Expert Mechanism on the Rights of Indigenous Peoples
Eleventh session
9-13 July 2018
Item 4: Study and advice on free, prior and informed consent

Joint Statement of: Amnesty International Canada; Assembly of First Nations; Assembly of First Nations of Quebec and Labrador; BC Assembly of First Nations; Canadian Friends Service Committee (Quakers); First Nations Summit; Grand Council of the Crees (Eeyou Istchee) / Cree Nation Government; Haudenosaunee External Relations; Indigenous World Association; KAIROS: Canadian Ecumenical Justice Initiatives; Grand Chief Wilton Littlechild, International Chief for Treaties 6, 7 and 8; Mariam Wallet Aboubakrine, Indigenous Independent Expert; Professor Brenda Gunn, University of Manitoba

Speaker: Kenneth Deer

Recommendation: We urge that the EMRIP study of FPIC clearly and explicitly express:

1. Commitments to merely "seek the consent" of Indigenous peoples are insufficient to fulfil the obligation of FPIC in international law; and

2. Whenever FPIC applies to the actions of States and other third parties, they have an obligation to ensure that decisions proceed only if Indigenous peoples give their free, prior and informed consent.

Our Nations and organizations welcome the Expert Mechanism's attention to the critical issue of Indigenous peoples' right to free, prior and informed consent (FPIC) in international law. FPIC has been a source of much debate and we would like to address how FPIC has been characterized related to this discussion.

FPIC is an integral aspect and expression of Indigenous peoples' inherent right of self-determination, as well as a standard of rigorous human rights protection made necessary by the entrenched patterns of colonialism, racism and other forms of discrimination that have marginalized and dispossessed Indigenous peoples worldwide.

We would like to address the Concept Note for this agenda item. We are concerned with Item 4 where, in regard to Articles 19 (legislative and administrative measures) and 32(2) (approval of projects relating to lands, territories and resources) of the *UN Declaration on the Rights of Indigenous Peoples*, one of the possibilities for consideration set out in the Concept Note is that "consent should be the objective of consultation".
Like the Government of Canada's submission to EMRIP's study - which refers only to an intention to "seek consent"[1] - the implication is that the right of FPIC has no consequences for State obligations where consent is withheld. This is not accurate.

[1] Government of Canada, *Input to the United Nations Expert Mechanism on the Rights of Indigenous Peoples – Call for submissions on free, prior and informed consent.* Undated (2018).

Where FPIC applies, States must ensure that decisions will proceed only if consent is granted and such consent is maintained. To do less, to seek consent but proceed anyway even if Indigenous peoples do not agree with the plans proposed by the State or private actors, breaches the standard of international law affirmed in the *UN Declaration* and articulated by UN Treaty Bodies, the Special Rapporteur on the Rights of Indigenous Peoples, and other human rights mechanisms.

This is especially important when considering legislative or administrative measures and proposed resource developments.[2] Art. 19 and Art. 32(2) address realities that have had far-reaching consequences for Indigenous peoples.[3]

The *UN Declaration* does not include the phrase "seek the consent" of Indigenous peoples. This weakened formulation of FPIC was explicitly rejected during the drafting process. States are instead required to "consult and cooperate in good faith" with Indigenous peoples "*in order to obtain* their free, prior and informed consent" [Articles 19 and 32.2, emphasis added]. The language of "in order to obtain" is a considerably stronger formulation of State obligations, than is expressed by the phrase "seek the consent."

Furthermore, where actions have been undertaken without FPIC, the *Declaration* also affirms that Indigenous peoples have the right to redress for this violation of their human rights [See Articles 11.2; 28; 32.3].

Critically, the *Declaration* explicitly affirms the right of self-determination [preambular para. 17, Article 3]. This includes the right of Indigenous peoples to make their own decisions in respect to their lands, territories and resources and the practice of their cultures, traditions and systems of law and governance [e.g. Articles 4, 13, 14, 23, 26, 31, 32, 33, 35].

The *Declaration* affirms that States have a duty to "promote respect for and full application of the provisions of this Declaration and follow up [its] effectiveness" [Article 42]. Also, under the two international human rights Covenants, States have an affirmative legal obligation to "promote the realization of the right of self-determination, and … respect that right".

We also note that UN Treaty Bodies have repeatedly defined the consent of Indigenous peoples as a necessary precondition for all decisions potentially affecting their rights. The

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[2] *E.g.*, Committee on Economic, Social and Cultural Rights, *Concluding observations: New Zealand*, UN Doc. E/C.12/NZL/CO/4 (1 May 2018), para. 8; Committee on the Elimination of Racial Discrimination, *Concluding observations: Norway*, CERD/C/NOR/CO/21-22 (25 September 2015), para. 30 (d); and Committee on the Rights of the Child, *Concluding observations: Kenya*, UN Doc. CRC/C/KEN/CO/3-5 (21 March 2016), para. 68(d).

[3] See, *e.g.*, Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories*, UN Doc. A/HRC/18/35 (11 July 2011), para. 82 (Conclusions and Recommendations): "natural resource extraction and other major development projects in or near indigenous territories [i]s one of the most significant sources of abuse of the rights of indigenous peoples worldwide."

UN Human Rights Committee has contrasted free, prior and informed consent with "mere consultation".[4]

A decade before the adoption of the *UN Declaration*, the UN Committee on the Elimination of Racial Discrimination called on States to ensure that no decisions directly relating to the rights and interests of Indigenous peoples "are taken without their informed consent."[5]

Clearly, commitments to only "seek consent" are in conflict both with the *Declaration* and with a wider body of international law.

Canadian courts have usefully set out a number of elements of good faith consultation that unfortunately were not referenced in the Government of Canada's submission to EMRIP. The Supreme Court of Canada has said that the duty to consult with Indigenous peoples, which exists whenever government contemplates any decision with the potential to impact rights asserted by Indigenous peoples, must be conducted with "the intention of substantially addressing the concerns" of Indigenous peoples.[6]

There is no guarantee that this obligation to substantially address Indigenous peoples' concerns will be fulfilled if States merely seek consent, but make no further commitment to address the concerns of Indigenous peoples. Furthermore, there is also precedent in Canadian domestic law that Indigenous peoples' own plans and proposals must be given proper consideration in any meaningful consultation process, even if such plans and proposals would mean putting the plans of government and industry on hold or abandoning them altogether.[7]

Finally, we also note that the minimum standard in the *UN Declaration* is not consultation, but consultation and cooperation [Article 38 and 43]. The term "cooperation" includes a consensual element. In addition, the last preambular paragraph in the *Declaration* proclaims

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[4] *Ángela Poma Poma v. Peru,* CCPR 1457/2006, 24 April 2009, para. 7.6.

[5] UN Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Indigenous Peoples*, Fifty-first session, 1997, 18/08/97.

[6] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 88. It's important to note that in this decision the Supreme Court defined the mandatory duty to consult as giving rise to a range of possible necessary accommodations, including the potential necessity to proceed only with consent. The inclusion of consent within the spectrum of possible State obligations was confirmed in a subsequent Supreme Court decision: *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para. 24. The Supreme Court of Canada has also confirmed in the landmark 2014 Tsilhqot'in Nation decision that Indigenous land title means that governments seeking to use the land "must obtain the consent" of the Indigenous title holders. *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256, para. 76. In light of these rulings, Canada's submission to EMRIP is misleading when it states "Where adequate consultation has occurred, a development may proceed without consent." While there are instances where this may be true, the Supreme Court has been explicit there are also instances where consultation alone is insufficient and consent is required.

[7] *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, (2010 BCSC 359). The decision was upheld on appeal 2011 BCCA 247) and in 2012 the Supreme Court of Canada declined to consider a further appeal [2011] S.C.C.A. No. 399, 2012 CanLII 8361).

the *Declaration* as a standard of achievement to be pursued “in a spirit of partnership and mutual respect”. Again, “partnership” includes a consensual element.