



Human Rights Council
Expert Mechanism on the Rights of Indigenous Peoples
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Item 4: Study on free, prior and informed consent

Comments submitted by the ILO

The International Labour Office appreciates the opportunity to provide technical comments regarding the draft study on free, prior and informed consent (A/HRC/EMRIP/2018/CRP.1) prepared by the Expert Mechanisms on the Rights of Indigenous Peoples, which explores this topic in the context of the United Nations Declaration on the Rights of Indigenous Peoples (“the Declaration”).

At the outset, the Office would like to emphasize that from a policy and practice perspective, consent or agreement is unachievable without effective and meaningful consultation and participation mechanisms, which is vital for securing the rights, integrity and well-being of indigenous and tribal peoples.

The draft study makes several references to the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (“the Convention”). An engagement with the Convention, which is the only international treaty specifically addressing the rights of indigenous peoples, is indeed relevant for the draft study. The Convention’s provisions regarding consultation, participation, and land and natural resources, amongst others, have played an important role in shaping the provisions of the Declaration. Yet, the Convention and the Declaration are different instruments in terms of legal nature, institutional context, content and time of adoption, and therefore stand for themselves. Nevertheless, it is useful to recall some of the key provisions of the Convention when addressing related issues under the Declaration. With regard to consultation, participation and consent, several provisions are relevant, particularly the following:

- Article 6(1) of the Convention provides that “in applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly”.

- Article 6(2) stipulates 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”.
- Article 7(1) of the Convention reads as follows: “The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly”.
- Article 16 of the Convention provides that indigenous and tribal peoples not be removed from the lands which they occupy and that “where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent”. The remainder of the Article proscribes safeguards to be respected in case consent could not be obtained.

The ILO supervisory bodies, over the almost three decades of the Convention’s existence have provided guidance with regard to applying the Convention. Some of the issues highlighted in the General Observation of the ILO Committee of Experts on the Application of Conventions and Recommendations published in 2012 are the following:

- Consultations must be formal, full and exercised in good faith; there must be a genuine dialogue between governments and indigenous and tribal peoples characterized by communication and understanding, mutual respect, good faith and the sincere wish to reach a common accord;
- Appropriate procedural mechanisms have to be put in place at the national level and they have to be in a form appropriate to the circumstances;
- Consultations have to be undertaken through indigenous and tribal peoples’ representative institutions as regards legislative and administrative measures;
- Consultations have to be undertaken with the objective of reaching agreement or consent to the proposed measures.

Pro forma consultations or mere information will not meet the requirements of the Convention. At the same time, such consultations do not imply a right to veto nor is the result of the consultations necessarily the reaching of agreement or consent.

The Convention was adopted by the ILO’s global membership with overwhelming support in 1989. In 2014, the UN General Assembly, in the outcome document of the World Conference on Indigenous Peoples, called for further ratification of the Convention. For ratifying States, the Convention’s provisions circumscribe the international obligations they have voluntarily

accepted. Ratifying States have an obligation to give effect to all of the Convention's provisions in good faith, subject to supervision by the ILO supervisory bodies. The Convention's provisions are also relevant for understanding the normative content of the rights of indigenous peoples to consultation and participation in international law more generally, including with regard to the aspect of consent. In many countries that have ratified the Convention, its provisions form part of national law, often at the constitutional rank. **However, certain sections of the draft study present a limited and narrow understanding of the scope of the Convention, despite a recognition of the complementarity of the Convention and the Declaration.**

As in the Convention, the provisions of the Declaration referring to consent are not constructed uniformly and have different rationales, origins and backgrounds. While the draft study refers cursorily to all articles of the Declaration mentioning "free, prior and informed consent", a detailed analysis of these provisions is warranted in order to explore the meaning and differentiate the different usage and implications of the notion of FPIC in the different parts of the instrument. This would create a better basis for reaching the study's stated objective which is to "contribute to an understanding of FPIC in the context of developing practices and interpretations" (para. 2). **Practices and interpretations can only be assessed if the underpinning provisions are clarified as a starting point.** This would also assist in overcoming the currently almost exclusive focus on consultations in respect of development projects that leaves little attention to consultations and consent with regard to other matters such as legislative measures, relocation or intellectual property.

While the Declaration is not a treaty, it is nevertheless an international instrument adopted by the UN General Assembly. This calls for clarity regarding the methodologies applied for the purpose of the study. Though this is not expressly stated as an objective, the study does seek to attach a specific meaning and scope to Article 19 and 32 of the Declaration, as including a mandatory consent requirement. In this regard, as mentioned, **it is necessary to engage in more detailed legal analysis of the relevant provisions, including their wording, origin, and background and drafting history.** Practices or policies of companies and international finance institutions promoting or requiring consent in certain circumstances in the context of projects, while being a relevant and noteworthy development, may not lend themselves as a basis for reading consent requirements into Articles 19 and 32 of the Declaration or establishing standards under international law, including due to their context specific understandings of consent.

FPIC is an element of several articles which deal with specific rights and issues. Despite not having the same implications in the different articles of the Declaration, **FPIC could be considered as an overarching and cross-cutting concept** in that instrument. Referring to FPIC itself as a "norm", however, may not be precise as "consent", as a concept, as such does not set a standard or establish a rule or command. More generally, it is noted that the draft study

refers to FPIC in multiple other ways, as a principle, a safeguard, a requirement or a process. This varied classification, understanding and elastic use of the FPIC as a concept makes it difficult to understand what it implies in the different contexts where it is used.

In Articles 19 and 32 of the Declaration, consent is mentioned in connection with the duty to consult with regard to administrative or legislative measures (Article 19), and measures which may consist of approval by the State of development projects (Article 32). Under the heading “Scope of FPIC” (p. 6), the draft study notes that in Article 19 of the Declaration, the State duty to consult and cooperate with indigenous peoples in order to obtain free, prior and informed consent, does not imply a requirement of reaching consent (paragraph 15). Hence, consent is the objective of the consultation process. However, the draft subsequently argues in relation to Article 19 and 32 combined (under the heading of “operationalization of FPIC”, p. 11) that consent *is* in fact a requirement in connection with the “adoption and implementation of legislative or administrative measures” and “any project affecting indigenous peoples’ lands, territories and other resources”, including all activities of extractive industries (paras 29 and 30). Such a reading does not appear to be borne out by the wording and drafting history of Articles 19 and 32, a view that is shared by academic writers and experts, including experts cited by the draft study.

The expression “free, prior and informed consent” is a distinct element in the structure of Articles 19 and 32 of the Declaration and at the same time an integral part of these provisions which fundamentally address the State duty to consult. The draft study elaborates on the meaning of the terms “free, prior and informed” precisely in connection with consultation which illustrates that consent in the context of Articles 19 and 32 is the desired outcome of a consultation process rather than an independent or separate requirement. The draft’s proposition that “FPIC is wider in scope than, and must be differentiated from, other terms in the UNDRIP, including ‘participation’ and ‘consultation’” (para. 14) would therefore benefit from further consideration.

While the draft study in paragraphs 29 and 30 appears to conclude that consent was a general requirement, it subsequently also considers that whether or not consent is required was a question of proportionality. In this connection, it is stated that indigenous peoples’ consent was a requirement “in matters of fundamental importance for their rights, survival, dignity and well-being” (para. 31) and where a measure is “likely to have a significant, direct impact on indigenous peoples’ lives or land, territories or resources” (para. 33). By reference to the word “affect” in Articles 19 and 32, the draft study essentially argues that the principle of proportionality would lead to a right to consent under these provisions, depending on the level of impact of a measure. In this regard, **the Office would note that Articles 19 and 32 of the Declaration set out the duty to consult with regard to measures that may affect indigenous peoples.** Whether or not a measure may affect indigenous peoples triggers the duty to consult, rather than a duty to obtain consent. Court decisions cited by the draft study

do not appear to establish “consent” as a stand-alone right or a part of the right to consultation, but rather have looked at consultation and consent in the context of assessing whether limitations of rights, such as the right to property, were justified or not. As far as the Office is concerned, the Inter-American Court of Human Rights, including in cases cited by the draft, has not read a consent requirement into Article 6 of the Convention or Article 19 or 32 of the Declaration when relying on these instruments. In addition, the Office would note that proportionality in human rights law goes beyond impact assessment and involves a balancing of interests in the context of assessing whether a measure has a legitimate public purpose and is necessary and proportional. Such assessments have to be made on a case by case basis.

Part III, section 4, refers to “consent” as “key principle that enables indigenous peoples to exercise their right to self-determination” (para. 24) and elaborates on situations where indigenous peoples legitimately should be able to say “no” to proposed measures. **The Office notes that both the Declaration and the Convention emphasize consultation, participation and co-operation.** Though the Convention does not encompass the right to self-determination, consultations and participation in line with the Convention are important aspects for exercising this right. Framing FPIC as a right to consent, however, runs the risk of deemphasizing the obligation of States to guarantee the right to consultations and participation in line with their international obligations. Certainly, not all consultation processes will lead to agreement or consent – this is implied in the very nature of dialogue and negotiation. Yet, this part of the draft study presents a narrow and reductive understanding of consultations as a “yes” or “no” exercise rather than a process for shaping agreements through dialogue which is the underlying philosophy of both the Convention and the Declaration. Seeing “no” as a response to problems such as distrust, lack of information, non-respect for international standards, which call for upfront, proactive and tailored solutions, is insufficient and likely counter-productive. These issues require continued efforts including enhancing substantially the capacity of the responsible government institutions as well as the representative institutions of indigenous peoples, putting in place appropriate legal frameworks and ensuring a continuing dialogue between indigenous peoples and the State to assess and improve existing practice, as well as effective access to administrative and judicial recourse. Recognizing “rights to consultation” are protected under the American Convention on Human Rights, the Inter-American Court of Human Rights is holding States responsible for adopting the “the necessary legislative, administrative or any other type of measures to give full effect, within a reasonable time, to the right to prior consultation of the indigenous and tribal peoples”.¹

Part IV of the draft study on “Review of FPIC practices” starts with a discussion on “interpretation” of Convention No. 169. In this regard, **the Office notes that the ordinary**

¹ *Sarayaku v. Ecuador*, Judgement of June 27, 2012 (Merits and reparations), para. 341 (operative part, order No. 4).

meaning of the terms of Convention's regarding consultation and participation are clear and unambiguous with regard to the aspect of consent. It is for ratifying States to ensure that they make effective, in good faith, all provisions of the Convention, subject to control by the ILO supervisory bodies. The supervisory bodies, through their work since the Convention's entry into force, have contributed to a better understanding the Convention's provisions and provided guidance on their application (including through two General Observations published in 2009 and 2011, respectively). The Office has prepared a Handbook on the Convention which explains the scope of the Convention's provisions regarding consultation, participation and consent, and related obligations under the Convention.² The provisions of the Convention are without prejudice to international obligations States may have under other treaties. Furthermore, the Convention clarifies that "the application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements" (Article 35).

² http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/WCMS_205225/lang--en/index.htm