Study on free, prior and informed consent in the Declaration on the rights of Indigenous Peoples

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In 2007 the Human Rights Council established the Expert Mechanism on the Rights of Indigenous Peoples with the mandate to advise the Council and prepare studies approved by the Council[1].

The objective of this report is to encompass some experiences from Latin America and Africa (the main human rights related in the jurisprudence) on free, prior and informed consent (FPIC).

In its recommendations, the African Commission on Human Rights acknowledged violations of Articles 1 (recognition of rights and duties), 8 (free practice of religion), 14 (right to property), 17 (right to freely take part in the cultural life) and 21 (right to lawful recovery of property) of the African Charter, as well as the right of the Endorois community to restitution of ancestral territory due to displacement of land around the Lake Bogoria by virtue of the creation of the Lake Bogoria Game Reserve by the Kenyan government in 1978. The violation of FPIC was related to **property**, **freedom of religion** and **cultural rights**.

FPIC is also provided by the Kampala Convention for displaced people of the African Union and is a duty of the States, but some understand in order to oblige also the private sector [Articles 1 (i) (Constitutive Act of African Union), 3.1 (h) (accountability of non-State actors for arbitrary displacement) and 10 (prevent displacement caused by private actors, full information, consultation of persons likely to be displaced by projects and prior socio-economic and environmental impact assessment of a proposed development project)][2].

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[1] Anaya, S. James. The human rights of indigenous peoples. In: Krause, Catarina & Scheinin, Martin (Ed.) International Protection of human rights: a textbook. Abo Akademi University Institute for Human Rights, Turku, Abo, 2012, p. 307

[2] Adeola, Romola. The responsibility of businesses to prevent development-induced displacement in Africa. African Human Rights Law Journal n. 17, 2017, pp. 245-265, available at: http://www.ahrlj.up.ac.za/adeola

According to the General comment n. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities: “States parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired”.

The cultural values associated with the ancestral land is highlighted [Committee’s general comment n. 21 (2009) on the right of everyone to take part in cultural life, paragraph 36 and articles 10, 19, 26, 28, 29 and 32, United Nations Declaration on the Rights of Indigenous Peoples].

The Interamerican Commission relates the FPIC to articles 13 (right to receive **information**), 23 (right to **participate in government**) and 26 (**progressive development in social, economic, cultural rights**) of the American Convention.

Notwithstanding, the Interamerican Court relates the FPIC to article 21, right to communal property, since the construction of the judges combines **right to property** with the **right to cultural identity**.

According to paragraph 180 of the case of the Kichwa Indigenous People of Sarayaku, 2012, the consultation must be carried out **in advance** and “should take place, **in accordance with the inherent traditions of the indigenous people**, during the first stages of the development or investment plan and not only when it is necessary to obtain the community’s approval”.

In paragraph 129 of the case of the Saramaka People v. Suriname, 2007, the Interamerican Court stated that prior to any project independent and technically capable entities must perform an **environmental and social impact assessment** with the State’s supervision.

According to paragraph 174, the prior consent can be connected to the **rights to access to justice**, since the State must ensure the recognition of juridical personality for the indigenous communities “with the aim of guaranteeing them the use and enjoyment of their territory in accordance with their communal property system, as well as the rights to access to justice and equality before the law”.

The States must respect the rights of indigenous peoples to be consulted, in accordance with their customs and traditions, through an adequate and accessible procedure: a continuous, reliable, good faith dialogue at all stages of project planning and development, in order to reach an agreement on the proposed measures (Article 6.2, ILO Convention 169).

The consensus is required. Separate consultations may create conflicts between the indigenous communities, that´s why the States must respect the established structures of authority and representation within and outside the communities.

The exercise of prior free, informed consent on development projects affecting indigenous lands must encompass environmental, social, cultural and even spiritual impacts which is a requirement of art.7.3 of ILO Convention 169.

Since the consultations with indigenous peoples must be undertaken using culturally appropriate procedures, the indigenous peoples have the autonomy to draw and exercise these procedures within its deliberation and representation entities.

In accordance to the Uwa case of the Colombian Constitutional Court, 1997, the consultation should seek the full knowledge of the community about the project and the effects it would cause in its social, cultural, economic and political environment, as well as the evaluation of its advantages and disadvantages[3]. In Colombia, the FPIC is a **fundamental right** of indigenous and cultural differentiated afrocolombian communities.

By 2015, 23 cases related to prior consultation by the Constitutional Court had been adjudicated, with three sets of case-law: (i) decisions defining the basic characteristics of a consultation, in line with the Uwa and Urrá cases; (ii) decisions extending the obligation for administrative and legislative measures; and (iii) decisions which guaranteed the right to say no, the **right to veto**[4].

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[3] Courtis, Christian. Anotações sobre a aplicação da Convenção 169 da OIT sobre povos indígenas por tribunais da América Latina. Revista Sur n. 10, São Paulo: 2009, p. 68, disponível em: http://www.scielo.br/pdf/sur/v6n10/a04v6n10.pdf

[4] Maldonado, Daniel Bonilla. Autogobierno y identidad cultural. La Corte Constitucional de Colombia y el derecho a la consulta previa. In: Maldondo, Daniel Bonilla (Ed.) Constitucionalismo del sur global. Siglo del Hombre Editores, Bogota: 2015, pp. 313-320

At Colombia, agreement was reached on 3600 prior consultations. In statistical terms, out of every ten cases, traditional communities have opposed three[5].

The lack of recognition of the territories of indigenous people or the delay in the demarcation procedures may affect the right to FPIC. Though, an infrastructure project may be outside the perimeter of an indigenous land, but still affect the living conditions of the indigenous community.

The general recommendation 23 on the rights of indigenous peoples of the UN Committee on the Elimination of Racial Discrimination, 1997, called "upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. **Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation**. **Such compensation should as far as possible take the form of lands and territories**".

FPIC can be related to demarcation procedures, since in the paragraph 209 of the case of Moiwana Village, 2005, the Court stated "that the State shall adopt such legislative, administrative and other measures as are necessary to ensure the property rights of the members of the Moiwana community in relation to the traditional territories from which they were expelled, and provide for their use and enjoyment of those territories. These measures shall include the creation of an effective mechanism for the delimitation, demarcation and titling of said traditional territories." Moreover, in cases of massacres, the State has to guarantee to right to safety in order to exercise the right to return.

The request for restitution of land of equal quality and extension should occur only if the request for demarcation of land, as in the case of flood, is impracticable. That is to say, for objective and well-founded reasons, the return of lands by means of the demarcation process is not possible, the State must deliver alternative lands, chosen in a consensual way with the affected community, according to their means of consultation

[5] IIDH. El derecho a la consulta previa, libre e informada: una mirada crítica desde los pueblos indígenas. IIDH, San Jose: 2016, p. 23

and decision. The extent and quality of these alternative lands should be sufficient to ensure the maintenance and development of the community's way of life.

The right of non-interference in cultural practices associated with rivers or sacred places (Article 15, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights) and the right to enjoy their own cultural life closely related to a river or a sacred place (art. 27 of the International Covenant on Civil and Political Rights) may be invoked facing hydroelectric projects.

In Brazil, due to the suspension of the injunction in the courts (a procedural remedy in favor of the State called "*suspensão de liminar*" or "*suspensão de segurança*"), it was possible to continue many infrastructure projects without any prior consultation.

Public hearings provided by environmental or regulatory statutes should not be confused with the FPIC international human rights´ standards.

Mexico has established in its constitution the prior consultation when drafting national, state and municipal development plans (article 2, B, IX), Peru has a specific statute regarding prior consultation for administrative and legislative measures (*Ley* 29785, 2011), but this does not mean that in practice there has been respect for indigenous rights in both countries.

A structural problem is the lack of dialogue with indigenous peoples and other traditional communities about the development national plans, including budgetary planning of the union, federal states and counties.

Also the media should reflect the pluralism of ways of life existing in society. More efforts are needed to mean the FPIC as an enforceable human right in the judiciary and also as a political right, to foster the right to participate in the legislative and executive branches.