

Expert Mechanism on the Rights of Indigenous Peoples: Study on the theme of free, prior and informed consent

Submitted by the Maya Leaders Alliance¹

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In response to the request by the Expert Mechanism to contribute to the study on the theme of free, prior and informed consent, the Maya Leaders Alliance submits the following report.

Introduction

The Maya Leaders Alliance (“MLA”) is a non-profit organization of Maya people that provides technical, legal, and other strategic support to the Maya elected leaders, or Alcaldes, of the Toledo District of Southern Belize. Together, the elected leaders, collectively organized as the Toledo Alcaldes Association (“TAA”), and the MLA serve as the appointed representatives of the Maya people. The MLA and TAA have successfully fought for recognition of Maya customary land rights in the Belize court system and the Caribbean Court of Justice,² however implementation by the government is yet to come.

The MLA’s decades-long involvement in the litigation and subsequent battle for recognition and protection of Maya peoples’ rights to land renders them uniquely situated to comment on the theme of free, prior and informed consent, with particular insight on the gap between recognition and implementation. Indeed, the Maya people have created their own Maya Consultation Framework to serve as a benchmark for consultation with the Maya people of Toledo, Belize.

While the present submission attempts to follow the outline set forth in the Expert Mechanism on the Rights of Indigenous Peoples’ *Concept Note: Issues for consideration in the preparation of a study on the theme of free, prior and informed consent, as comprised in the Declaration on the rights of Indigenous Peoples*, the MLA recognizes that many questions raised in the Expert Mechanism Concept Note on free, prior, and informed consent fundamentally depend upon an indigenous peoples’ own understanding and assertion of what it means to meaningfully consult with them as a peoples. Therefore, the MLA responds to the issues in a manner that comports with their understanding of the principle of free, prior and informed consent, a method which will hopefully shed useful light on the meaning of this principle in the experience of the Maya people. Further, the MLA uses the Maya Consultation Framework (the “Framework”) to better situate their responses to the questions and issues raised.

I. Rights holders and scope of free, prior and informed consent

Self-determination is a foundational principle at the heart of international law, and its expressions within the United Nations Charter, the International Covenant on Civil and Political Rights, and the International Covenant on Economic and Social Rights render it a

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² *Maya Leaders Alliance v. The Attorney General of Belize*, CCJ Appeal No BZCV2014/002 (hereinafter “CCJ Order of April 22, 2015”).

legally binding right. It is from this legal grounding, that EMRIP must approach the United Nations Declaration on the Rights of Indigenous Peoples and its articulation of free, prior and informed consent. The Declaration breathes life into the right of self-determination for indigenous peoples, and the principle of free, prior and informed consent serves to guide implementation of this right.

Although the EMRIP Concept Note acknowledges a “right” to free, prior, and informed consent, the United Nations Declaration on the Rights of Indigenous Peoples affirms free, prior, and informed consent as a correlative principle inherent in the recognition of other rights. Indeed, the principle of free, prior, and informed consent informs how universally accepted rights, such as rights to cultural integrity, equality, and property are to be implemented in the context of indigenous peoples.

It is important to note here the particular relationship between consultation and free, prior and informed consent, for free, prior and informed consent serves to guide consultations in a way that upholds indigenous peoples’ rights. Stated another way, consultation working towards the free, prior and informed consent of an indigenous peoples is an important operative mechanism for realizing the rights of indigenous peoples articulated in the Declaration.

The Declaration demands certain requirements of consultations in order to adequately achieve its role of protecting indigenous human rights in the face of state sovereignty. The state duty to consult articulated in the Declaration imposes both procedural requirements that protect against arbitrariness and substantive requirements to ensure balanced outcomes among unequal stakeholders.³

The procedural requirements of the duty to consult include: good faith effort to secure rights on agreed terms; direct engagement between states (or other entities) and indigenous peoples; mitigation of power imbalances (technical, political, economic); transparency in impact assessments; timing; and representativeness (indigenous peoples must be able to choose their own representatives for consultations).⁴ Substantive requirements include impact mitigation, compensation and benefit sharing, joint management arrangements, and adequate grievance procedures.⁵ The Maya Consultation Framework includes both procedural and substantive requirements, which are further explored in the sections below.

The Maya people approach free, prior and informed consent as a formative principle that should guide all formal interactions between indigenous peoples and outside entities. Consultations are essential to any meaningful and just agreements between stakeholders, and they cannot be viewed as single events, but instead must be understood as representative of an ongoing relationship.

II. Maya Leaders Alliance approach to free, prior and informed consent

The principle of free, prior and informed consent is inextricably related to the international norm of the state duty to consult, and a comprehensive review of either norm must include a discussion of both. Within the international system, states have a duty to consult indigenous peoples when actions may affect certain of their human rights, and such consultations must seek to obtain the free, prior and informed of the indigenous peoples implicated.

³ S. James Anaya and Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 *University of Toronto Law Journal* 435 (2017).

⁴ S. James Anaya and Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 *University of Toronto Law Journal* 435 (2017).

⁵ S. James Anaya and Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 *University of Toronto Law Journal* 435 (2017).

While the Maya Leaders Alliance approaches free, prior and informed consent and the state duty to consult from a consent-veto approach, they also accept and recognize that a human rights approach provides a useful guide for transforming the state duty to consult from simply a principle of rights recognition, to an action for rights realization.⁶

The consent-veto approach to the state duty to consult, and the related objective of obtaining free, prior, and informed consent, is one grounded in the historical recognition of indigenous sovereignty.⁷ This approach invokes an indigenous community's complete right to give or withhold consent before a state takes action that may directly affect that community's fundamental rights, particularly rights to land. The human rights framework on the other hand, tempers indigenous sovereignty with a recognition of the fundamental principle of international law: state sovereignty. This framework asserts that consultations must serve a balancing function for protecting human rights within a state-centric global framework.⁸

While a consent-veto approach represents the ultimate realization of the sovereign and sacred right of the Maya people to protect their land and cultural survival, it is in tension with how international law recognizes sovereignty among states, as well as contrary to existing domestic constitutional arrangements. The Maya people's experience with the Belizean government is a painful reminder of this tension. Thus, while the MLA will continue to strive for the full assertion of the sovereignty of the Maya people and their ability to bestow or withhold consent to decisions that may affect them, they jointly recognize that meaningful consultations striving toward a people's free, prior, and informed consent, even where consent is not reached, nonetheless serve to safeguard indigenous peoples' rights against the sovereign power of states.

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

While the Maya Leaders Alliance recognizes free, prior and informed consent as a principle, not as a right in and of itself, the Maya people's right to property necessitates that they not be relocated without their free, prior and informed consent. The Maya people, in considering how best to actualize the principle of free, prior and informed consent in cases of potential removal or relocation from their lands or territories, set forth two corresponding plans to address both relocation and compensation. The Framework addresses these plans in its section on environmental, social, cultural, and economic impact assessments, although the terms should also apply when relocation takes place apart from consultations or where impact assessments are not undergone.

The Framework states that where relocation or resettlement becomes absolutely necessary as part of a mitigation measure, the assessment report must include a clear "Resettlement Action Plan" and a "Livelihood Restoration Plan" of the affected villages. Consultation with the Maya people is required when designing each of these plans, and they both must include: timelines for implementation of the plan; a written declaration signed by the proponent or by an entity designated by the proponent, accepting full responsibility for the cost of implementing the plans; and a determination of adequate compensation or replacement rates (whichever is greater), for damages resulting in the loss of livelihood, cultural and spiritual practices, traditional environmental attachments, crops and game, infrastructure, and social ways of life. These plans account for both physical and cultural upheaval.

⁶ See Generally S. James Anaya and Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 *University of Toronto Law Journal* 435 (2017).

⁷ *Id.*

⁸ *Id.*

Further, given the unique spiritual relationship the Maya people have with their lands, territories, and resources, consent shall not be presumed unless: the procedure for issuing such consent has been subjected to traditional Maya decision-making processes; and the consent is expressed in a written agreement signed by the project proponent and the Maya representatives, stating clearly all the conditions upon which consent is based.

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

In the spirit of self-determination, the Maya people created a Consultation Framework to proactively identify actions they perceive as potentially threatening their fundamental rights as indigenous peoples. In language very similar to Article 19 of the Declaration, the Framework requires that “Maya indigenous peoples be consulted in good faith through their own representatives or institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them or their territory.”⁹ The Maya people perceive the overarching nature of Article 19 to set forth broad, but distinct guidance for state consultation with indigenous peoples, in furtherance of their right to self-determination as a peoples within a state-centric international legal system. This guidance provides both procedural and substantive safeguards for indigenous peoples.

a. Procedural Safeguards

The Maya people understand that to “consult and cooperate in good faith” means that consultations shall be culturally appropriate and undertaken with the objective of reaching agreement on just terms.¹⁰ Consultations undertaken in good faith must actively engage indigenous peoples in impact assessments, determine the substantive rights and interests that may be affected, and work to find less harmful alternatives. Respect for indigenous peoples’ rights is paramount.

Article 19’s specification that indigenous peoples be consulted “through their own representative institutions” is an important affirmation of the right to self-determination, which necessitates the right of indigenous peoples to their own forms of self-government. At the outset, the Framework identifies the appropriate points of contact with whom the state or third parties must engage when actions may affect the well-being of the Maya people. This ensures that outside parties do not engage in consultations with individuals who do not have the authority to agree to projects or actions that may affect the Maya people.

As is true of many indigenous communities, Maya self-government is a collective responsibility, one that involves the input of all villagers. Procedurally, this means that Alcaldes or the TAA shall not be expected to make decisions in meetings, unless the outcomes of the deliberations first go through a village meeting, “*se komonil*”.¹¹ The framework proactively lays out this traditional method for community decision-making, transparently articulating the voting practices and procedures, so that state entities or business enterprises have a clear understanding of how community decisions are made and with whom to bring any concerns.

Of special importance is the Framework’s emphasis on the need for any consultation or negotiation process to incorporate sufficient time to accommodate Maya traditional decision-making processes. As community decision-making is often a foundational characteristic of

⁹ Maya People of Southern Belize, Consultation Framework, Preamble (2014).

¹⁰ S. James Anaya and Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 University of Toronto Law Journal 435 (2017).

¹¹ Consultation Framework, Maya People of Southern Belize, Maya Decision-Making Process, page 7.

indigenous communities, ensuring that traditional methods of community engagement are honored is paramount. It is imperative that states or third parties provide indigenous representatives with adequate notice of any meetings regarding consultation, negotiation, or any other material events, as this allows for indigenous representatives to communicate relevant information to the villagers, so that they may adequately prepare. Not only do many villagers live in far, remote communities, but Maya decision-making practices take time, as full community participation and input is sought before decisions are made. Further, it is imperative that indigenous peoples' own temporal rhythms be respected.

Mitigation of power imbalances is also important. The Framework states that effective and informed participation in the consultation process necessitates that the Maya people have an unqualified right to seek independent technical and legal assistance of their choice. This safeguard is essential for many reasons, but specific to free, prior and informed consent, it serves to ensure that the indigenous peoples are accurately informed and aware of their rights in the face of state or third-party negotiations and potential infringements.

b. Substantive Safeguards

Benefit sharing is an essential aspect of consultations when indigenous lands, territories, or resources are potentially utilized by outside entities. Both incidental as well as financial benefits should accrue to indigenous peoples because of the compensation due for adverse effects, as well as the significant social capital they contribute by opening their land to development.¹² The Framework dedicates an entire section to benefit sharing. Importantly, the Framework first grounds the need for equitable benefit sharing of lands, territories, and resources in the Maya peoples' rights to these lands, territories, and resources. The Framework states that where a proposed action involves any economic exploitation of Mayan lands, territories, or resources, the consultation process shall incorporate provisions for the participation of the Maya people in the benefits derived from such ventures.

The Framework further states that benefit-sharing plans should respect the Maya norm of equity and collective ownership within villages. This means that any benefit sharing plans should provide for collective or egalitarian distribution among those affected and shall not be accrued to village leaders. This term ensures that Maya customary land practices be considered and honored in any benefit-sharing agreements, and it further addresses state or third party attempts to manipulate individual villagers into accepting project terms that may unfairly deny the rights of the Maya people as a collective. Finally, the Framework states that any benefit-sharing provision shall include a transparent mechanism for determining the benefits due, the recipients, as well as a schedule for such disbursement.

Impact mitigation measures are also important to safeguard against or mitigate environmental and other impacts that could adversely affect the rights of indigenous peoples, and they are an essential component of any agreement. Provisions for impact prevention and mitigation should be developed in consultation with the impacted indigenous peoples. The MLA discusses impact mitigation measures below.

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

Again, while free, prior and informed consent is not itself an actionable right under the Declaration, the principle does guide implementation and protection of indigenous peoples' rights to their lands, territories, or resources. In pursuing free, prior and informed consent,

¹² S. James Anaya and Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 *University of Toronto Law Journal* 435 (2017).

impact mitigation is an important tool available during the consultation process, as it helps provide necessary information and can prevent undue harm.

The Framework calls for a detailed study and transparent analysis of the environmental, social, cultural, and economic impacts that a proposed action may have on affected Maya people, and it further requires that these studies be conducted by an independent and technically competent professional. The Framework specifies that the environmental, social, cultural, and economic impact assessments be integrated into a single detailed document, written in plain language in order to facilitate adequate understanding by the Maya people so that potential impacts be clearly identified and articulated to the potentially affected Maya people.

The Framework further requires that these impact assessments be presented in languages understood by the Maya people and that they be prepared with the effective participation of the Maya people. The Framework also requires that all costs related to the effective participation of the Maya people in the impact assessments be covered by the project proponent. While this term is not usually honored, it is an important reminder that any project proponents must ensure that consultation processes be accessible to the Maya people.

The Framework also states that when adverse impacts are identified, the consultation process must sufficiently address measures necessary to mitigate these impacts, as well as determine the fair compensation for any damages that may result, including how payments of such damages will be made. The assessments must further include a plan for the establishment of a management or monitoring team, which shall include Mayan representatives, or an independent proxy, appointed by the Maya people. These terms lay out how the Maya people expect to be engaged throughout impact assessments so that they may both understand potential effects on their communities, as well as help to prevent or mitigate these effects.

VI. State as duty bearer

The particular experience of the Maya people of Toledo, Belize offers insight into the implementation of rights guided by the principle of free, prior and informed consent. Due to incessant logging on Maya lands by the government of Belize, the Maya people brought their claim for customary land tenure to the domestic courts, where the Caribbean Court of Justice in 2015 ultimately affirmed that Maya customary land tenure is protected under the Belize constitution. Specifically, the judiciary upheld Maya land rights and ordered the government of Belize to, “in consultation with the Maya people or their representatives, develop legislative, administrative and/or other measures necessary to create an effective mechanism to identify and protect the property and other rights arising from Maya customary land tenure, in accordance with Maya customary laws and land tenure practices.”¹³ The CCJ explicitly included consultation within the order provisions, acknowledging its essential importance for ensuring that both the spirit and letter of the order be implemented.

As of this writing, the judiciary is the only governmental body in Belize that has acknowledged that meaningful consultation with the Maya people is essential for the ultimate realization of their rights. Whatever the state institution ultimately deemed specifically responsible for ensuring consultation and implementation of Maya rights, it is clear to the Maya people that governmental policies must be reformed state-wide. All institutions within the government must be on notice of their duty to consult the Maya people, as well as the domestically affirmed rights of the Maya communities. Until then, different ministries will continue to claim ignorance or conflicting information regarding land ownership, and

¹³ CCJ Order of April 22, 2015, paragraph 3.

incursions onto Maya lands and territories will continue with impunity. A clear directive from the executive affirming the unique rights of Maya people over their lands necessitating consultation would go a long way in sending a message to the citizens and government officials of Belize. It would further oil the wheels of change within the legislature so that measures to create an effective mechanism to identify and protect the property and other rights arising from Maya customary land tenure may begin to turn.

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

Although the Maya people have successfully affirmed their rights in the domestic courts of Belize, outside entities (in part due to the actions and policies of the government of Belize) continue to operate on Maya lands and territories without their consent. These entities include individuals, as well as corporations. While the CCJ Order specifically identifies the government as responsible for ensuring that Maya lands and territories be protected against third-party actions, these entities should also abide by domestic law, international law, and Maya customary law. The Framework expressly applies to non-state and private entities and instructs them in this regard. It is clear to the Maya people that until such incursions are met with real action from the government, the Maya people must assert their rights through the court system, which does not provide the on the ground response necessary to prevent ongoing harm.

VIII. Reparation/Remedies/Restitution

Although the Maya Framework does not expressly provide terms for the redress of cultural, intellectual, religious and spiritual property taken without the Maya peoples' free, prior and informed consent, the MLA believes that any provisions for redress should follow the overall guidance of the Framework, placing special importance on the need for the cultural norms and integrity of the Maya people to guide any consultation processes.

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

The Framework sets forth concrete terms for identifying and verifying that consultations are undertaken in the spirit of reaching free, prior and informed consent throughout the period of engagement.

As a threshold matter, the Framework clarifies that contact with an indigenous peoples' representative institution must continue beyond the initial provision of information, which is a prerequisite of consultation, but not indicative of consultation in and of itself. Oftentimes the state of Belize points to initial, informative meetings as evidence of consultation with the Maya people. Thus, multiple, truly engaged meetings between the Maya people and outside entities is essential to establish meaningful consultation.

The Framework asks that all initial correspondence to the Maya representatives requesting consultation be in writing and must be expressed in the language directed by the Maya representatives. This correspondence should include: a full description of the action or project proposed, including its scope, timelines and duration; reports of environmental, social and cultural impacts; clear analysis of the risks and benefits of the affected Maya villages; a description of proponents of the action or project; and identification of the contact person who will liaise with the Maya representatives. While some of these terms may not be available at the time of initial contact (in fact, if the state or third party are truly honoring

indigenous rights, initial contact would be prior to undertaking these studies so that they may engage the Maya people throughout the planning and investigative stages), the state or third party should provide the Maya representatives with as much information as possible regarding the proposed project or action.

The Framework also requires the establishment of a consultation schedule (in the case of Maya acceptance of a proposal). Considerations of timing mentioned above are important in the creation of this schedule so that Maya customary practices may be honored throughout the life of the project. It is important to note that while the Framework prefaces the development of a consultation schedule on Maya acceptance of a proposal, in the absence of consent, the state or third party should nonetheless work to develop a mutually acceptable consultation schedule if they continue to move forward with the project (as is so often the case).

Further, the Framework sets out terms for reimbursing the reasonable costs of Maya representatives when undertaking initial communication to determine if the Maya people will formally engage in consultation process. Generally, it is important for the state or third parties to cover reasonable costs that directly affect the ability of the indigenous representatives to participate in consultations. For instance, in the current, strained consultation process between the MLA/TAA and the Government of Belize Toledo Land Rights Commission (a body established to help implement the terms of the CCJ Order recognizing Maya customary land tenure) the Commission refuses to cover the costs of transportation for Alcaldes to attend consultation meetings. These Alcaldes must travel by bus over long distances, often leaving at 4am in order to reach consultation meetings by mid-morning. Transportation for indigenous peoples is often a barrier to meaningful consultation, as many indigenous peoples live in remote areas that offer limited options for travelling into more populated towns. If a state or third party covers the costs of transportation so that indigenous representatives may engage in consultation, this payment is a solid indication that meaningful consultation is taking place.

Ultimately, any single method for identifying acts of consultation is not in itself indicative of whether the consultation truly seeks free, prior and informed consent. However, an overall assessment of these consultative acts does help to reveal the veracity of the consultation and its true efforts to uphold the rights of the indigenous peoples implicated.

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

As stated above, the principle of free, prior, and informed consent (and the related state duty to consult) derives “from the overarching right of indigenous peoples to self-determination...”¹⁴ Any understanding of the principle of free, prior, and informed consent must thus be grounded in the right of self-determination, “without which indigenous peoples’ human rights, both collective and individual, cannot be fully enjoyed.”¹⁵ It is self-determination that guides the principle of free, prior, and informed consent. All other rights of indigenous peoples stem from the universally recognized human rights to self-determination and equality articulated in the formative human rights instrument.

Jurisprudence continues to develop around the interpretation of the rights arising from indigenous peoples’ distinctive cultural patterns, characteristics, and histories. This development is taking place in domestic, international, and indigenous realms, and it will continue to establish and inform the realization of indigenous peoples’ rights on the ground.

¹⁴ James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, U.N. Doc. A/HRC/12/34, page 14 (2009).

¹⁵ *Id.*

As Professor, and Expert Mechanism Member, Kristen Carpenter states in her article, *The Jurisgenerative Moment*,

This is ... a jurisgenerative moment in indigenous rights – a moment when human rights have the potential to become more capacious, embracing norms of equality and self-determination, and multiple means of implementation, to reflect the ways that individuals and peoples around the globe live, and want to live, today.¹⁶

Indigenous peoples are seizing the international norms that offer protection of their rights and are aligning them with their own conceptions of self-government. Professor Carla Fredericks emphasizes the importance of this move, stating, “indigenous peoples must develop and implement their own free, prior and informed consent protocol in order to assert their human rights.”¹⁷ As indigenous peoples continue to engage the legal system to assert their rights, the legal and cultural character of these rights will gain legitimacy, as well as influence, deepening acceptance in international law, and advancing implementation in domestic settings.

The Maya Consultation Framework is evidence of this emerging jurisprudence on consultation with indigenous peoples. The Framework requires that the entire consultation process be in accordance with Maya customary practices, respect Maya traditional methods of decision-making, and be guided by the principle of free, prior and informed consent. The Maya people have taken ownership of the international norms that protect their rights by grounding these norms within Maya conceptions of self-government and cultural identity. This harmonization of international norms and indigenous customary practice is an essential step toward actualizing the right to self-determination in the contemporary experience of indigenous peoples.

¹⁶ Kristen Carpenter and Angela Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 Cal. LR 173 at 234 (2014).

¹⁷ Carla Fredericks, *Operationalizing Free, Prior, and Informed Consent*, 80.2 Albany L.R. 429 (2016/2017).