SUBMISSION BY AMNESTY INTERNATIONAL

EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES – STUDY ON FREE, PRIOR AND INFORMED CONSENT

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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 submission is based on the organization's own experiences of researching FPIC processes and its engagements with Indigenous partners. The considerations here should not be assumed to be an exhaustive compilation of all necessary issues involved in such processes, but a selection of those that appear to be most salient to this study and may be under-represented in the literature on FPIC.

Amnesty International would like to encourage EMRIP, through this study, to emphasize to states the mutual benefits that can arise from FPIC processes. States may assume that fully engaging with FPIC is time-consuming and expensive, and with little realization of its beneficial effects especially in relation to increasing public support and the viability and effectiveness of projects and policies.

Similarly, states may neglect the fact that if Indigenous peoples reject projects, it may be because of a genuine concern for the impacts on their rights and well-being. In practice evidence suggests that, where some form of mutual benefit can be achieved, Indigenous peoples are very often open to working toward mutual agreement on proposals including when they involve projects on their land. For example Natural Resources Canada has documented almost 200 cases where some form of agreement was reached between companies and First Nations in Canada for projects on their land, mostly involving benefit-sharing.[1] It should be noted, however that these agreements should not necessarily be considered as good practice with regard to FPIC, as the necessary conditions for FPIC cannot be guaranteed to have existed, and agreements may have been reached even in the absence of such conditions.

Our submission will further emphasize the following:

- That where a proposed measure by government has any impact on Indigenous peoples, the duty to consult, with the objective of obtaining their free, prior and informed consent, is the minimum requirement;
- That while it is possible to come up with some general guiding principles, the analysis of whether a proposal requires an Indigenous people's free, prior and informed consent to be obtained, needs to be done on a case by case basis, in light of the fact that the history of each community, the cumulative impacts of previous initiatives affecting them, their contemporary situation, and the specific risks and potential harms involved, will be different in each case;

[1] http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/mineralsmetals/files/pdf/abor-auto/aam-eac-e2013.pdf

- That an overly narrow, article-by-article reading of UNDRIP, making a sharp differentiation between the types of situations covered by Articles 10 and 29 on the one hand, and 19 and 32 on the other, may not necessarily reflect the intentions of the drafters of UNDRIP, nor the fact that UNDRIP is not the only source of interpretations of FPIC;
- Given the known risks of certain types of intervention, for example proposals for mining or other extractive operations on Indigenous lands, the burden of proof should be on the state to demonstrate why FPIC is not required;
- A vital precondition of FPIC processes is trust and good will on both sides; this can be undermined if the state is engaging in intimidation, criminalization or violence towards Indigenous communities, or if FPIC is launched at a late stage in a project's development, when crucial details are already decided;
- In order to fulfill Article 3 of UNDRIP[2], states should be urged to work with Indigenous peoples to develop, as part of their approach to FPIC, national action plans which enable them to realize their development priorities and ambitions; development proposals should then emerge from these plans, thus avoiding a situation where the rights of Indigenous peoples are addressed only in response to development projects which are proposed by the state.

Rights holders and scope of the right to free, prior and informed consent

A number of situations will potentially make it difficult, if not impossible, for consent to be freely granted. The following examples, based on Amnesty's experience, is not exhaustive:

- Threats / violence / assassinations of leaders or members of the Indigenous people make it difficult or impossible for the community to organize and engage with consultations; furthermore the trust needed for an effective and adequate process is unlikely to be present;
- The community has been wholly or partially dispersed (by intimidation, violence including war, forced eviction) thus making difficult the convening and functioning of decision-making structures;
- The state or a private entity such as a company, is attempting to cause divisions in the community, for example by co-opting individuals, or engaging in consultations on an individual basis rather than through the community's decision-making structures;
- Impoverishment of Indigenous communities and discrimination in access to essential services is used as bargaining tactic to gain consent in return for benefits such as access to health care and education to which Indigenous peoples are already entitled;
- Indigenous peoples are not informed of their rights, under domestic law and/or international human rights law, to be consulted and to give or withhold their free, prior and informed consent; in addition, obstacles such as the lack of formal education, or language barriers, may create obstacles for the process of accessing judicial remedy or engaging with the state in other ways to challenge violations of these rights;
- Sectors of Indigenous peoples are inadequately included in FPIC processes, for example women, resulting in the failure of agreements to address their concerns, either because the state imposes a structure for consultations which neglects specific sectors, or internal dynamics in the community are insufficiently inclusive;
- State authorities acting in collusion with private companies use the threat of compulsory acquisition (sometimes known as eminent domain) powers to coerce Indigenous peoples

[2] "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."

to consent to selling their land.

- Essential information has either not been disclosed, or has not been collected, such as environmental impact assessments; or meaningful opportunities for Indigenous peoples to participate in such assessments have not been made available.[3]

A further question now arises; what is the next step, if the preconditions for FPIC do not exist? If it is the state which is proposing a measure or project, and the proposal does not have immediately obvious benefits for the Indigenous people concerned, one option may be to abandon the proposal – this might be the case for a mine or other extractive operation, for example (which of course does not void the obligation on the state to remedy the conditions that make FPIC difficult or impossible to achieve). However, if the proposal concerns a measure required to remedy a previous human rights violation committed against the Indigenous people in question, the state will need to mitigate or remedy the conditions that make FPIC problematic, and then proceed. In either case, if the state proceeds with trying to obtain FPIC in the absence of preconditions which allow for an adequate process, it will not be satisfying its obligation to seek and obtain FPIC.

Situations when the receipt of free, prior and informed consent, is required

There has been much discussion regarding the extent of the obligation not to proceed with a measure without the FPIC of an Indigenous People, or whether the state in some cases expunges its FPIC duties by engaging in consultations in good faith, working to obtain consent, developing a robust consultation process, and doing everything to mitigate harms and address the community's concerns – even if that means that in the end, it proceeds without the people's consent. Certain general principles can be sketched out, but each case will need to be looked at on its merits. The wording of Articles 10, 19, 29 and 32 of UNDRIP gives some guidance (it should also be remembered that Article 30 on military activities establishes a test broadly equivalent to FPIC but using different wording). Analysis by the former Special Rapporteur, James Anaya, and international case-law indicate that an essential factor to consider is the potential impact / harm to the rights of Indigenous Peoples.

Anaya starts by affirming that, according to UNDRIP, Articles 10 and 29 identify "*two situations in which it is necessary to obtain the consent of the indigenous peoples concerned prior to moving forward with the proposed initiative*". But he argues that this obligation to obtain consent also applies to "*situations involving the establishment of natural resource extraction projects within indigenous peoples' lands and other situations in which projects stand to have a significant social or cultural impact on the lives of the indigenous peoples concerned*."[4] He argues that it might be possible to proceed with a project without the consent of the community when there is a lower level of impact, but the state must at least do all it can to seek consent. In the case of natural resource extraction projects, he argues, it is hard to imagine a situation when the level of impact would not trigger a requirement of consent.[5] This reflects the principle affirmed at the Inter-American Court of Human Rights that FPIC must be obtained for development or investment plans that "may have a profound impact" within indigenous territories.[6] In its 2008 interpretation judgment in Saramaka, the Court elaborated on the applicable standard, stating that:

"*… depending on the level of impact of the proposed activity, the state may additionally be required*

[3] Report of the Special Rapporteur on Environment and Human Rights (A/HCR/37/59, para 20.

[4] Report to the General Assembly on the Rights of indigenous peoples, Special Rapporteur on Rights of Indigenous Peoples, A/66/288 (2011), para. 84.

[5] Report on Extractive industries and indigenous peoples (2013), paras 29-31

[6] Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs), paras 134 & 137

to obtain consent from the Saramaka people. The tribunal has emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people's lands and natural resources, the state has a duty not only to consult with the Saramaka's, but also to obtain their free, prior and informed consent in accordance with their customs and traditions."[7]

The Declaration, read as a whole, supports this harm/impact framework. It is clear that if there is significant potential for harm to the rights – for example to their cultural integrity as a people – the State should not proceed as it would be violating, in this case, Articles 7, 8, 11, 31. This illustrates the vital function of FPIC – to identify possible harms that may not be clear to the State/project proponent, and mitigation measures to address those harms.

An illustration of this last point is as follows. Many states have proposed projects to formally recognise land title in law in areas where communities – often Indigenous Peoples – have occupied land on the basis of customary title. Such customary land ownership is often collective – the land is considered to be owned by the community, rather than individuals. However if the state only recognises individual title, it may seek to convert this collective customary title into individual legally formalised title. A fact that may not be identified by the state is the significant danger that the community's cultural integrity will eventually be destroyed by such a process, especially where high levels of poverty exist; individuals who find themselves in desperate need may leave the community, selling their land to people from outside the community, allowing the piecemeal break-up of the community's land. Consultations with the objective of obtaining FPIC would reveal this risk.

"Significant impact" on indigenous peoples requires consideration of the nature, scale, duration, and the long-term impact of the action. Such actions may include, not only the more obvious ones e.g. relocation, damage to community lands, or harm to the community's cultural integrity, but also actions impacting on freedom of speech and assembly, administration of justice, violence against women and other forms of gender-based discrimination. In the Saramaka case, the Inter-American Court noted that environmental and social impact assessments need to address the "cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual or cumulative effects of existing or future activities could jeopardize the survival or indigenous or tribal people".[8] A consideration of the historical context, especially the nature and severity of past harms and the extent to which adequate restitution has been provided, is also needed, as this helps to assess vulnerability to harm and the cumulative impact that new initiatives could have – which might to an uninformed external observer appear to be relatively insignificant.

Harm however is not the only factor to consider. Proposals under consideration by national and sub-national governments may overlap with the jurisdiction of Indigenous Peoples as exercised as part of their right to self-government or as set out in specific treaties between the Indigenous peoples and the state, and in that case FPIC is also likely to be required. This jurisdiction may or may not be recognised in domestic law, or in the case of treaties may be poorly protected or inadequately implemented. In fact the failure of the state to recognise the continued jurisdiction of Indigenous peoples under their own laws and traditions is likely to be a violation of their rights to self-determination and autonomy and might furthermore be considered to be discriminatory. Consideration must be taken of what the constitution/national laws say about the issues that

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[7] Saramaka People v. Suriname (interpretation of the judgment on preliminary objections, merits, reparations, and costs), para. 17.

[8] *Saramaka People v. Suriname (interpretation of the judgment on preliminary objections, merits, reparations, and costs),* para. 41. See also Advice No 2: Indigenous peoples and the right to participate in decision making, UN Expert Mechanism on the Rights of Indigenous Peoples (2011), Para. 22

come under the community's jurisdiction.

Other articles of UNDRIP shed further light on the framework within which FPIC rights must be interpreted. In line with other international standards, Art. 46.2 places limits on what restrictions on human rights are permissible:

In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

Art. 46.3 of UNDRIP requires that the Declaration must be interpreted "in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith". The state must ensure that it acts within this framework, for example, if it proposes to take any action in the absence of an Indigenous People's consent. Art. 46 also places limits on the actions of the Indigenous People when exercising FPIC; as is the case with any entity exercising decision-making powers, these cannot be in violation of human rights, whether with regard to substance or process.

For these reasons it is important not to use the term 'veto', when situations do amount to an obligation not to proceed without consent. The term has been used by states to try to undermine the legitimacy of the FPIC concept.[9] It implies an arbitrary and one-way process that does not in any way do justice to the collaborative, iterative nature of consultations foreseen by UNDRIP.

FPIC and the protection of the environment

Amnesty International is in the process of collecting information on two cases where the duty to obtain free, prior and informed consent was violated in the context of environment protection projects – one a climate change reduction and forest conservation project, and one a clean energy project. Failing to involve Indigenous peoples in consultations on such initiatives, in order to obtain their FPIC, may not only result in human rights violations, it can also be a missed opportunity to improve the effectiveness of environmental protection initiatives by incorporating Indigenous knowledge on conservation that has been accumulated over generations. There is a growing body of evidence for example, that conservation areas managed or co-managed by the Indigenous peoples on whose land they are located, are more effective in achieving conservation goals than areas run exclusively by governments.[10] The Special Rapporteur on the rights of Indigenous Peoples has taken note of "concerns that climate finance has been provided for mitigation measures such as biofuel production and renewable energy projects, including hydroelectric dams, on indigenous territories without undertaking consultations to ensure the free, prior and informed consent of the affected peoples. Such projects risk compounding long-standing and systemic violations of the rights of indigenous peoples" and recommended that states "Comply with the duty to consult and obtain the free, prior and informed consent of indigenous peoples at all stages in the development of climate

[9] The Arctic Center: Canada's Acceptance of the United Nations Declaration on the Rights of Indigenous Peoples: Implications for the Inuit, August 9, 2016

[10] F Seymour, T La Vina, K Hite, "Evidence linking community-level tenure and forest condition: An annotated bibliography", Climate and Land Use Alliance (2014) p. iii; L Porter-Bolland, EA Ellis, MR Guariguata, I Ruiz-Mallén, S Negrete-Yankelevich, V Reyes-García, "Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics" Forest Ecology and Management, Elsevier (2012) p.6.

change initiatives which may affect their rights".[11] The recently developed policy on Indigenous peoples of the Green Climate Fund states that "Indigenous peoples have invaluable and critical contributions to make to climate change mitigation and adaptation. Yet they are also facing serious threats to the realization of their rights from climate change actions".[12] The policy requires that FPIC be obtained "whenever consideration is being given to GCF-financed activities that will affect indigenous peoples' lands, territories, resources, livelihoods and cultures or require their relocation".[13]

Considerations when consent cannot be achieved

There are four possible situations which could result in failure to achieve consent:

1. The community decides to reject a proposal before being approached for consultation
2. There is no consensus in the community after consulting
3. The community rejects the proposal after consulting
4. The community gives its consent, then later withdraws it
5. The community consents to a proposal but subject to conditions that the proponent rejects.

The result in terms of the state's obligations is reasonably similar in each case. As the former UN Special Rapporteur James Anaya puts it:

> 'As a basic principle, it is necessary to be aware that, with or without the consent of the Indigenous party, the state has the obligation under international law to respect and protect the rights of Indigenous Peoples in accordance with the established international standards'.[14]

In the situation where a community refuses to engage in consultations, Anaya notes that it can be then considered that the community has waived its right to be consulted. It has not, however, waived its right to withhold its consent. In this case the community is refusing to give its consent, in the same way as if it had entered into consultations and had then withheld its consent. In many such cases, the community will have held its own – internal – consultation on the measures proposed, and will have decided to reject them.[15]

Anaya notes that in most cases where consent is sought, the measure proposed involves a restriction on the enjoyment of human rights by the community – that is why consent is being sought. If the project proponent goes ahead with a measure against community opposition, it will most likely be restricting the community's rights in some way (see remarks on Art. 46 of UNDRIP in Section 7.9.2). Therefore Anaya notes that:

when there is no consent, in order to proceed with the proposed measure, the state would need to demonstrate that the restrictions that the measure places on rights are necessary and proportionate in relation to a valid objective of the state within the framework of human rights.[16]

Many states will assert that the general economic development of the country is just such a valid

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[11] Thematic study on the impacts of climate change and climate finance on indigenous peoples' rights, A/HRC/36/46 (2017) paras 50 and 122(c).

[12] Para. 1.

[13] Para. 22(a).

[14] J. Anaya, Presentation at the event, "*El rol de los Ombusdman en América Latina: El derecho a la consulta previa a los pueblos indígenas*", Lima, Peru, http://unsr.jamesanaya.org/statements/el-deber-estatal-de-consulta-a-los-pueblos-indigenas-dentro-del-derecho-internacional (2013) (translation from Spanish by Amnesty International)

[15] El deber estatal de consulta a los pueblos indígenas dentro del Derecho Internacional

[16] El deber estatal de consulta a los pueblos indígenas dentro del Derecho Internacional

objective (and therefore that, for example, a mine on an Indigenous People's territory is justified). However Anaya notes that, where projects involve such a serious violation of the rights of the Indigenous People concerned, e.g. forced relocation from their land, 'this usually makes it difficult in these situations to demonstrate that need and proportionality exist, without the consent of the Indigenous party, even assuming that there is a valid objective of the state.'[17]

Indigenous peoples have the right to challenge, reject or withdraw from a process in which their consent has been inappropriately acquired – for example under duress, or on the basis of misrepresentations; in such cases in fact, consent cannot be said to exist in the first place, because of the fraudulent circumstances under which it was given. Otherwise, once given, consent should not be arbitrarily withdrawn. But when is it reasonable for Indigenous Peoples to withdraw consent? This may be conceivable for example, if, after the project has begun, the project has impacts on the lands and resources of the community that were not foreseen during consultations, or if workers associated with the project are involved in significant criminal behaviour. If the project proponent withheld information related to these new concerns, such developments could effectively invalidate the earlier decision, given that we would no longer be talking about informed consent. This is a matter to be negotiated by the project proponent and the community and clearly outlined in the agreement. Issues concerning withdrawal of consent can also be referred to a dispute resolution process, if one exists.

Considerations with regard to the meaning of "prior"

Consultations should allow for the potential for harm to be addressed while there is still opportunity to make all the necessary accommodations, and in such a way that Indigenous Peoples' own goals or plans are not precluded.

For example, Amnesty International has documented a number of cases in which bilateral or multilateral donors engaged with governments on design of projects, and then engaged with Indigenous peoples to seek their FPIC only at a later stage, when activities were beginning on a local level. At this point, the overall philosophy or methodological underpinning of the project may be hard to change. The newly agreed Indigenous Peoples Policy of the Green Climate Fund, for example, requires that "Free, prior and informed consent shall be an iterative process, requiring indigenous peoples' consent before any GCF activity is undertaken on the basis of their own independent deliberations and collective decision-making processes, customs, values and norms, based on adequate information to be provided in a manner that is understood by indigenous peoples".[18] Companies engaging in extractive operations may engage with Indigenous peoples only after a mining licence has already been approved. This may be evidence of a lack of willingness to accept that cancelling the project is an option. In both cases, there may be a profound negative impact on how the community sees the initiative and how it affects their ability to trust the consultation process.

Finally, it is important to note that a proper interpretation of the rights of Indigenous Peoples to self-determination and self-government, and to participate in decisions that affect them, requires a framework of ongoing engagement between state and Indigenous Peoples, quite apart from consultations on individual projects, allowing the state to engage with their long-term perspectives and plans. In this regard, states committed, in the Outcome Document of the UN World Conference on Indigenous Peoples (2014), to develop national action plans in consultation with Indigenous Peoples, to achieve the ends of UNDRIP.[19]

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17 El deber estatal de consulta a los pueblos indígenas dentro del Derecho Internacional

18 Para. 54.

19 *Outcome document of the World Conference on Indigenous Peoples*, General Assembly, A/RES/69/2 (2014), para. 8

Reparation/Remedies/Restitution

An effective FPIC process is vital when deciding what form remedies should take when rights are violated or infringed. Amnesty International has documented one case in which cash compensation was offered to an Indigenous people on an individual basis in a case of resettlement in which there was a need to buy alternative land. The decision to allocate cash compensation was taken without their free, prior and informed consent and resulted in the following negative impacts:

- Creation of tensions within families as in some cases only one person in the family received compensation;
- Due to general very low levels of economic empowerment, cash was used in some cases for other very urgent purposes, such as children's education, thus leaving the beneficiaries without land;
- The process generated an incentive for corruption, resulting in cash compensation being diverted from deserving members of the Indigenous people to people with no connection to the land;
- The individual nature of the compensation meant that the community was not able to resettle collectively in one place; subsequently Amnesty International documented an erosion of culture and identity through the resulting difficulty in practicing traditional customs, the organization of governance systems, and the maintenance of the Indigenous language and religion, calling into question their continued existence as a people.

It is critical that Indigenous peoples be able to make their own decision about the form of redress best able to restore and protect their rights. States should not limit redress to cash compensation or arbitrarily exclude the potential for return or restoration of lands. The UN Principles and Guidelines on Development-Based Evictions state that "Cash compensation should under no circumstances replace real compensation in the form of land and common property resources. Where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better".[20]

There are instances where cash compensation has been agreed, and has benefited an Indigenous people, as one element in a package of measures. For this reason it should not be ruled out but it illustrates the need for a genuine process of free, prior and informed consent.

With regard to the remedy available through the domestic legal framework for violations of the duty to obtain FPIC, there is a range of different practices around the world. In India, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, provides for criminal penalties including custodial sentences for a number of violations including any person who "wrongfully dispossesses a member of a Scheduled Caste or a Scheduled Tribe from his land or premises or interferes with the enjoyment of his rights, including forest rights, over any land or premises or water or irrigation facilities or destroys the crops or takes away the produce therefrom" …. "without the person's consent" or "with the person's consent, where such consent has been obtained by putting the person, or any other person in whom the person is interested in fear of death or of hurt". Amnesty International does not take a position on the proportionality of sentencing; however the example illustrates the potentially criminal nature of the violation of consent in particular when expropriation of land is in question, and the range of possible responses that the state has at its disposal when responding to such violations in order

[20] Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18) §60.

to provide remedy.

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