to compare it with information from other independent sources, so they may form their own opinion; the State must provide those consulted with the necessary resources for them to access the counsel they consider necessary and freely chosen by them.

Colombian constitutional jurisprudence maintains that mechanisms of participation should not be limited to simply serving an informative function, nor does mere notification of the measure to be adopted constitute consultation. This does not mean that prior consultation excludes the informative process, but it should not be limited to that. In fact, it has been indicated that during prior consultation, "governments should provide appropriate and complete information, that can be fully understood by indigenous and tribal peoples"… The information on the measure to be adopted should include the mechanisms, procedures and activities required to implement it and an explanation as to how its implementation could affect their identity. Additionally, the actual possibility to express a position and influence decision-making requires, in some cases, "actions aimed at helping these peoples acquire the knowledge and skills necessary to understand and decide between existing development options".[45]

One aspect that should be seriously taken into account when providing information to Indigenous Peoples within a consultation process is that this information be in their language so that they can fully understand it. In this sense, Peru's Law on the Rights to Prior Consultation[46] mandates: When conducting a consultation, the linguistic diversity of indigenous or first peoples is considered, especially in areas where the official language is not spoken by the majority of the indigenous population. Therefore, processes of consultation should have support from interpreters who are duly trained in the topics that are the object of the consultation; interpreters must also be registered with the specialised technical entity in indigenous material (Art. 16).

45 Constitutional Court of Colombia. CASO T-116/11 (24.02.2011). (in Spanish)

46 Law on the right to prior consultation of the indigenous peoples recognised in ILO Convention 169. 31 August 2011. (in Spanish)

Studies conducted in diverse regions of the world indicate that when communities are given information in terms that are not familiar to them or even languages that are not well understood by them, this limits processes of consent.[47]

Indigenous Peoples' use of their own languages is a right that is closely linked to the principal of interculturality[48] and self-determination. Interculturality in processes of dialogue implies the need to recognise the "other", their otherness, their particular forms of expression and their value systems in order to, thereby, establish favourable terrain, upon which the basic principle of free, prior and informed consent may be met (Office of the High Commissioner for Human Rights in Mexico, 2011).

Article 27 of the International Covenant on Civil and Political Rights recognises the right of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practice their own religion and to use their own language.

Conduct of impact assessments:

The UN Guiding Principles on Business and Human Rights require the corporate entities to conduct human rights due diligence prior to commencing a project. This is being interpreted as requiring a human rights impact assessment in high risk activities such as extractive projects located in Indigenous Peoples territories. In the context of natural resource extraction projects the conduct of these assessments is generally delegated to project proponent, who pays for the consultants to conduct them, with the State acting in a regulatory and oversight role. In addition to this legal and technical oversight role, the obligation on the State should also be to ensure that the Indigenous Peoples have a say in who is selected to conduct these assessments, and guarantee the participation of the impacted Indigenous Peoples in their conduct. Equally importan the State should require project proponent to allocate funds to an escrow account which can be used by the communities to

47 The Forest People Programme recounts: In the meeting between AMAN and FPP held in Indonesia, Luzon, Mindoro and Mindanao Indigenous Peoples testified, detailing such abuses. They indicated that the companies and local government employees frequently got away with abbreviated PFIC procedures because the communities did not know their rights or the required due process. They indicated that there were times when information was provided in terms that were not familiar to them and even in languages that they did not understand well. (Forest People Programme, 2007)

48 Some international instruments that refer to interculturality, cultural diversity and cultural rights are UNESCO's Universal Declaration on Cultural Diversity of 2 November 2001, which establishes that cultural diversity is an ethical imperative, inseparable from respect for human dignity; the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions; the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of December 18, 1992, which contains the general rights of ethnic minorities to enjoy their own culture and demand protection of their ethnic and cultural identity by States and States' obligation to adopt measures tending to guarantee that ethnic or linguistic minorities receive instruction in their native language; the Declaration on Race and Racial Prejudice of November 27, 1978, which refers to the right of peoples to cultural self-determination, the right to protection and preservation of their culture and the right to not be assimilated by other cultures, among others (Office of the High Commissioner for Human Rights in Mexico, 2011); the Convention on the Rights of the Child, which includes an article on respect for the culture of indigenous children (Art. 30), 1989.

employ independent experts of their own choosing to validate the findings of these assessments. The nature of the impact assessment will vary according to the particular project phase with different information requirements arising, for example, prior to seeking consent for exploration and exploitation.

4.4 Obtained in good faith

The three United Nations mechanisms specialised in the rights of Indigenous Peoples, the Special Rapporteur, the Expert Mechanism and the Permanent Forum have highlighted this characteristic of consent.

The first has manifested that: A good faith effort towards consensual decision-making of this kind requires that States "endeavour to achieve consensus on the procedures to be followed; facilitate access to such procedures through broad information; and create a climate of confidence with Indigenous Peoples which favours productive dialogue". The creation of a climate of confidence is particularly important in relation to Indigenous Peoples, "given their lack of trust in State institutions and their feeling of marginalisation, both of which have their origins in extremely old and complex historic events, and both of which have yet to be overcome".[49]

The second, for its part, highlights that consultations should be undertaken in good faith and in a form appropriate to the relevant context. This requires that consultations be carried out in a climate of mutual trust and transparency.[50] And the third says, with reference to consultations of Indigenous Peoples, that: The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation.

The creation of an environment of trust between the consulters and the consulted appears as a key factor for the construction of consent. That environment is only possible so far as mutual respect is cultivated, which is founded on one hand on the recognition of Indigenous Peoples' character as subjects of rights, and on the other hand on the openness they show to hearing what the State has to propose.

This can only be achieved if the objective of the consultation is to gain free, prior and informed consent. If those consulted perceive that the objective is other, that there is no genuine commitment by the consulting State to create conditions for agreement with those consulted, if the consultation is on immovable decisions that

49 A/HRC/12/34; page 19; paragraph 50.
50 A/HRC/18/42; page 19; paragraph 9.

have already been made and, thus, the result of the consultation is irrelevant, then the consultation is not in good faith.[51]

These four key requirements for the consent of Indigenous Peoples - to be free, to be prior, to be informed, and to have been reached in good faith - are indivisible and inseparable. They must be achieved as whole, and they can only be substantial in that way.

In the context of foresting a climate of mutual trust, which is a pre-requisite for good faith consultations, Indigenous Peoples must be provided with the opportunity to agree and formulate their own conceptions of FPIC, and if they so choose document these in the form of FPIC protocols or policies. In addition to addressing the procedural dimension of FPIC they may also wish to strengthen existing, or establish new, structures through which they engage with the State and other third parties in FPIC processes. The development of these protocols or policies should ideally occur in a context where there are no imminent threats arising from proposed measures.

The formal recognition of Indigenous Peoples' land, territory and resource rights is a further pre-requisite for the establishment of a climate within which meaningful good faith consent seeking engagement can occur. In addition, given that consent is a safeguard for Indigenous Peoples right to self-determined development they must be in a position to consider the alternative development options available to them prior to making a determination. In the context of extractive project this necessitates prior participation of Indigenous Peoples in the formulation of developmental strategies and policies pertaining to potential extractive industry operations in their territories. For the right to development as recognized under Art 7 of C169 and Article 32(1) of the UNDRIP to be realized in practice, adequate provision of information on alternative developmental options available to Indigenous Peoples prior to a consultation on a particular developmental option, such as an extractive project, should be guaranteed. In addition there should be sufficient prior capacity building so that communities are in a position to assess and contrast these alternative developmental options and paradigms, and Indigenous Peoples should have the opportunity to formulate their own development plans should they so choose.

51 For example, the Protocol for the Participatory Consultation of the indigenous peoples of TIPNIS (March 24, 2012) establishes that one of the objectives of the consultation is to establish the best possible conditions for the construction of Bolivia's first ecological highway…, which shows that the decision to create a road had already been adopted by the Bolivian State and the process of consultation being conducted would have no other purpose than to validate said decision in the communities.

Fifth Section

Phases or stages of consultations leading to consent

Legislative and jurisprudential advances[52] in many countries demonstrate the need to formulate processes for consultation of Indigenous Peoples, which are formal and composed by stages. These phases or stages could be:[53]

A. Identification of the administrative, legislative and/or development measure that needs to be consulted on.

According to Article 6 of ILO Convention 169 and the Declaration, art. 19, 32.2, the State has the obligation to consult Indigenous Peoples anytime legislative or administrative measures are planned that are likely to directly affect them, including in connection with any project for development, investment in infrastructure, exploration or exploitation of natural resources in indigenous territories or likely to affect the rights of Indigenous Peoples over these territories. Consequently, the planned legislative or administrative measure subjected to consultation must be well described, clear, and sufficiently specific and detailed. The characterisation must tell the consulted subjects the content and scope of the decision being presented for consultation, without leaving any room for doubt.

52 For example, Peru's Law on the right to Prior Consultation (Law 29785) and Judgment 001-10-SIN-CC of March 18, 2010 from the Constitutional Court of Ecuador, with reference to the unconstitutionality of the Mining Law.

53 On this point we follow Peru's Law 29785 on the right to Prior Consultation, as it is the most recently approved legal instrument on the issue in the region.

This is reflected in the variety of organisations and actors that adopt this standard, including not only the organisations of the United Nations System and the Inter-American System of Human Rights (like CEACR, CERD, the Human Rights Committee and the ICHR), but also multilateral organisations, like the Inter-American Development Bank and the World Bank, as well as private actors, such as the International Association of Oil and Gas Producers, who have established soft law standards on the topic.

Nevertheless, it is precisely this obligation that has been violated most seriously and repeatedly by States. Proof of this are the multiple declarations by CEACR, in which it has been forced to warn several States for neglecting to consult before authorising explorations and exploitations of natural resources, such as oil projects, lumber concessions, nickel mineral exploitations, extensive oil palm plantations and livestock projects, among others, located in areas inhabited by Indigenous Peoples.[54]

Likewise, the Human Rights Committee believes that the omission of consultation in cases of natural resource exploitation and exploration in indigenous territories threatens the right of ethnic minorities to preserve their culture, considered in article 27 of ICCPR. In this sense, the committee has made recommendations in its concluding observations on countries, indicating the necessity to consult on these kinds of projects with affected communities.[55] The CERD has also analysed the lack of consultation before undertaking projects of this nature, referring in particular to its General Recommendation Nº 23, in which it urges states to "Ensure that members of Indigenous Peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".[56] In General Recommendation 23, the CERD highlights the need to obtain informed consent before adopting any decision that affects Indigenous Peoples without explicitly mentioning exploration and exploitation projects.

B. Identification of subjects to be consulted

Both article 6 of ILO Convention 169 and article 19 of the United Nations Declaration on the Rights of Indigenous Peoples establish the duty to consult peoples who will be affected by a legislative or administrative measure. Convention

54 CEACR, (Committee of Experts on the Application of Conventions and Recommendations) Individual Observations on Convention 169: Mexico, 1999; Ecuador, 2003; Bolivia, 2003, 2005 and 2006; Guatemala, 2006, 2007 and 2008; Colombia, 2007.

55 United Nations Human Rights Committee, concluding observations for: Guyana, 2000; Venezuela, 2001; Sweden, 2002; Suriname, 2004; Canada, 2006.

56 CERD (Committee on the Elimination of Racial Discrimination). General Recommendation xxiii (51), on the rights of Indigenous Peoples, 1997, art. 4(d).

169 specifies that affected peoples must be consulted directly and through appropriate procedures and in particular through their representative institutions.

Consequently, it is critical to the success of processes of consultation that these be directed at all the peoples who will be effectively impacted by the measure to be approved, respecting mechanisms of convocation, dialogue and decision-making. Here, the Special Rapporteur has indicated that Indigenous Peoples themselves should contribute to facilitate processes of consultation through their own systems of decision-making, identifying clear representative structures that facilitate processes of consultation.[57]

The State, through the corresponding body, must verify with the participation of Indigenous Peoples and register who will be affected by the measure submitted for consultation, and who, therefore, must participate in the process. In order to do so, it must define the area or level of impact of the measure - if it will be targeted to a defined geographical area or if it is a measure with a regional or national scope - and allow those who feel affected to give their reasons for believing that they should participate in the consultation. For development projects and/or programmes, the affected area could encompass more than one People or Indigenous People, more than 2 communities or communities of Indigenous Peoples.

Peru's Law on Prior Consultation allows Indigenous or First Peoples to request to be consulted on a determined measure that they believe directly affects them. To this end, they must submit a petition to the state agency responsible for conducting the consultation, which must move forward with the petition. The act that denies the petition can be challenged through administrative and legal channels.

In Ecuador on the other hand, the Instructions for Pre-legislative Consultation contemplate a mechanism to enrol in the process of consultation, which may be accessed by any indigenous commune, community, people or nationality, Afro-Ecuadorian people, Montubio people and organisations that are entitled to collective rights in the first degree, connected to the fundamental issues to be consulted on (Article 11).

C. Publicise the administrative or legislative measure and report on its scope and applications

Through appropriate means (see above 4.3) that guarantee, materially and not only formally, access to information for the Indigenous Peoples that may be affected

57 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Addendum: Observations on the situation of the rights of the indigenous people of Guatemala with relation to the extraction projects, and other types of projects, in their traditional territories para. 50. March, 2011. (in Spanish)

by said measure. The information must be provided in the language of those consulted and in a socio-culturally appropriate, complete, simple way, and must include, when the case may be, studies conducted on the environmental and socio-cultural impact and the project/programme document and/or legislative measure.

Thus, for example, the Instructions for Pre-legislative Consultation in Ecuador expect the relevant issues to be published in languages of intercultural exchange (Article 9). Said languages, according to Article 2 of the Constitution of the Republic of Ecuador, are Spanish, Kichwa and Shuar. However, the same constitutional article establishes that other ancestral languages are also official for Indigenous Peoples in the areas where they live and in the terms established by law. The State shall respect and stimulate their use and preservation.

As we analysed in section 4.3, the transmission of information in the language of the peoples consulted is an important factor for compliance with the principle of interculturality and the self-determination of peoples, guaranteed by international instruments.

D. Internal evaluation by the Indigenous Peoples consulted

Article 7 of ILO Convention 169 recognises the right of Indigenous Peoples 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. On the other hand, the Declaration recognises that Indigenous Peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions (Art. 18).

As a result of this right, the Indigenous Peoples consulted should have the opportunity to evaluate the information provided them internally, without interference from the State or agents promoting the consulted decision. The format and duration of the internal process should be decided by the peoples, according to their traditional and customary models of decision-making. In the process, the peoples consulted should be able to access the technical counselling that they require, provided by the individuals or entities selected by them and where the State cannot interfere.

This criteria is followed in the Instructions for Pre-legislative Consultation in Ecuador which require that the internal discussion within the various levels of organisation of the participating indigenous communes, communities, peoples and

nationalities, the Afro-Ecuadorian people and the Montubio people, be conducted according to their customs, traditions and internal procedures for deliberation and decision-making, without the interference of any outside institution in the internal process. Nevertheless, the entities participating in the consultation may seek technical and specialised opinions, if so required (Article 14).

E. Methodology for consultation between the State and the Peoples consulted

Article 6 of ILO Convention 169 establishes that: The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures. As a result, the dialogue that occurs in the context of the consultations should be directed at creating the consent of the peoples consulted (see above II.II); it should be an open and sincere dialogue in good faith, which contributes to an environment of trust (see above IV). Positive dialogue is only possible to the extent that the State is willing to modify the consulted decision to accommodate the proposals of those consulted, if it is possible to thereby obtain consent, or reject the decision, if consent is not obtained.

As a core principle of free, prior and informed consent, all sides in a FPIC process must have equal opportunity to debate any proposed agreement/development/project. "Equal opportunity" should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in indigenous language(s), as appropriate […][58]

In general terms, international norms conceive of consultation as a process of dialogue and negotiation in good faith, in which all parties involved, the State and Indigenous Peoples, must make an effort to reach an agreement on the planned projects.[59] If the State convincingly establishes that the planned measure is founded on the legitimate interests of the State and society as a whole, both the indigenous party as well as the State party have the mutual responsibility to engage in dialogue in good faith on the projects with the aim of reaching an agreement.

It has been argued that human rights standards do not provide a particular methodology that indicates what steps should be followed to ensure the suitability of the consultation and the procurement of free, prior and informed consent. However, the following elements contribute to the development of processes of consultation and the application of free, prior and informed consent:

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58 Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (E/C.19/2005/3), approved by the Permanent Forum in its Fourth Session in 2005, para. 48

59 A/HRC/12/34 (2009), para. 39-40.

- Conduct, prior to the approval of any project, "a prior environmental and social impact assessment", carried out by "independent and technically capable entities" and directly by a responsible State body, as a guarantor of rights.[60]
- The clear identification of the Indigenous People or peoples affected and their natural territory;
- Respect for the culture and cultural identity of the Indigenous Peoples;
- The participation of the Indigenous Peoples in all stages of the consultation;
- The identification of the peoples or communities possibly affected;
- Respect for traditional and customary representative authorities;
- Credible and independent grievance mechanisms need to be established with indigenous participation for the oversight of FPIC processes and for on-going monitoring of agreements reached.
- Respect for the forms of notification and dialogue of the Indigenous Peoples;
- Recognition that, in processes of consultation, Indigenous Peoples must be allowed to set their own conditions and requirements, demand that the project be adjusted to their concept of development and propose other alternatives for development;
- Respect their ways of generating consensus, their ways of developing arguments and the importance of symbols and images through which they demonstrate their positions;
- Respect the times and rhythms that mark their decision-making processes;
- Obtain free, prior and informed consent according to their customs and traditions (in their own languages, according to their oral traditions, in their own time, etc.);
- Recognition of declarations of international law on the need to consult Indigenous Peoples on the projects that affect the use, administration and conservation of the resources in their lands or territories;
- The imperativeness of the principal of good faith during the processes.[61]
- The recognition that the right to give or withhold FPIC is an exercise of the right to self-determination and not an obligation to be imposed on Indigenous Peoples.
- Where consent is obtained in a manner which is not free, prior and informed it should be considered vitiated.

60 Saramaka People v. Suriname, para. 134.

61 Office of the High Commissioner for Human Rights in Mexico, 2012. (in Spanish)

Given the absence of this equality of arms in practice, as a result of the enormous power asymmetries between Indigenous Peoples on one hand, and the State and project proponents on the other, it is fundamental that the State guarantee respect for Indigenous Peoples' conception of consultation and consent and that control over the procedural and substantive aspects of the process be maintained by Indigenous Peoples.

F. Protocols for Free, Prior and Informed Consent of Indigenous Peoples

Some Indigenous Peoples have documented their own consultation and FPIC protocols specifying how their consent must be sought in accordance with their customary laws and practices, who is to be consulted, what their representative structures are, and the manner in which they will provide or withhold consent.[62] This concept of indigenous community protocols is promoted under the Nagoya protocol to the Convention on Biological Diversity on access and benefit sharing.

Such protocols may extend to cover multiple communities or peoples and constitute a pro-active exercise of the right to self-determination[63] Where an indigenous community or people, or group of indigenous communities or peoples, have developed such protocols as a pro-active exercise of their right to self-determination, the State and all third parties seeking to engage with Indigenous Peoples, should adhere to the requirements specified therein. The State should ensure that the legislative and institutional framework accommodates these protocols thereby guaranteeing culturally appropriate consultation and consent seeking processes.

G. Adopt the corresponding decision

As Article 6 of ILO Convention 169 and Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples indicate, the object of processes of consultation is to reach an agreement or obtain free, prior and informed consent on the proposed measures. As noted earlier the wording and intent of the Declaration in relation to the affirmation of a consent requirement goes beyond that of the ILO C169, in light of the former's recognition of Indigenous Peoples' right to self-determination. Consultations with Indigenous Peoples, therefore, must be aimed at obtaining free, prior and informed consent. If it is obtained, the appropriate public authority will adopt the decision, adjusting it according to the changes proposed by those consulted as a condition for their consent. If this is not obtained, the process is truncated and

62 Examples include the FPIC Manifesto of the Subanen of Zamboanga in Mindanao the Philippines and the Kitchenuhmaykoosib Inninuwug a Canadian first nation community in Northwestern Ontario.

63 In the case of the Subanen of Zamboanga the protocol covered most of the Subanen communities of the Subanen people who number approximated 300,000 in total.

ineffective and cannot be completed. The State must decide, together with those consulted, on an appropriate time to resume talks or to accept the rejection of the proposal for which it was unable to obtain consent.

In this regard, the CERD has emphasised in several concluding observations and Early Warning Urgent Action letters the need for States to obtain said consent. An example of this is the concluding observation made by CERD on Ecuador in 2003, in which it noted that, As to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of Indigenous Peoples. The Committee therefore recommends that the prior informed consent of these communities be sought.[64] Consistent with its focus on the need to obtain consent CERD's 2010 Early Warning Urgent Action letter to India requested information on measures taken to 'in order to seek and clearly and fully obtain [the Dongria Kondh peoples] free prior and informed consent to these mining activities'[65]

As outlined earlier good faith consultation and FPIC processes can only occur where an environment of mutual trust exists within which Indigenous Peoples are free to deliberate on their decision-making procedures and structures. In order to establish such an environment adequate space, outside the context of a particular measure or project consultation, should be provided for the peoples to formalize, develop or strengthen these procedures, representative structures, where appropriate at a pan community or people level. This is particularly relevant in the context of natural resource exploitation, and implies a moratorium of sorts during which time an environment is established in which the State can reach an agreement with Indigenous Peoples as to how their particular and diverse conceptions of consultations and consent interface with the State regulatory framework and institutional apparatus. The State is thereby provided with the opportunity to make the appropriate modification to this apparatus in order to ensure that consultation and FPIC processes are culturally appropriate and consistent with the exercise of the right to self-determination. This overarching engagement with Indigenous Peoples to create an environment within which FPIC process can be realized is consistent with Article 2 of ILO Convention 169 which requires that Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

64 CERD, Concluding observations for Ecuador, 2003, para. 16; also see CERD, Concluding observations for Suriname, 2004.

65 CERD Early Warning Urgent Action letter to India 12th March 2010

"Given that the right of Indigenous Peoples to free, prior and informed consent is recognized and affirmed in the United Nations Declaration on the Rights of Indigenous Peoples, questions have arisen concerning its implementation. In the light of such fundamental concerns, the Permanent Forum has decided to prioritize free, prior and informed consent. Therefore, in the context of future work, the Permanent Forum will explore the potential for the development of guidelines on the implementation of free, prior and informed consent. The Permanent Forum will endeavour to do so in collaboration with the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the rights of Indigenous Peoples, who are specifically mandated to address the human rights of Indigenous Peoples. This initiative, as well as those referred to immediately below, are fully consistent with articles 38, 41 and 42 of the Declaration." This is the 37th recommendation of the Tenth Session of United Permanent Forum on Indigenous Issues. 2011.

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