"Responsibilities of the States and private sector with respect to prior consultation with indigenous peoples and free, prior and informed consent"

Presentation by the United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz
For the Expert Seminar on free, prior and informed consent

Organized by Expert Mechanism on the Rights of Indigenous Peoples and the Centro de Derechos Humanos - Universidad Diego Portales
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Introduction

On behalf of Ms. Victoria Tauli- Corpuz, Special Rapporteur on the rights of indigenous peoples, I would like to thank the Expert Mechanism on the rights of indigenous peoples and the Centro de Derechos Humanos of the Universidad Diego Portales for organizing this important event on free, prior and informed consent.

According to the mandate given by the Human Rights Council, the Special Rapporteur is tasked to examine the obstacles, challenges, barriers and good practices by States in protecting, respecting and fulfilling indigenous peoples' rights. In the course of her mandate, as was the case with her predecessors, the issue of consultation and free, prior and informed consent has arisen in the context of specific cases brought to her attention through the communications procedure, in country visits, and meetings with indigenous and government representatives. The concern consistently expressed is the lack of effective implementation of consultation in the context of legislative measures or plans for natural resource development or investment that could affect the rights of indigenous peoples.

The Special Rapporteur has been informed about initiatives in many countries for the development of legislation on prior consultation. This includes cases like in Peru, where specific legislation was enacted, yet challenges remain. Initiatives are also being discussed in Brazil, Colombia, Honduras and Mexico, among others. In the case of Honduras, the Special Rapporteur provided technical assistance with respect to the Honduran government's initiative for developing a draft law on consultation in which various substantive and procedural problems were identified. In the context of this technical assistance and in other spaces, the Special Rapporteur has reiterated various aspects related to international standards on consultation and consent, including the duties of States to respect indigenous peoples' human rights. The Special Rapporteur has based her analysis in the United Nations Declaration on the rights of indigenous peoples ("Declaration"), as well as Convention No. 169 on indigenous and tribal peoples of the International Labor Organization ("ILO 169") and the jurisprudence of the inter-American human rights system.

The duty of states to guarantee rights

According to the different international legal sources mentioned, it is clear that prior consultation is considered a duty held by States. States are responsible for ensuring that international standards on consultation and free, prior and informed consent are observed and applied with respect to legislative and administrative measures or activities that affect indigenous peoples. Regarding development or investment projects, States cannot delegate their duties to the private companies or other parties promoting said activities. Although in principle, the companies can play an important role in consultation processed by providing information about the projects, benefit-sharing and other important matters.

The States' duty to consult must be adequately incorporated in national legislative and public policy initiatives, Government programs and the decisions and rulings by judicial bodies. According to the Inter-American Court of Human Rights, the obligation to consult indigenous peoples on matters that may affect their rights and interests, "entails the duty to organize appropriately the entire government apparatus and, in general, all the organizations through which public power is exercised, so that they are capable of legally guaranteeing the free and full exercise of those rights. This includes the obligation to structure their laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively, in accordance with the relevant international standards. Thus, States must incorporate those standards into prior consultation procedures, in order to create channels for sustained, effective and reliable dialogue with the indigenous communities in consultation and participation processes through their representative institutions."[1]

The measures that States take to organize their government apparatus and the structures of public power should take into account the role that the principles of consultation and consent play within the framework of international standards related to indigenous peoples. As was emphasized by the previous Special Rapporteur on indigenous peoples, the principles of consultation and consent must not be viewed as separate or stand-alone rights, but must be seen as essential safeguards that supplement and help effectuate the substantive human rights of indigenous peoples. These rights include, for example, their rights to lands, territories and natural resources, culture religion, health, environment, to define their own priorities for development and self determination.[2]

In addition to consultation and consent, States must implement other safeguards particularly in the case of measures or activities that affect indigenous peoples' lands, territories and other rights. These other safeguards may include prior social, cultural and environmental impact assessments "that provide adequate attention to the full range of indigenous peoples' rights, the establishment of mitigation measures to avoid or minimize impacts on the exercise of those rights, benefit-sharing and compensation for impacts in accordance with relevant international standards."[3] As emphasized by the previous Special Rapporteur, "[a]ll these safeguards, including the State's duty to consult, are specific expressions of a precautionary approach that

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[1] I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, para. 166.
[2] Report of Special Rapporteur on the rights of indigenous peoples, James Anaya (6 July 2012) ["UNSR 2012 Report"], A/HRC/21/47, paras. 49, 50.
[3] UNSR 2012 Report , para. 52.

should guide decision-making about any measure that may affect rights over lands and resources and other rights that are instrumental to the survival of indigenous peoples."[4]

In light of the above, States should adopt measures to reform and strengthen their national legal framework in order to guarantee adequate protection of indigenous peoples' rights to lands, territories, natural resources, their right to decide their own development priorities, as an expression of their right to self-determination and other substantive rights. This would be a preliminary and crucial requirement to ensure that any mechanism adopted by a State to implement its duty to consult is effective in complying with its role of safeguarding the rights of indigenous peoples recognized in international instruments and jurisprudence.[5]

With respect to the implementation and regulation of prior consultation at the domestic level, States must consult indigenous peoples about the specific modalities that could be adopted. Although the adoption of specific legislation could be a way to secure the recognition of prior consultation within a domestic normative framework, the Special Rapporteur considers that this is not necessarily the only way to implement this duty. Indigenous peoples in several countries, like Colombia and Brazil, have opted instead to develop their own consultation or bio-cultural protocols as a way through which a particular people or community establishes their own consultation methods with the State. In various countries, indigenous representatives have pointed out that the processes followed by Governments to develop, debate and approve a law on prior consultation could unduly restrict the scope and content of consultation and consent principles recognized in international instruments and jurisprudence.

In each State, it is important to evaluate if indigenous peoples consider that a specific legislation or other type of mechanism, such as the recognition of their own consultation protocols or systems is necessary. In addition, it is also necessary to evaluate if the social and political context of a particular country presents the necessary conditions for the discussion and approval of a law on prior consultation. In some cases, it would be more advisable that States and indigenous peoples first initiate a process of establishing contact and dialogue to address fundamental issues regarding the situation of indigenous peoples in a particular country. These dialogues could help the States adopt measures to build trust, especially in contexts where indigenous peoples have denounced grave human rights violations caused by measures and activities adopted without prior consultation and obtaining their free, prior and informed consent. In addition, it might be necessary that State and indigenous peoples' representatives could have the time and means to obtain the necessary training and capacity-building in order to start a process of dialogue and consultation concerning a law on prior consultation and other rights of indigenous peoples.[6]

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[4] Ibid., para. 52.

[5] "Consultation and consent: Principles, experiences and challenges", Presentation by the UN Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, for the *International Colloquium on free, prior and informed consultation: International and regional standards and experiences* (Mexico City, 8 November 2016) ["International Colloquium"], pp. 13-14. Available in: http://unsr.vtaulicorpuz.org/site/images/docs/special/UNSR_Presentation_OHCHR_MX_Colloquium_Nov2016_ENG.pdf.

[6] *See*, Observaciones adicionales de la Relatora Especial sobre los derechos de los pueblos indígenas sobre el proceso de regulación de la consulta previa en Honduras, 9 June 2017. Available in: http://unsr.vtaulicorpuz.org/site/images/docs/special/2017-06-09-honduras-unsr-additional-observations.pdf.

If the indigenous peoples of a particular country consider that the adoption of a prior consultation law is the best option, the States should guarantee that the development, discussion and approval of said legislation is itself the result of an adequate consultation process. This process should be carried out with the full and effective participation of the widest range of indigenous peoples and respecting the different forms of representation of the indigenous peoples of that country. Said process should also be the result of consensus with the indigenous peoples concerned about the methodology, timelines and other important aspects related to consultation on this type of initiative.[7] Additionally, the legislative proposals made by indigenous peoples themselves should also be duly taken into account in the development, consultation and approval of these types of legislative measures.

In any case, it must be emphasized that the absence of specific legislation does not exempt States from their obligations to consult indigenous peoples in compliance with their international commitments and obligations. In repeated occasion, government and private sector representatives have stated that the the lack of a specific legislation on consultation has been an impediment to the implementation of ILO 169 and other international standards. However, as the ILO itself has pointed out, indigenous peoples' right to consultation and the obligation of governments to carryout consultations with indigenous peoples is "derived directly from Convention No. 169, not from the recognition of that right by national legislation."[8]

State institutional development and cross-cutting institutional and legislative reforms

With respect to institutions in charge of implementing the duty to consult indigenous peoples, the Special Rapporteur has observed that it is necessary that States ensure adequate capacity-building, inter-agency coordination and technical and financial resources for State institutions in the area of consultation. This is an important issue in States that have designated a specific agency to conduct and coordinate consultation processes with other State entities; or in States where consultation processes are undertaken by the specific entity proposing a given measure or activity affecting indigenous peoples, with the assistance of a designated agency. These institutions should be provided with the necessary technical and financial resources, and their personnel must be properly trained to undertake their tasks. In addition, they require greater decision-making and enforcement authority to effectively coordinate with other agencies in sectors such as investments, mining, hydrocarbons and others, and ensure all relevant measures and activities contemplated by State agencies are effectively identified and subject to consultation.[9]

Along with inter-agency coordination, other cross-cutting efforts should be made to ensure that legislation in other areas, such as in infrastructure, mining, hydrocarbons and energy sectors and other relevant areas, comply with international human rights standards. This would refer not

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[7] International Colloquium, p. 13.
[8] ILO, *Indigenous and tribal peoples' rights in practice: a guide to ILO Convention No. 169*, International Labour Office: Geneva (2009)["ILO 169 Guide"], p. 66, *citing*, Governing Body, 282nd Session, November 2001, Representation under article 24 of the ILO Constitution, Colombia, GB.282/14/3.
[9] International Colloquium, p. 11-12.

only to consultation standards as such, but also in the areas of substantive rights, such as on the lands, territories, natural resource, culture, religion and other rights of indigenous peoples. This would entail not only the enactment of legislation that is consistent with these standards but also the modification or repeal of legislative provisions contrary to these standards.[10]

It is also necessary to establish effective judicial, administrative or other mechanisms to ensure indigenous peoples can effectively enforce international standards on the duty of consultation and the protection of their substantive rights. This could include oversight of the actions taken by the different State government bodies in order to ensure that legislative, administrative and other measures that should be consulted with indigenous peoples are correctly identified. In addition, specialized bodies could be created that would be in charge of monitoring and evaluating consultation processes and their results, as a way of ensuring that States are fulfilling their international commitments related to indigenous peoples' rights.[11]

In addition to the above measures, States should also establish legal, judicial and administrative remedies to ensure the correct implementation of prior consultation. In countries like Colombia, Peru, Mexico and others, indigenous peoples have used writs of amparo or constitutional challenges as a means to invoke judicial protection of the right to consultation in specific cases.[12] The Special Rapporteur has also pointed out the review mechanisms, for example by a judicial or other type of competent and impartial body, should be established with regards to decisions following consultation processes that are adopted without the the consent of the indigenous people or peoples affected. Said body should ensure that the authority responsible of said decisions can clearly prove that the measure meets international standards regarding permissible restrictions on human rights; i.e. requirements on legality, proportionality and valid public purpose. In addition, it must be proven that the substantive rights and survival of the indigenous peoples concerned will not be affected. [13]

Responsibilities of the private sector

In the case of development or investment projects promoted by business enterprises that could affect indigenous peoples, it must be highlighted that the United Nations Guiding Principles on Business and Human Rights state the responsibilities of business enterprises to respect human rights "exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and… it exists over and above compliance with national laws and regulations protecting human rights."[14] In the great majority of cases, it can be observed that

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[10] Ibid., p. 12.
[11] Comentarios de la Relatora Especial de las Naciones Unidas sobre los derechos de los pueblos indígenas en relación con el *Anteproyecto de Ley Marco de consulta libre, previa e informada a los pueblos indígenas y afrohondureños* (Honduras), 22 de diciembre de 2016, p. 22 ["UNSR Comments on Honduras"]. Available in: http://unsr.vtaulicorpuz.org/site/images/docs/special/2016-honduras-unsr-comentarios-anteproyecto-ley-consulta-sp.pdf.
[12] UNSR Comments on Honduras, pp. 22-3.
[13] *See*, Ibid. p. 20; and Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples, (1 July 2013), A/HRC/24/41 ["UNSR 2013 Report"], paras. 39.
[14] Guiding Principles on Business and Human Rights, ["Guiding Principles"], HR/PUB/11/04, Principle 11 (Commentary).

activities promoted by business enterprises that result in human rights violations arise in a context of deficient recognition and protection of indigenous peoples' rights within the domestic legislation of a State. This creates a vacuum in which companies assert that they have fulfilled their responsibilities by complying with national legislation related to the request, obtaining of permits and execution of said development activities.

The due diligence that companies and financial institutions funding a project should exercise under the Guiding Principles should consist of an independent evaluation of applicable international standards on human rights and indigenous peoples. Firstly, it would be necessary for companies and financial institutions do determine if there are indigenous peoples on or near places where an activity is proposed and there should be an examination of the land, natural resource and prior consultation rights that could correspond to the indigenous peoples under international standards, and the potential impacts on those rights. Said examination should not be limited to land tenure rights that are officially recognized by the State, since the duty to consult arises not only in cases where a measure or activity affects lands recognized as indigenous lands but whenever their particular interests are at stake, even when the interests do not correspond to a recognized right to land.[15]

This due diligence must be undertaken "at the very earliest stages of determining the feasibility of the project, in advance of a more complete project impact assessment in later stages of planning or decision-making about the project."[16] In addition, companies should ensure that they are not "contributing to or benefitting from any failure on the part of the State to meets its international obligations towards indigenous peoples. Thus, for example, extractive companies should avoid accepting permits or concessions from States when prior consultation and consent requirements have not been met."[17] The latter also includes avoiding acquiring permits previously acquired by other companies in connection with prospecting for or extracting resources in violation of indigenous peoples rights.[18] Companies should also adopt formal policies that apply to all levels of decision-making about how they "will perform due diligence and act at the operational level to avoid violating or being complicit in violations of indigenous peoples' human rights."[19]

These are some of the measures that companies and financial institutions can adopt as a way to contribute in the compliance with international standards on prior consultation and consent and other rights of indigenous peoples.

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[15] Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Honduras, A/HRC/33/42/Add.2 (21 July 2016), *Annex – Observations on the situation in Rio Blanco*, para. 51; and Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/HRC/12/34 (15 July 2009) ["UNSR 2009 Report"], para. 44.
[16] UNSR 2013 Report, para. 54.
[17] Ibid., para. 55.
[18] Ibid., para. 54.
[19] Ibid., para. 56.