

SUBMISSION BY AMNESTY INTERNATIONAL

COMMENT ON THE DRAFT STUDY ON FREE, PRIOR AND INFORMED CONSENT BY THE EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES

July 2018

Index: IOR 30/0112/2018

Introduction

Amnesty International would like to express its appreciation to the Expert Mechanism on the rights of Indigenous Peoples (EMRIP) for this opportunity to contribute to the study on free, prior and informed consent (FPIC). This is our second submission, having now had the opportunity to read the draft study prepared by the Expert Mechanism.

Amnesty International would like to welcome the draft study as an important contribution to the issue. The EMRIP study has the authority of an official body of the United Nations, and one which is made up of experts from Indigenous peoples. While there is a growing body of literature on FPIC, including guidance on operationalization, much of it has been developed by agencies or NGOs who focus on a specific area of application.¹ Valuable guidance has been provided by the current and former special rapporteurs, but is not collected in one place.

This submission is based on the organization's own experiences of researching FPIC processes and its engagements with Indigenous partners. As was the case with our first submission, the considerations here should not be assumed to be an exhaustive compilation of all necessary issues involved in such processes; furthermore, we have focused attention on the Expert Mechanism's draft study, particularly on a number of points where we believe it might be strengthened.

Indigenous peoples' decision-making and FPIC

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), codifies the right of Indigenous peoples to take decisions in matters of relevance to them. Article 18 states 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.*

A number of other articles in the Declaration guarantee Indigenous peoples' decision-making rights in various domains, including Articles 5, 9, 11, 12, 13, 14, 16, 20, 33, 34, 35, and 36. It would be useful for the study to recognize that there is an important

¹ Examples include the UN-REDD Programme's *Guidelines on Free, Prior and Informed Consent* (<https://www.unclearn.org/sites/default/files/inventory/un-redd05.pdf>); the Food and Agriculture Organisation's *Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition* (<http://www.fao.org/3/a-i3496e.pdf>); the Forest Stewardship Council's *Guidelines for the Implementation of the Right To Free, Prior And Informed Consent* (https://unredd.net/index.php?option=com_docman&task=doc_download&gid=8973&Itemid=53). These documents are included as examples; however, no comment is made on their compliance with international standards or on the extent of their acceptance by Indigenous peoples.

link between these decision-making rights and FPIC as a means to ensure that the state respects and upholds those decisions.

Consultation and FPIC

The draft study importantly establishes the difference between consultation, participation and FPIC. The study should recommend that language used by states is consistent, for example by ensuring that mere “consultation” is not used where FPIC is meant. Similarly, the UNDRIP formulation “consultation and cooperation” should be used where appropriate rather than merely “consultation”.

The value of FPIC externally and internally

Para 17 states “the right to participation of indigenous peoples seeks to revitalise and restore indigenous peoples’ own decisions-making and representative institutions that were also either disregarded or abolished.” This passage might create the unintended impression that the only purpose of such institutions is to engage with external actors on proposed projects; and also that such institutions have fallen into abeyance because such outlets for engagement have not existed. In reality, a significant function of such institutions is to take care of internal governance tasks, fulfilling the right to self-government,² and the main reason they fall into abeyance is external oppression. Amnesty International’s research in a number of countries indicates that Indigenous peoples’ leaders, activists and lawyers are regularly subjected to threats, violence and arbitrary arrest in order to deter them from advocating for the rights of their communities.³

As in the above situation, of contested representation, the solution in this case is most likely to lie in the state ensuring that oppression of Indigenous peoples, and in particular on their representative institutions, ceases, and it is recommended that the study explicitly recognizes this fact.

Indigenous peoples’ FPIC protocols

It would be helpful for the study to note that any engagement of states with Indigenous peoples is a process in which both parties can learn and be enriched. It is therefore suggested that the recommendation in the Advice Note Annex – “States and the private sector should promote and respect indigenous peoples own protocols, as an essential means of preparing indigenous peoples to enter into consultations with the State and for the smooth running of the consultations” be modified as follows: “States and the private sector should promote and respect indigenous peoples own protocols, as an essential means of preparing *the State, third parties and indigenous peoples to enter into consultation and cooperation*, and for the smooth running of the *process*”. Similarly, in para 55, “These protocols are an important tool in preparing *the State, third parties and indigenous peoples to engage in a consultation or FPIC process, setting out how, when, why and whom to consult*”.

FPIC processes, as well as any process of consultation and cooperation, are necessarily

² Tockman, J., Cameron, J., Plata, W., “New Institutions of Indigenous Self-Governance in Bolivia: Between Autonomy and Self-Discipline”, in *Latin American and Caribbean Ethnic Studies*, Routledge, July 2015; Binder, C., Binder, C., “A capability perspective on indigenous autonomy”, in *Oxford Development Studies*, Routledge (April 2016), pp. 297-314.

³ For example, Malaysia (Urgent Action: End Harassment of Indigenous Rights Defenders, January 2017; Honduras and Guatemala (We Are Defending the Land with Our Blood: Defenders of the Land, Territory and Environment in Honduras And Guatemala), September 2016; Ukraine (Harassment and Violence Against Crimean Tatars By State and Non-State Actors), May 2014

processes that involve (at least) two parties, and the first step is to reach an agreement over the modalities to be adopted for such an engagement. It would however not be acceptable for the state to unilaterally impose its own preferred modality. It should also be recognized that the identity of Indigenous peoples is informed by a history of cumulative injustices (UNDRIP, PP6), and they are currently marginalized from state decision-making. The adoption of protocols proposed by the Indigenous people⁴ would therefore go some way towards providing redress for historical injustices and correcting power imbalances, thus helping to fulfil the obligation to “consult and cooperate in good faith” (to obtain FPIC) (Art. 19 UNDRIP).

Most importantly, it would be helpful if the note would point out that a purposive reading of the applicable standards suggests that it is in fact obligatory for the state to follow such protocols; as long as they are developed and/or recognized by the people’s legitimate representatives, they would form part of those “representative mechanisms” through which the state is required to consult in accordance with UNDRIP Art. 19 (such mechanisms being composed not only of people, but also, of a body of customary practice, law and policy which informs how such mechanisms function). Article 18 (*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*) and Article 5 (*Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State*) also support this reading.

The meaning of “prior” in “free, prior and informed consent”

The study notes (para. 20) “Involving indigenous peoples at an early stage: Consultation should be undertaken as early as conceptualisation and design phases and not launched at a late stage in a project’s development, when crucial details are already decided upon”. This point could be usefully expanded. It would be helpful for the study to note that in some cases, highly complex projects are proposed that might require the state to engage in FPIC processes at both national and local level, and engaging with different peoples collectively or separately as circumstances require. In one such case in Kenya, regarding a conservation and climate change mitigation project, covering a number of geographical areas and affecting a number of communities, the state did not consult with affected Indigenous peoples when designing and initiating the overall project. It proposed to consult with them when activities at the local level commenced, arguing that it was in this way fulfilling its obligation to obtain FPIC. However, crucial details of the project, including the conservation model to be adopted, had already been decided at the project design stage.⁵ The obligation to obtain FPIC cannot therefore be said to have been fulfilled. Arguably, the most appropriate approach was a national level FPIC process engaging with all affected peoples on the design of the project, followed by separate processes for each affected people when proposing activities at the local level; “Consent may be required at multiple phases during the consultation and negotiation processes and

⁴ An example from Argentina: *Kachi Yupi – Huellas de la Sal: Procedimiento de Consulta y Consentimiento Previo, Libre e Informado para las Comunidades Indígenas de la Cuenca de Salinas Grandes y Laguna de Guayatayoc*

⁵ Amnesty International, *Families Torn Apart: Forced Eviction of Indigenous People in Embobut Forest, Kenya* (2018) pp. 67-8.

throughout the project's lifecycle".⁶

When Indigenous peoples' representative institutions are weakened

The draft study notes that "States should be mindful of situations where indigenous peoples have lost their decision-making institutions, where communities have been dispersed, dispossessed of land and/or relocated, including to urban areas, as well as groups that remain in voluntary isolation." In some cases, due to Indigenous peoples' experience of colonization, expropriation of land, and other forms of persecution and marginalization, the weakened state of decision-making structures may mean that the necessary conditions for a valid FPIC process do not exist. The draft continues by noting that "[t]hese situations may demand assistance by the State to rebuild their capacity to represent themselves appropriately". In such cases, there may indeed be an obligation on the state to provide material or other support to efforts to reconstitute or strengthen Indigenous peoples' representative institutions and decision-making processes, should such assistance be sought; the study might note that this is consistent with Article 39 of UNDRIP.

Where institutions are weakened to that extent, the Indigenous people may then decline to engage in an FPIC process. Under such conditions, any FPIC process, or any claims that consent has been obtained, would be invalid. In such cases the state should not proceed with the FPIC process (and necessarily, the proposed initiative) until such issues are resolved.

Contestations of representative institutions

In para. 22, the study notes that "Establishing who can represent indigenous peoples may cause difficulties". It should be noted that decision-making structures vary greatly. Some peoples may delegate some decision-making powers to an appointed leader or body of leaders; in some communities, all decision-making may take place collectively, with all members present or being given the opportunity to be present, and the role of appointed representatives may be merely to communicate such decisions to outside parties.

One consequence of weakened representative institutions can be that contestations arise as to who legitimately represents an Indigenous people. We would note that contestations regarding the identity of persons who can claim to represent Indigenous peoples can arise for a number of reasons:

- while this phenomenon is often portrayed by the state (and other actors such as the media) as being related to internal politics, states or other parties may interfere with Indigenous peoples' decision-making structures with the express intent of creating the appearance of internal disagreement, or manipulating consent for a project; this can be done by co-opting community members by means of threats or promised/actual advantages, in order to encourage them to challenge the legitimate leadership; approaching community members on an individual basis; threatening, spreading false information about, or otherwise putting pressure on legitimate representatives;⁷

⁶ Gilbert, J., Doyle, C., "A New Dawn Over the Land: Shedding Light on Collective Ownership and Consent", p. 315, in Allen S., Xanthaki, A. (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples*, Hart Publishing, 2011, pp. 314-5) (hereinafter, "A New Dawn Over the Land")

⁷ International Work Group for Indigenous Affairs, *Indigenous World 2009* (co-optation and bribery of Indigenous leaderships by political parties in Nepal), pp394-5; In the Philippines, "portraying individuals amenable to the interests of [...] external entities, but who are not selected according to the community's procedures, customs or traditions", was "a consistent theme

- States or third parties may spread false information about the membership of Indigenous peoples, falsely identifying sections of the community who are allegedly excluded from decision-making structures;
- Historical injustices, ongoing violence and human rights violations including arbitrary arrests, removal of control over natural resources, and dispersion away from their ancestral lands, may undermine Indigenous peoples' capacity to resolve internal tensions.

The draft states that “[f]urther exploration may also be required of States or third parties in ensuring that institutions supporting indigenous peoples and claiming to represent them are so mandated” (para 22). This implies an externally-led process of “fixing” the problem of legitimate representation that is potentially problematic. The requirement that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions” (Art. 19 UNDRIP) still applies. Great care must be taken to ensure that any external intervention does not further undermine such institutions; the emphasis should therefore be on supporting the conditions needed for institutions to reestablish themselves from within. In some cases, this may in practice mean that all the state has to do is to make sure that any external pressure on institutions – from the state or from third parties – ceases. In other cases, some external support for the reestablishment of structures may be appropriate, if sought by the people in question. It may be appropriate for third parties trusted by the Indigenous people in question to be invited to support this process.

In this regard, the study notes in a different section: “Any tensions which may arise within indigenous communities in the process of seeking FPIC should be resolved by the indigenous peoples themselves, in accordance with their own laws, traditions and customs, through their own representative institutions.” (para 38).⁸ This is helpful and could usefully be moved up to the section on contested representation.

Additional suggested modifications

Para 56:

The study notes the existence of “laws, practices or guidelines in Venezuela, Ecuador, Chile, Mexico, Argentina, Guatemala, Peru, the Philippines, Finland, Canada and the USA” – we would recommend to note that the mere existence of such documents should not be interpreted as meaning that these countries have unequivocally positive records on FPIC, as negative examples have also been cited in a number of these countries.⁹

Para 58:

The study correctly notes that at the national level, many laws on consultation,

that emerged from regional consultations held with indigenous peoples in the Philippines in preparation for the ICERD indigenous peoples shadow report, July-August 2008” (“A New Dawn Over the Land”, pp. 314-5).

⁸ See also *Saramaka People v. Suriname* (Inter-American Court of Human Rights), Judgment of November 28, 2007: “the question of whether certain self-identified members of the Saramaka people may assert certain communal rights on behalf of the juridical personality of such people is a question that must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case.” (para. 164)

⁹ *Angela Poma Poma v. Peru*, Human Rights Committee, Communication No. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (27 March 2009); Amnesty International, “The Point of no Return: the Human Rights of Indigenous Peoples in Canada Threatened by the Site C Dam” (2016); Inter-American Commission on Human Rights, Report no. 2/121, Case 12.094, Indigenous Communities of the Lhaka Honhat (Our Land) Association, Argentina, Merits Report (January 26, 2012)

cooperation and consent are developed without sufficient consultation with Indigenous peoples or obtaining their FPIC. It is recommended to include a recommendation to address this failing in the advice note.

Para 58:

The study notes “The absence of regulatory mechanisms defining how to carry out a consultation encourages contradictory interpretations of which measures and projects need to be preceded by consultation processes and which require consent”. This is to some extent true but the standards themselves are clear in the obligations they apply to the state. Regulations play an important role but their absence must not be an excuse for the state to say that they do not understand what they have to do. The draft study may further unintentionally imply that the state can determine in advance that certain decisions require consultation only, and certain decisions require FPIC, independent of the view of the affected peoples and independent of an assessment of their specific circumstances and the potential impacts of the proposed measures. The state is obliged to fully involve affected Indigenous peoples in decision-making concerning the application of these standards.

Advice Note, p. 21, para. 1:

It is recommended that the note insists on the obligation that the named agencies consult with Indigenous peoples and obtain their FPIC for policies developed.

Advice Note, p. 23, para 4:

It is recommended that “States should establish procedures necessary to regulate, verify and monitor the consultation process ensuring that free, prior and informed consent, was sought and if consent was required was received” be amended to “States should *consult and cooperate with the Indigenous people in question in order to* establish procedures necessary to regulate, verify and monitor the *process, ensuring that the state consulted and cooperated in order to obtain* free, prior and informed consent, and if consent was required was received.

Amnesty International is a global movement of more than 7 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.