



UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

“Consultation and consent: Principles, experiences and challenges”

**Presentation by the
United Nations Special Rapporteur on the rights of indigenous peoples,
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for the
International Colloquium on the free, prior, informed consultation:
International and regional standards and experiences
(Mexico City, 8 November 2016)**

Introduction

Ladies and Gentlemen,

I would like to thank the Office of the High Commissioner for Human Rights in Mexico, the Inter-American Commission on Human Rights and the Universidad del Claustro de Sor Juana for organizing this important event on the topic of consultation.

I also want to give my respect to the indigenous peoples of this land whose rights to land, cultures, and other basic human rights is the subject of discussion in this colloquium.

As UN Special Rapporteur on the Rights of Indigenous Peoples, I am tasked to look into the obstacles, challenges, barriers and good practices by States in protecting, respecting and fulfilling indigenous peoples' rights. Thus, events of this kind provide further opportunities to gather information on the issues and challenges facing indigenous peoples and discuss ways and exchange views to overcome problems that affect the enjoyment of their rights.

In the course of my mandate, the issue of consultation and free, prior and informed consent has arisen in the context of specific cases brought to my 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 and investment projects.

The regulation of consultation has been an objective of many indigenous peoples and State governments. I have been informed of developments in many countries like Peru, where specific consultation legislation has been enacted, yet challenges still remain. In other States, I have been informed of ongoing efforts to develop legislation in this areas. Such has been the case here in Mexico as well as Brazil, Colombia and Honduras and various other countries. Most recently, in

Honduras, I was requested to provide technical advice on the development of legislation on consultation, which has been carried out by the Government of Honduras with the assistance of the United Nations Development Programme. This process has offered important insights on the difficult challenges that such initiatives present, in terms of what the substantive content of this type of legislation should be and the process for consulting indigenous peoples about a proposed law on consultation.

In this presentation, I will begin by addressing the legal foundations of the principles of consultation and consent and its intended purposes and objectives within the broader framework of international law on indigenous peoples' rights. I will then address the challenges faced in the implementation of consultation and consent standards, including in the process of developing legislation, institutional development and cross-cutting coordination. This would include some comparative experiences in other countries. Lastly, I will present some recommendations for the road ahead.

1. Legal sources of consultation and consent

Throughout the Latin American region, the point of reference for ascertaining States' obligations in the area of consultation, has been the International Labour Organisation Convention No. 169 on Indigenous and Tribal Peoples ("ILO 169"), which is the principal international treaty on the subject of the rights indigenous peoples, and has been ratified by Mexico and the vast majority of States in Latin America. The main provision of ILO 169, states that State parties are to consult indigenous peoples "through appropriate procedures and in particular through their representative institutions, whenever considerations is being given to legislative or administrative measures which may affect them directly" (art. 6.1.a).

While the important legal status of ILO 169 is unquestionable, it is not the only source of legal obligation with respect to consultation. State obligations to consult indigenous peoples also derive from universal and regional human rights instruments of general application and the interpretative jurisprudence by supervisory mechanisms of these instruments. These instruments, which have been ratified by Mexico and the majority of Latin American States, include the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the American Convention on Human Rights. For example, the Committee on the Elimination of Racial Discrimination has stated that State obligations under the Convention on Racial Discrimination include ensuring "that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their land rights and interests are taken without their informed consent."¹

The application of the above human rights instruments to the particular situations of indigenous peoples is reflected in the United Nations Declaration on the Rights of Indigenous Peoples ("Declaration"). As an official resolution of the General Assembly voted favorably by the vast majority of member States, the Declaration reflects the current consensus of the international community about the content and scope of the rights of indigenous peoples which

¹ CERD, General Recommendation No. 23 (1997), art. 4.d.

are also grounded in universal human rights instruments of general application.² Regarding consultation, the Declaration in its article 19 provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

In the Latin American region, another fundamental source of obligation derives from the human rights treaties and resolutions of the inter-American human rights system. The recently approved American Declaration on the Rights of Indigenous Peoples, in similar terms as the UN Declaration on indigenous peoples, provides for consultation with indigenous peoples before adoption of legislative and administrative measures affecting them (art. XXIII.2). This instrument further demonstrates the ongoing commitments publicly made by American States with regards to the protection of indigenous peoples’ rights.

In addition, the jurisprudence of the Inter-American Commission and the Inter-American Court of Human Rights has also played an important role in outlining the legal precepts of consultation deriving mainly from the American Convention on Human Rights. The Inter-American Court has determined that the obligation of States to consult indigenous peoples through special and differentiated consultation processes whenever the rights and interests of indigenous peoples can be affected constitutes a general principle of international law. As the Court stated this obligation has been widely recognized within legislative and jurisprudential developments in numerous countries in the world, including those that have not ratified either ILO 169 or the American Convention on Human Rights.³

Keeping in mind these legal sources, it is worth highlighting the importance of the constitutional reform undertaken in Mexico in 2011 which establishes a new paradigm in the field of constitutional law and human rights. The constitutional reform provides constitutional status to human rights recognized in international treaties, it enshrines the *pro personae* principle, that is, the application of the most favorable law to a person, and it establishes the obligation that all national laws and their application adjust to international treaties, including the American Convention on Human Rights and the jurisprudence of the Inter-American Court. I consider this to be a momentous constitutional reform that serves as a model for other countries. It should serve to lay the foundations for necessary processes of adaptation of national laws on the rights of indigenous peoples to their lands, territories, natural resources and other rights, as well as sectorial laws on mining, hydrocarbons, energy, water, natural resources, political participation, land-use planning and other areas that have an impact on the rights of indigenous peoples. As I will explain later, these types of national law reforms are crucial to ensure that the regulation of prior consultation fulfills its objectives.

² See, Report of the Special Rapporteur on the rights of indigenous peoples James Anaya to the General Assembly, A/64/338 (4 September 2009), paras. 43-49.

³ I/A Court H.R., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012 [“Sarayaku Case”], para. 164.

A. Consultation as a duty and a safeguard of human rights

From the above international legal sources, it is clear that consultation is viewed as a duty of States, even if it is widely referred to as a right of indigenous peoples. This duty must be duly reflected in domestic legislative initiatives and the decisions and judgments by judicial bodies. To that end, it is important to remember the role that the principles of consultation and consent play with regards to the protection of indigenous peoples' human rights. As was emphasized by my predecessor, Prof. James Anaya, consultation and consent must not be viewed as separate or stand-alone rights or procedures necessary for the approval of previously approved measures, but must be seen as essential safeguards that supplement and help effectuate the substantive human rights of indigenous peoples.⁴ This is consistent with the jurisprudence of the Inter-American Court stating that consultation processes constitute safeguards against measures or activities proposed by the State that could result in the restriction of their collective property and cultural identity.⁵

Therefore, in the context of State proposals for legislative or administrative measures and development and investment projects, a focus on the substantive rights implicated is an indispensable starting point for devising appropriate consultation and consent procedures.⁶ The substantive rights that can be implicated, for example, in the context of natural resource and extraction activities include among others the rights to property, culture, religion, health, environment, to define their own priorities for development and self-determination. These are rights recognized in the aforementioned international human rights instruments and are articulated in the Declaration.⁷ Consequently, the development of legislative reforms to adequately protect these substantive rights must be understood as an essential objective, in addition to efforts to regulate the duty to consult.

It must also be remembered that in addition to consultation and consent, other safeguards must be implemented particularly in the case of measures or activities affecting indigenous peoples' lands, territories, natural resources 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."⁸ As emphasized by my predecessor, "[a]ll these safeguards, including the State's duty to consult, are specific expressions of a precautionary approach that 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."⁹

⁴ Report of Special Rapporteur on the rights of indigenous peoples, James Anaya, (6 July 2012), A/HRC/21/47, ["UNSR 2012 Report"] para. 49.

⁵ I/A Court H.R., *Case of Saramaka People v. Suriname*, Judgment of 28 November 2007 ["Saramaka Case"], paras. 129, 130; *Sarayaku Case*, paras. 212-220.

⁶ UNSR 2012 Report, para. 84.

⁷ *Ibid.* para. 50.

⁸ *Ibid.*, para. 52, *citing* *Saramaka Case*, paras. 138-140.

⁹ UNSR 2012 Report. para. 52.

B. The principle of free, prior and informed consent

Considering the function of consultation as a safeguard of substantive human rights of indigenous peoples, the objective of seeking consent must be understood. ILO 169 states that consultation with indigenous peoples must be undertaken “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures” (art. 6.2). As mentioned earlier, the Declaration states that the free, prior and informed consent of indigenous peoples must be obtained prior to the adoption of legislative or administrative measures that may affect them (art. 19) and prior to the approval of development projects affecting their lands, territories and other resources (art. 32.2).

In assessing the standards on consultation contained in the Inter-American jurisprudence, the Declaration and other sources, the previous Special Rapporteur has emphasized that beyond being the objective of consultations, indigenous consent to proposed measures or activities would be required “where the rights implicated are essential to the survival of indigenous groups as distinct peoples and the foreseen impacts on the exercise of the rights are significant.”¹⁰ The rights commonly understood to be necessary for indigenous peoples’ survival include for example the rights to their lands and resources - whether they are officially recognized or based on their customary use - or rights to lands that are of cultural significance, such as sacred places, or traditional natural resources essential for their survival.¹¹

The above further demonstrates the importance of undertaking social, cultural and human rights assessments before the approval of extractive, energy or similar activities or measures potentially affecting the lands, resources, cultures and other rights of indigenous peoples. Such studies can help determine appropriate mitigation and other measures to ensure substantive rights are not affected or that a given indigenous peoples’ survival is not threatened. The information from these assessments must be in an accessible format so that indigenous peoples can make an informed decision about the proposed measure and provide or withhold their consent.

Any decision by States to proceed with a measure or activity that is not consented by the indigenous peoples concerned and that restricts their substantive rights, must demonstrate compliance with strict international standards on acceptable limitations to human rights. These standards relate to necessity and proportionality with regard to a valid public purpose that is consistent with an overall framework of respect for human rights. In the context of extractive activities affecting indigenous peoples, the previous Special Rapporteur has cautioned that a valid public purpose “is not found in mere commercial interests or revenue-raising objectives” and must be backed at a minimum within a human rights framework.¹² In evaluating the requirements of necessity and proportionality, the rights potentially affected by a measure and their significance to the survival of indigenous peoples must be duly considered. Given the paramount importance of lands, territories and natural resources to the survival of indigenous peoples’ as distinct peoples, a finding of proportionality of a State-imposed limitation to such

¹⁰ Ibid., para. 65.

¹¹ Ibid.

¹² See, 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. 34, 35.

essential rights would be difficult. Thus, this reinforces the general rule of indigenous consent for extractive or other types of measures or activities that affect essential substantive rights.¹³

In a context where State proposed activities or measures do not have the consent of the indigenous party, States should have the burden to prove that measures exist to ensure their substantive rights and their survival as distinct peoples would not be affected, and that the international legal requirements of necessity, proportionality and valid public purpose are met. To that end, I consider that mechanisms for judicial review by a competent body should be instituted to ensure any decision by a State entity acting without the consent of the indigenous peoples concerned meets the burden described above, and other applicable international standards on the rights of indigenous peoples. If said burden is not met, it should be apparent that the measure or activity should not proceed.

2. Challenges in the implementation of consultation and consent standards

Throughout the course of my mandate I have received information about the efforts in many States to implement the international standards on consultation and consent through the development of specific legislation, resolutions by national human rights institutions, jurisprudential developments, the creation of specific institutions or other types of measures.

In the Philippines where I come from, a law called the Indigenous Peoples Rights Act (Republic Act 8371) was passed in 1997 and this has extensive references to free, prior and informed consent. This law defines Free Prior and Informed Consent to mean “the consensus of all members of the ICCs/IPs (Indigenous Cultural Communities/Indigenous Peoples) to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community”. Under the auspices of the National Commission (Commission) on Indigenous Issues which is regulated by the Act, Free prior and Informed consent needs to be sought before the delineation processes within ancestral domains. The Act also establishes the requirement for express consent from indigenous communities under section 58 for environmental considerations including for critical watersheds, wildlife sanctuaries or protected areas. Free Prior and Informed Consent is required to access biological and genetic resources within ancestral lands as per section 35 of the Indigenous Peoples’ Rights Act. Finally, the Act places a certification precondition with the Commission before the issuance, renewal or granting of concessions, licenses or leases to ensure that they do not occur within ancestral lands and the obligation for the Commission to seek the Free Prior and Informed Consent of indigenous peoples prior to issuing the certification.

Most of the efforts in the area of regulation of consultation have occurred in Latin America, where the widespread ratification of ILO 169 along with important constitutional reform processes had provided avenues for indigenous peoples to demand implementation of this duty, particularly given the high incidence of social conflicts due to the approval of natural resource development plans and other investment projects affecting indigenous peoples’ lands, territories and natural resources.

¹³ Ibid., para. 36.

Peru was the first State to enact specific legislation on this subject – the *Act No. 29785 On the Rights of Indigenous and Aboriginal Peoples to Prior Consultation*, recognized in the *International Labour Organization (ILO) Convention No. 169*, in 2011 and its regulations in 2012. However, the passage of this legislation has not been without its challenges and indigenous peoples and civil society groups in Peru have continually expressed concern about the Act, its implementing regulations as well as a methodology guide subsequently developed to implement the law. Many of these concerns were reflected in the 2012 report of my predecessor on *The situation of indigenous peoples' rights in Peru with regard to extractive industries*.¹⁴

These concerns include substantive aspects of the law, such as the absence of a specific requirement that consent be a precondition in cases of measures bringing significant impacts. The law provides for the creation of a database meant to identify the indigenous peoples and groups that need to be consulted. This has led to concerns about how the criteria used by the government can lead to exclusion of certain indigenous peoples from the database. Another concern has been the non-retroactive character of the law, which would be problematic especially in cases of projects that generate ongoing effects despite being approved before passage of the law.¹⁵

In addition, there are still challenges related to the need to build further capacity within the government to implement prior consultation in methodological, logistical and budgetary terms. Since diverse State sectors are given the task of determining key elements of consultation processes, this can lead to inconsistent application of the law. This has led to problems in how consultation would be implemented throughout the different stages related to hydrocarbon sector. In the mining sector, there has been a lack of consultations before the granting of mining concessions.

Keeping in mind the experiences in Peru and the efforts in other countries to develop similar legislation, I will address on some key issues and challenges that need to be considered by indigenous peoples, State governments, civil society groups and other relevant actors in addressing avenues to implement the international standards and obligations related to consultation and consent at the domestic level.

A. The question of whether to implement through legislation

While the development of specific legislation in Peru was an important step given the demands of indigenous peoples and the Peruvian government's willingness and interest in legislating on this issue, I consider that specific legislation is not necessarily the only means to implement a States' obligation to consult indigenous peoples.

Throughout many countries, including Peru, an ongoing concern is that draft laws or laws already approved do not adequately meet the aforementioned international standards on consultation and consent. Indigenous peoples in Colombia, for example, have expressed that the development of a statutory law on consultation might actually not be the best course since any draft laws developed and discussed with executive government agencies can eventually be

¹⁴ A/HRC/27/52/Add.3 (3 July 2014), paras. 32-44.

¹⁵ Ibid.

altered once the draft laws go through the legislative debate process. Indigenous peoples, in Colombia and other countries in the region, have instead opted for the development of consultation or bicultural protocols as a means by which a specific indigenous people or community can establish methods of consultation between States and indigenous peoples.

In Colombia, the absence of a specific law on consultation has led the Constitutional Court to develop an extensive body of jurisprudence elaborating on the duty to consult within specific cases it has examined. This has resulted in decisions finding the unconstitutionality of legislative measures or natural resource development projects that were approved without adequate consultation. This has included a case regarding a decree for consultation with indigenous peoples prior to the exploitation of natural resources within their territories which was found by both the Colombian Constitutional Court and the ILO as incompatible with ILO 169.¹⁶ Thus, the Constitutional Court in Colombia, and similar tribunals in other countries of the region, have also played an important role in promoting observance of international standards on consultation, regardless of the existence of specific legislation on consultation.¹⁷

Another important matter that must be addressed, is that the absence of legislation does not exempt States from their obligations to consult indigenous peoples in compliance with their international commitments and obligations. I am aware that government agencies and the private sector in many States, have repeatedly stated the lack of a specific legislation on consultation has been an impediment to the implementation of ILO 169 and other international standards. As stated earlier, the enactment of legislation is just one example of mechanisms to implement, and States must devise other types of mechanisms to implement consultation in the absence of legislation in that regard. It must be noted that the ILO supervisory mechanisms have stated that indigenous peoples' right to consultation and the obligation of governments to carry out consultations with indigenous peoples is "derived directly from Convention No. 169, not from the recognition of that right by national legislation."¹⁸

B. Consultation processes related to legislation

If State entities decide to develop legislation or other types of legal instruments to regulate consultation, they must remember that this instrument itself must be the product of adequate consultation with indigenous peoples. The former Special Rapporteur explained that consultation processes require a climate of confidence and mutual respect between the State and indigenous parties whereby the "consultation procedure itself should be the product of consensus."¹⁹ I share my predecessor's observations that "in many instances, consultation procedures are not effective and do not enjoy the confidence of indigenous peoples, because the affected indigenous peoples

¹⁶ See, Constitutional Court of Colombia, Sentencia T-652 de 1998 ("Caso Urrá").

¹⁷ For general reference, see, María Clara Galvis Patiño & Ángela María Ramírez Rincón, *Digesto de jurisprudencia latinoamericana sobre los derechos de los pueblos indígenas a la participación, la consulta previa y la propiedad comunitaria*, Due Process of Law Foundation (2013).

¹⁸ 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.

¹⁹ Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, A/HRC/12/34 (15 July 2009) ["UNSR 2009 Report"], para 51.

were not adequately included in the discussions leading to the design and implementation of the consultation procedures.”²⁰

In Honduras, important steps have been taken by the Government and UNDP in Honduras towards the development of a draft law on consultation. Throughout this year, they have conducted meetings, with indigenous peoples, which were deemed as consultations, in order to discuss the contents of the draft law with a view to gather comments and submit a revised draft to the Congress within a timeframe previously determined by the Government. However, I observed that indigenous representatives would require more time and space to adequately prepare for consultation process required for this type of legislation, so that they can be able to reflect on the content of the law and make substantive comments and proposals.

In this case, important sectors of the indigenous peoples of the country did not agree with how the process was undertaken and did not participate in said meetings. Therefore, problems of legitimacy regarding this process are apparent that require concerted efforts by the government and the UN system in Honduras to ensure greater inclusion of all indigenous peoples and organizations, and equally important, that the process for consulting indigenous peoples about this and any other type of legislation be the product of consensus and agreement.

The experience in Honduras highlights the importance of instituting adequate mechanisms for “consultations on consultations”. As explained by my predecessor, this involves a process of open and exhaustive dialogue between the parties about various aspects related to the consultation procedure including, *inter alia*, the determination of the different stages for the consultations, the corresponding deadlines and specific modalities or methods of participation. Consequently, in these types of dialogues, there should not be any predetermined positions about these aspects.²¹ This of course entails an intercultural dialogue and understanding of indigenous representative structures, their conceptions of time, their decision-making processes, and other related factors.

C. Capacity-building, technical assistance and strengthening of indigenous representative structures

With respect to measures needed to ensure adequate participation of indigenous peoples within consultation processes, special measures must be taken to address imbalances of power and other disadvantages faced by indigenous peoples. As observed by the former Special Rapporteur, “indigenous peoples are typically disadvantaged in terms of political influence, financial resources, access to information, and relevant education in comparison to the State institutions or private parties, such as companies, that are their counterparts in the consultations.”²² To address this imbalance of power, States must ensure “arrangements by which indigenous peoples have the financial, technical and other assistance they need, and they

²⁰ Ibid.

²¹ UN Special Rapporteur on Indigenous Peoples, James Anaya, *La situación de los pueblos indígenas afectados por el proyecto hidroeléctrico El Diquís en Costa Rica* (30 de mayo de 2011), A/HRC/18/35.Add.8, para. 32.

²² UNSR 2009 Report, para 50.

must do so without using such assistance to leverage or influence indigenous positions in the consultations.”²³

As was also noted by my predecessor, the building of confidence and genuine consensus also requires respect for indigenous peoples’ own representative and decision-making institutions. I concur that “indigenous peoples may also need to develop or revise their own institutions, through own decision-making procedures, in order to set up representative structures to facilitate the consultation processes.”²⁴ As indicated by ILO supervisory bodies, indigenous peoples have to identify what their representative institutions are, and this must “be the result of a process carried out by the indigenous peoples themselves.”²⁵ Despite the difficulties that may present themselves in this regard, ILO bodies have stressed that “if an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultation will not comply with the requirements of the Convention [169].”²⁶

Thus, in contexts of proposed development projects affecting indigenous peoples’ lands and resources, or legislative initiatives affecting indigenous peoples, such as the case of the draft consultation law in Honduras, indigenous peoples and their representative structures require adequate time for preparation and build capacity in order to participate efficiently in consultation processes, and to be able to have access to independent technical advice and assistance.

In addition, State governments must ensure they do not take actions that divide or undermine indigenous representative structures. This was apparent in the case of consultations related to the leasing process for the continuation of oil production activities in Lot 192 in the Amazonian region of Peru.²⁷ Indigenous communities affected by decades of contamination from oil production activities have in recent years engaged in negotiations with government agencies and signed agreements where they have demanded preconditions for the continuation of oil activities which include measures for environmental remediation, medical attention and recognition of their land rights. The communities selected their own representative organizations for the consultation process, who developed and signed a comprehensive consultation agreement with the government. But in the last stages of the process, the government fostered the incorporation of an indigenous NGO which was not party of the original agreement, without any consultation with the representative organizations. This created divisions and problems that, together with the lack of implementation of the agreements previously signed, has undermined what potentially could have been an important reference point for consultations in the region.

²³ Ibid., para. 51.

²⁴ Ibid., para. 52.

²⁵ ILO 169 Guide, p. 61, *citing*, Governing Body, 289th Session, March 2004, Representation under article 24 of the ILO Constitution, Mexico, GB.289/17/3.

²⁶ ILO 169 Guide, p. 61, *citing*, Governing Body, 282nd Session, November 2001, Representation under article 24 of the ILO Constitution, Ecuador, GB.282/14/2, para. 44.

²⁷ The recent negotiations related to Lot 192 have been the subject of communications sent to the government of Peru by the Special Rapporteur on indigenous peoples and the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, on 8 December 2014, 28 May 2015 and 27 August 2015.

D. State institutional development and cross-cutting legislative and institutional reform

As stated in the Inter-American Court's jurisprudence, 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."²⁸

A major challenge I have observed is the need to ensure adequate capacity-building, inter-ministerial coordination and technical and financial resources for State institutions in the area of consultation. This is a challenge whether the route undertaken by a State is to designate a specific agency to conduct and coordinate consultation processes with other State entities, as is the case of the Department of Prior Consultation in Colombia; or whether consultation processes are undertaken by the specific entity proposing a given measure or activity affecting indigenous peoples, with the assistance of a designated agency such as the role undertaken by the Office of the Deputy Minister of Intercultural Relations of Peru.²⁹ Such institutions require greater institutional resources and decision-making and enforcement authority to effectively coordinate with other agencies in sectors such as mining, hydrocarbons and others, and ensure all relevant measures and activities contemplated by state agencies are effectively identified and subject to consultation, and that applicable international human rights standards are complied with.

Along with inter-institutional coordination and capacity-building in the area of indigenous peoples' rights, other related actions need to also be taken to ensure consultation processes fulfil their intended purposes. Efforts must be made to ensure that legislation in other areas, such as in the mining, hydrocarbons and energy sectors and other relevant areas comply with international human rights standards. This would refer not 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. In addition, effective judicial, administrative or other mechanisms must be established to ensure indigenous peoples can effectively enforce international standards on the duty of consultation and the protection of their substantive rights.

²⁸ Sarayaku Case, para. 166.

²⁹ For further reference on comparative experiences in legislative, jurisprudential and institutional developments regarding prior consultation in Peru, Colombia, Chile and other countries, see, Due Process of Law Foundation, *Derecho a la consulta y al consentimiento previo, libre e informado en América Latina: Avances y desafíos para su implementación en Bolivia, Brasil, Chile, Colombia, Guatemala y Perú*, (2015), págs. 70-77.

3. Recommendations for the road ahead

As reflected in this presentation, various factors need to be considered regarding the implementation of the principles of consultation and consent which are part of the obligations deriving from international human rights commitments made by Mexico and the majority of Latin American states. An essential starting point is understanding that consultation and consent are not stand-alone concepts or procedural processes entailing only the giving of information about a course of action already decided by governmental and other actors. As the ILO itself has stated, the establishment of effective mechanisms of consultation with indigenous peoples is the cornerstone of ILO 169; thus, it is essential to the fulfilment of the rights enunciated in this instrument.³⁰

As a safeguard of the substantive land, natural resource, cultural and other rights of indigenous peoples, the duty to consult also entails concerted efforts in all areas of government, to ensure there is adequate knowledge, capacity, and ultimately, political will to respect and protect the rights of indigenous peoples. Without such efforts, it is difficult to guarantee the foundations for the necessary good faith and intercultural dialogue and understanding that the ILO 169 and other international instruments and jurisprudence require for consultation processes. State institutions within the executive, legislative and judicial branches, need to be aware of the important role they can play in this regard. It is an imperative given the urgent need to effectively address the current social conflicts present in Mexico and other countries due to the lack of consultation and consent related to natural resource development and other types of measures and activities that affect their rights and interests.

Awareness and capacity-building are necessary within government institutions as well as private business and other sectors whose actions also affect the lives of indigenous peoples. Legislative and other mechanisms are necessary to regulate and supervise the actions of private businesses in the context of extractive, energy and other activities in order to ensure they respect the rights of indigenous peoples.

In addition, national processes for development and energy policy planning should include indigenous peoples, taking into account international standards for the protection of their cultures, traditional lands and resources; consultation and free, prior and informed consent; social, cultural environmental and human rights impact assessments; and an agreed definition of mitigation, compensation and benefit measures must be reached.³¹ States, companies and other actors should recognize that indigenous peoples have much to contribute to the planning of local and national development thanks to their millenary knowledge and their special relationship with their ancestral lands. Through real consultation and participation processes, indigenous peoples must be provided a space to contribute to development planning, including through their own proposals and alternatives to the types of projects commonly promoted States, companies and financial institutions.³²

³⁰ ILO 169 Guide, p. 59.

³¹ 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), para. 97.

³² *Ibid.*, Annex: Observations on the situation in Rio Blanco, para. 66.

Regarding the duty to consult itself, it must be remembered that it is an obligation that exists regardless of the existence of domestic legislation. It is important to assess if indigenous peoples in a given State deem a specific legislation is necessary or some other mechanisms like the recognition of consultation protocols for specific indigenous peoples or communities. If legislation to regulate consultation is the path chosen, States must ensure that the development, discussion and approval of that legislation is itself the result of an adequate process of consultation with the widest range of indigenous peoples and representative organizations. That would include consensus with the indigenous peoples concerned about the methodology, timelines and other important aspects related to consultation on this type of initiative.

At the same time, it is necessary that, in consultation with indigenous peoples, legislative reforms be adopted to protect and strengthen the rights of indigenous peoples over their lands, territories, natural resources and other substantive rights. This represents a crucial element to ensure that any mechanism that regulates consultation fulfills its role as a safeguard of substantive rights recognized in international instruments and jurisprudence.

In addition, measures must also be taken to ensure indigenous peoples have the adequate time and space to strengthen or develop their representative institutions in order to effectively participate in consultation processes and also have independent technical advice and assistance. As recommended by my predecessor, “[r]elevant agencies and programmes within the United Nations system, as well as concerned NGOs, should develop ways to provide indigenous peoples with access to the technical capacity and financial resources they need to effectively participate in consultations and related negotiations.”³³ U.N. agencies and programmes could also play an important role in ensuring State entities have the necessary capacity and assistance to effectively comply with their international human rights obligations. This can include providing the necessary technical assistance and undertaking oversight activities to ensure adequate consultation processes are carried out by State entities in accordance with the international human rights standards described above.

³³ UNSR 2009 Report, para. 71.