

Expert Mechanism Advice No. 2 (2011):
Indigenous peoples and the right to participate in
decision-making

1. Indigenous peoples are among the most excluded, marginalized and disadvantaged sectors of society. This has had a negative impact on their ability to determine the direction of their own societies, including in decision-making on matters that affect their rights and interests. This can still be a major factor contributing to their disadvantaged position. Decision-making rights and participation by indigenous peoples in decisions that affect them is necessary to enable them to protect, inter alia, their cultures, including their languages and their lands, territories and resources. In many cases, however, indigenous peoples practised or continue to practise their own forms of governance.

2. The right of indigenous peoples to participation is well established in international law. More recently, the indigenous-rights discourse has seen increased focus on rights not only allowing indigenous peoples to participate in decision-making processes affecting them, but to actually control the outcome of such processes.

3. This spectrum of rights is well illustrated by the Declaration on the Rights of Indigenous Peoples, which contains more than 20 general provisions pertaining to indigenous peoples and decision-making. These rights range from the right to self-determination encompassing a right to autonomy or self-government to rights to participate and be actively involved in external decision-making processes. Other provisions establish specific duties for States to ensure the participation of indigenous peoples in decision-making, inter alia, to obtain their free, prior and informed consent; to consult and cooperate with indigenous peoples; and to take measures in conjunction with them.¹

4. As a normative expression of the existing international consensus regarding the individual and collective human rights of indigenous peoples in a way which is coherent with already existing international human rights standards, the Declaration on the Rights of Indigenous Peoples provides a framework for action aiming at the full protection and implementation of the rights of indigenous peoples, including their right to participate in decision-making.

¹ Arts. 3-5, 10-12, 14, 15, 17-19, 22, 23, 26-28, 30-32, 36, 37, 38, and 40-41.

5. With regard to participatory rights, international human rights law refers to the right to participate in public affairs in both general and specific forms, including as set out in various human rights treaties, such as in article 25 of the International Covenant on Civil and Political Rights and in the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization (ILO).² Participation in public affairs in its general form includes involvement in the conduct of public affairs. Electoral participation is only one specific expression of the right to participation. Moreover, the right to take part in public affairs is not limited to participation in formal political institutions, as it also includes participation in civil, cultural and social activities of a public nature. The right to participate in public affairs has conventionally been understood as a civil and political right of the individual. In the context of indigenous peoples, however, the right also takes on a collective aspect, implying a right of the group as a people to exercise decision-making authority.

6. The right of indigenous peoples to participate in decision-making is also affirmed in international jurisprudence more generally, such as in the decision of the Inter-American Court of Human Rights in which the Court recognized indigenous peoples' right to organize themselves in ways that are consistent with their customs and traditions under State electoral laws.³ The African Commission on Human and Peoples' Rights has expressed concern about the exclusion of indigenous peoples from decision-making about the treatment of their lands.⁴

7. Article 6 of ILO Convention No. 169 requires that consultations with indigenous peoples be carried out through institutions that are representative of indigenous peoples. Indigenous peoples should control the process by which representativeness is determined, in accordance with human rights standards as set out in, inter alia, the Declaration on the Rights of Indigenous Peoples.⁵

8. The requirement that consultations be carried out through appropriate procedures implies that general public hearing processes are not normally regarded as sufficient to meet this procedural standard. Consultation procedures need to allow for the full expression of indigenous peoples' views, in a timely manner and based on their full understanding of the issues involved, so that they may be able to affect the outcome and consensus may be achieved.

² Arts. 2, 5-7, 15-17, 20, 22, 23, 25, 27, 28, 33 and 35.

³ Inter-American Court of Human Rights, *Yatama v. Nicaragua*, judgement of 23 June 2005.

⁴ African Commission on Human and Peoples' Rights, *Endorois Welfare Council v. Kenya*, 4 February 2010.

⁵ A/HRC/EMRIP/2010/2.

9. Moreover, consultations should be undertaken in good faith and in a form appropriate to the relevant context. This requires that consultations be carried out in a climate of mutual trust and transparency. Indigenous peoples must be given sufficient time to engage in their own decision-making process, and participate in decisions taken in a manner consistent with their cultural and social practices. Finally, the objective of consultations should be to achieve agreement or consensus.

10. As indicated above, the duty to consult indigenous peoples is further reflected in a number of provisions of the Declaration on the Rights of Indigenous Peoples.⁶ Like ILO Convention No. 169, Declaration articles 19 and 32(2) require States to consult indigenous peoples in good faith, through appropriate procedures, with the objective of obtaining their agreement or consent when measures that may affect indigenous peoples are considered.

11. Moreover, a number of United Nations human rights treaty bodies have established that States have a duty, within the framework of their treaty obligations, to effectively consult indigenous peoples on matters affecting their interests and rights and, in some cases, to seek to obtain the consent of indigenous peoples.⁷

12. The duty of States to consult with indigenous peoples and to obtain their consent are also expressed in the jurisprudence of, inter alia, the universal periodic review of the Human Rights Council,⁸ the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights,⁹ the African Commission on Human and Peoples' Rights,¹⁰ the Special Rapporteur on the rights of indigenous peoples,¹¹ and in international policy,¹² some of which is described in the Expert Mechanism's progress report on indigenous peoples and the right to participate in

⁶ Arts. 10, 11, 15, 17, 19, 28, 29, 30, 32, 36, 37 and 38.

⁷ See A/HRC/EMRIP/2010/2. See also CCPR/C/79/Add.109 and Add.112, CCPR/CO/69/AUS and CCPR/CO/74/SWE; *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. II, annex X, section I, para. 9.6; CERD/C/CAN/CO/18, paras. 15 and 25; CERD/C/NZL/CO/17, para. 20; CERD/C/IDN/CO/3, para. 17; CERD/C/COD/CO/15, para. 18; CERD/C/ECU/CO/19, para. 16; CERD/C/USA/CO/6, para. 29; CERD/C/NAM/CO/12, para. 18; CERD/C/SWE/CO/18, para. 19; CCPR/C/NIC/CO/3, para. 21; CCPR/C/BWA/CO/1, para. 24; CCPR/C/CRI/CO/5, para. 5; CCPR/C/CHL/CO/5, para. 19; *Official Records of the General Assembly, Fifty-second Session, Supplement No. 18 (A/52/18)*, annex V; and E/C.12/GC/21.

⁸ See, for example, Human Rights Council decision 12/106.

⁹ For example, *Yatama v. Nicaragua* (see footnote 65) and *Saramaka People v. Suriname*, judgement of 28 November 2007.

¹⁰ *Endorois Welfare Council v. Kenya* (see footnote 66).

¹¹ A/HRC/12/34.

¹² For example, see the Akwe: Kon Voluntary Guidelines for the implementation of article 8(j) of the Convention of Biodiversity, and the European Bank for Reconstruction and Development, Environmental and Social Policy (May 2008).

decision-making.¹³ In the progress report, the Expert Mechanism noted that several treaties between States and indigenous peoples affirmed the principles of indigenous peoples' consent as an underpinning of the treaty relationship between States and indigenous peoples.¹⁴

13. The right to full and effective participation in external decision-making is of fundamental importance to indigenous peoples' enjoyment of other human rights. For instance, the right of indigenous peoples to identify their own educational priorities and to participate effectively in the formulation, implementation and evaluation of education plans, programmes and services is crucial for their enjoyment of the right to education.¹⁵ When implemented as a treaty right, the right to education can offer a framework for reconciliation. Truth and reconciliation commissions offer a model for improved relations between States and indigenous peoples as well.¹⁶

14. The participation of indigenous peoples in external decision-making is of crucial importance to good governance. One of the objectives of international standards on indigenous peoples' rights is to fill the gap between their rights on the one hand and their implementation on the other hand.

15. Many indigenous peoples remain vulnerable to top-down State interventions that take little or no account of their rights and circumstances. In many instances, this is an underlying cause for land dispossession, conflict, human rights violations, displacement and the loss of sustainable livelihoods.

16. The duty to consult indigenous peoples applies whenever a measure or decision specifically affecting indigenous peoples is being considered (for example, affecting their lands or livelihood). This duty also applies in situations where the State considers decisions or measures that potentially affect the wider society, but which affect indigenous peoples, and in particular in instances where decisions may have a disproportionately significant effect on indigenous peoples.¹⁷

17. With regard to the right to self-determination, the Declaration on the Rights of Indigenous Peoples affirms that indigenous peoples, in exercising their right to self-determination, have the right to develop and maintain their own decision-

¹³ A/HRC/EMRIP/2010/2.

¹⁴ Ibid. In Canada, treaties 6, 7 and 8 contain provisions on indigenous peoples' consent. For instance, Treaty No. 6, concluded in 1876, provides that "and whereas the said Indians have been notified and informed by Her Majesty's said Commissioners that it is the desire of Her Majesty to open up for settlement, immigration and such other purposes ... and to obtain the consent thereto of Her Indian subjects inhabiting the said tract" (para. 3).

¹⁵ A/HRC/12/33.

¹⁶ A/HRC/15/36, para. 11.

¹⁷ See A/HRC/12/34, paras. 42-43.

making institutions and authority parallel to their right to participate in external decision-making processes that affect them. This is crucial to their ability to maintain and develop their identities, languages, cultures and religions within the framework of the State in which they live.

18. Article 3 of the Declaration on the Rights of Indigenous Peoples mirrors common article 1, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Consequently, indigenous peoples have the right to determine their own economic, social and cultural development and to manage, for their own benefit, their own natural resources. The duties to consult with indigenous peoples and to obtain their free, prior and informed consent are crucial elements of the right to self-determination.

19. As affirmed in articles 5, 18, 36 and 37 of the Declaration on the Rights of Indigenous Peoples, and within the ambit of the right to self-determination, indigenous peoples have the right to make independent decisions in all matters relating to their internal and local affairs, and to effectively influence external decision-making affecting them if they choose to participate in such processes.

20. As mentioned above, the right to free, prior and informed consent is embedded in the right to self-determination. The procedural requirements for consultations and free, prior and informed consent respectively are similar. Nevertheless, the right of free, prior and informed consent needs to be understood in the context of indigenous peoples' right to self-determination because it is an integral element of that right.

21. The duty of the State to obtain indigenous peoples' free, prior and informed consent entitles indigenous peoples to effectively determine the outcome of decision-making that affects them, not merely a right to be involved in such processes. Consent is a significant element of the decision-making process obtained through genuine consultation and participation. Hence, the duty to obtain the free, prior and informed consent of indigenous peoples is not only a procedural process but a substantive mechanism to ensure the respect of indigenous peoples' rights.

22. The Declaration on the Rights of Indigenous Peoples requires that the free, prior and informed consent of indigenous peoples be obtained in matters of fundamental importance for their rights, survival, dignity and well-being. In assessing whether a matter is of importance to the indigenous peoples concerned, relevant factors include the perspective and priorities of the indigenous peoples

concerned, the nature of the matter or proposed activity and its potential impact on the indigenous peoples concerned, taking into account, *inter alia*, the cumulative effects of previous encroachments or activities and historical inequities faced by the indigenous peoples concerned. Premised on the right to self-determination, article 10 of the Declaration prohibits the forcible removal of indigenous peoples from their lands and territories. In contrast, ILO Convention No. 169, article 16(2), includes procedural elements that permit forced relocation as an exceptional measure, without the consent of the indigenous peoples concerned. The Declaration moreover requires States to obtain the free, prior and informed consent of indigenous peoples in certain other situations, as reflected in its articles 11(2), 19, 28(1), 29(2), 32(2) and 37.

23. The duty to obtain the free, prior and informed consent of indigenous peoples presupposes a mechanism and process whereby indigenous peoples make their own independent and collective decisions on matters that affect them. The process is to be undertaken in good faith to ensure mutual respect. The State's duty to obtain free, prior and informed consent affirms the prerogative of indigenous peoples to withhold consent and to establish terms and conditions for their consent.

24. The elements of free, prior and informed consent are interrelated; the elements of "free", "prior" and "informed" qualify and set the conditions for indigenous peoples' consent; violation of any of these three elements may invalidate any purported agreement by indigenous peoples.

25. The element of "free" implies no coercion, intimidation or manipulation; "prior" implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; "informed" implies that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; "consent" implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.¹⁸

Measures

26. Reform of international and regional processes involving indigenous peoples should be a major priority and concern. In particular, multilateral environmental

¹⁸ For an interpretation of free, prior and informed consent, see E/C.19/2005/3.

processes and forums should ensure full respect for the rights of indigenous peoples and their effective participation including, for example, in relation to the negotiation of the Nagoya Protocol.

27. Respect for indigenous peoples' right to participate in decision making is essential for achieving international solidarity and harmonious and cooperative relations. Consensus is not a legitimate approach if its intention or effect is to undermine the human rights of indigenous peoples. Where beneficial or necessary, alternative negotiation frameworks should be considered, consistent with States' obligations in the Charter of the United Nations and other international human rights law.

28. Free, prior and informed consent implies that States have a duty to obtain indigenous peoples' consent in relation to decisions that are of fundamental importance for their rights, survival, dignity and well-being. States should ensure that consultations and negotiations with indigenous peoples as required by article 18 of the Declaration on the Rights of Indigenous Peoples and consistent with other human rights standards.

29. States have a duty to respect indigenous peoples' right to participate in all levels of decision-making, including in external decision-making, if the indigenous peoples concerned so choose and in the forms of their choosing, including, where appropriate, in co-governance arrangements.

30. States should respect and assist both traditional and contemporary forms of indigenous peoples' governance structures, including their collective decision-making practices.

31. States should enact and implement constitutional and other legal provisions that ensure indigenous peoples' participation in decision-making consistent with the Declaration on the Rights of Indigenous Peoples, in particular where that is sought by affected indigenous peoples.

32. Indigenous women often face exceptional impediments to participation in decision-making. States, international organizations, indigenous peoples and other decision-making entities should therefore conduct more intensive studies and design appropriate mechanisms to facilitate the participation of indigenous women in their activities and increase their access to address difficulties facing indigenous women seeking to fully participate in decision-making. Likewise, the inclusion of indigenous youth in decision-making is essential in both internal and external, including legislative, decision-making.

33. States and relevant international and domestic organizations should ensure that indigenous peoples have the financial and technical capacity to engage in consultation and consent-seeking exercises and to participate in regional and international decision-making processes.

34. States should also recognize that the right to self-determination of indigenous peoples constitutes a duty for States to obtain indigenous peoples' free, prior and informed consent, not merely to be involved in decision-making processes, but a right to determine their outcomes. Treaties, as evidence of the right to self-determination, and the relationship they represent are the basis for a strengthened partnership, consistent with the Declaration on the Rights of Indigenous Peoples.

35. States shall respect indigenous peoples' right to self-determination consistent with the Declaration on the Rights of Indigenous Peoples and other international standards. States shall ensure that indigenous peoples have the means to finance their autonomous functions.

36. The United Nations should, in accordance with the Declaration on the Rights of Indigenous Peoples, establish a permanent mechanism or system for consultations with indigenous peoples' governance bodies, including indigenous parliaments, assemblies, councils or other bodies representing the indigenous peoples concerned, to ensure effective participation at all levels of the United Nations.

37. ILO should enable effective representation by indigenous peoples in its decision-making, and especially with regard to the implementation and supervision of ILO Conventions and policies relevant to indigenous peoples.

38. UNESCO should enable and ensure effective representation and participation of indigenous peoples in its decision-making, especially with regard to the implementation and supervision of UNESCO Conventions and policies relevant to indigenous peoples, such as the 1972 World Heritage Convention. Robust procedures and mechanisms should be established to ensure indigenous peoples are adequately consulted and involved in the management and protection of World Heritage sites, and that their free, prior and informed consent is obtained when their territories are being nominated and inscribed as World Heritage sites.

39. National human rights institutions, as independent bodies, should play an important role in bringing together representatives of Government and indigenous peoples, thus promoting indigenous peoples' participation in discussions and decisions on issues that concern them. National human rights institutions can also stress the need for all stakeholders to ensure indigenous representatives are

involved in decision-making. Such institutions, through their own programmes, could also actively involve indigenous peoples in decision-making on related issues.