

Concept Note

Expert Mechanism on the rights of Indigenous Peoples

Issues for consideration in the preparation of a study on the theme of free, prior and informed consent, as comprised in the Declaration on the rights of Indigenous Peoples (UNDRIP)

During its annual session in July 2017¹, the Expert Mechanism decided that its next annual study on the status of the rights of indigenous peoples worldwide in the achievement of the ends of the UNDRIP (Council Resolution 33/25, paragraph 2 (a)) will focus on the theme of free, prior and informed consent.

In preparing for this study, the EMRIP intends to draw from information received from a broad variety of stakeholders and sources including: states, indigenous peoples, civil society, academics, earlier EMRIP studies; the Special Rapporteurs on the Rights of Indigenous Peoples; the Permanent Forum on the Rights of Indigenous Peoples; the treaty bodies; jurisprudence from the Inter-America and African Systems; Universal Periodic Review procedure; UN agencies and other multilateral actors.

The EMRIP plans to hold a 2-day expert seminar on the theme of free, prior, and informed consent, from 4 to 5 December 2017, in Universidad Diego Portales, Santiago, Chile, as part of its annual inter-sessional meeting to be held there from 4 to 8 December.

In preparation for this meeting and to assist States and indigenous peoples in contributing to the study, the EMRIP has set out below some of the issues that may be included in the context of this theme. To a large extent the issues are organised by the contents of the relevant articles of UNDRIP. This note is meant to guide stakeholders only and is not necessarily the form the final study will take or an exhaustive list of issues that will be considered in the report.

Introduction

This may include:

A short description of EMRIP and its mandate;

Methodology behind drafting the report.

1. Short overview of different approaches to free, prior and informed consent

This may include:

Consideration of the main human rights related jurisprudence on free, prior and informed consent, including differences in terminology;

Exploration of different approaches to free, prior and informed consent, including in the private sector, inside and outside the human rights framework;

Exploring various forms that free, prior and informed consent has taken.

¹ A/HRC/36/57

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

This may include:

Consideration of whether communities other than indigenous peoples enjoy the right to free, prior and informed consent;

Examining the nature of FPIC as right: mere procedural right? A substantive right in itself?;

Exploring whether there are pre-conditions for an effective free, prior and informed consent. How should it be prepared? How should it be collected or obtained? How should it be implemented once obtained? How should it be monitored?

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

This may include:

Consideration of the meaning of the common language of articles 10 and 29;

Consideration of the terms, free, prior, informed and consent;

Consideration of the meaning of “forcibly removed” and “relocation”, as referred to in article 10;

Connection between relocation and requirement for compensation/where possible option of return, as referred to in article 10;

Consideration of the meaning of, “lands or territories of indigenous peoples”, as referred to in article 29;

Examining whether free, prior and informed consent can be achieved in any circumstances;

Examples of good practices in contemplation of the rights protected in articles 10 and 29.

4. Situations where consent should be the objective of the consultation

This may include:

Overarching nature of articles 19 and 32;

Consider the meaning of the common language in articles 19 and 32: “Consult and cooperate in good faith”; “Indigenous peoples concerned”; “through their own representative institutions”; “*in order to obtain* (emphasis added) free, prior and informed consent”;

Guidance on representative institutions or decision-making processes;

Consideration of required safeguards even if consent is not strictly required, including benefit sharing, establishment of mitigation measures, compensation for any impact, benefit sharing;

Exploration of the legislative and/or administrative measures that may affect indigenous peoples within the context of article 19;

Examples of good practices in contemplation of the rights protected in articles 19 and 32 above.

5. Possible situations where consent may be required under articles 19 and 32

This may include:

Explanation of possible situations where there may be a *requirement* of free, prior, and informed consent, prior to the approval of certain development projects on indigenous lands (article 32);

Exploring situations which may amount to “substantial” interference or concern for the “survival” of indigenous peoples;

Assessing impact on indigenous peoples, including through environmental, human rights and social impact studies;

Examples of good practices where such consent was sought and provided.

6. The state as duty bearer

This may include:

Exploration of the different state institutions and organs responsible for ensuring and implementing free, prior and informed consent, including, the legislature and the executive;

States obligations/responsibilities towards ensuring indigenous peoples have the resources and capacity to effectively engage in the processes of free, prior and informed consent;

Roles of national judiciary as State’s institution and remedial mechanism for free, prior and informed consent.

7. Private sector or third party involvement in free, prior and informed consent and consultation

This may include:

Considering obligations/responsibilities that the private sector or third party has with respect to consulting with indigenous peoples on projects affecting them;

Issues arising if/when the private sector or third party negotiates directly with indigenous peoples;

Good practices of private sector or third party engagement with indigenous peoples.

8. Reparation/Remedies/Restitution

This may include:

Consideration of free, prior and informed consent, in the context of the rights contemplated in article 11 (cultural, intellectual, religious and spiritual property);

Consideration of forms of redress through effective mechanisms, including restitution within the context of article 11;

Requirement for redress to be developed in conjunction with indigenous peoples (article 11);

Consideration of the right to redress contemplated in article 28 (1) when indigenous peoples lose their land/territories including restitution, just, fair and equitable compensation for lands/territories/resources traditionally owned/occupied/used confiscated/taken occupied/used/damaged without free prior and informed consent;

Consideration of the meaning of compensation within the context of article 28 (2), taking form of lands/territories/resources equal quality, size, legal status/monetary compensation or other redress;

Good practice of redress provided in contemplation of the rights protected in articles 11 and 28.

9. Mechanisms/Procedures to verify consultation and seeking of free, prior and informed consent

This may include:

Consideration of procedures necessary to verify that consultation was undertaken and/or that free, prior and informed consent, was sought;

Examples of good practices of mechanism/procedures to verify consultation and/or free, prior and informed consent.

10. Relationship between free, prior and informed consent and corollary rights in the UNDRIP

This may include:

The relationship between the principles of consultation and free, prior, and informed consent (e.g under ILO 169) and other rights including: self-determination; participation in decision making; cultural integrity; equality; property; religion; non-discrimination; health and physical well-being; the right of indigenous peoples to set their own priorities for development, including with respect to natural resources and the rights of Indigenous Peoples Human Rights Defenders.

Consideration of what should be the human rights legacy of free, prior and informed consent.

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