

# Free, Prior and Informed Consent of Indigenous Peoples

“At the national level, the Declaration has inspired new legislation and mechanisms for dialogue with indigenous peoples. Despite these positive signs, the promise of the Declaration is far from being universally fulfilled. (...) Rights of indigenous peoples are frequently the first victims of development activities in indigenous lands, often pursued with no regard to the principle of free, prior and informed consent and other guarantees of the Declaration.”

*Ms. Navi Pillay, United Nations High Commissioner for Human Rights, August 2013. Foreword to the Manual for National Human Rights Institutions.*

## What is free, prior and informed consent?

The Declaration on the Rights of Indigenous Peoples requires States to 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 (article 19). States must have consent as the *objective* of consultation before any of the following actions are taken:

- The adoption of legislation or administrative policies that affect indigenous peoples (article 19)
- The undertaking of projects that affect indigenous peoples' rights to land, territory and resources, including mining and other utilization or exploitation of resources (article 32).

In certain circumstances, there is an obligation to *obtain* the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations. For example, the Declaration explicitly requires States to obtain consent of indigenous peoples in cases of:

- The relocation of indigenous peoples from their lands or territories (article 10)
- The storage or disposal of hazardous materials on indigenous peoples' lands or territories (article 29)

Furthermore, indigenous peoples who have unwillingly lost possession of their lands, when those lands have been “confiscated, taken, occupied or damaged without their free, prior and informed consent” are entitled to restitution or other appropriate redress (article 28).

## Normative foundations of the requirement for free, prior and informed consent

The principle of free, prior and informed consent is linked to treaty norms, including the right to self-determination affirmed in common Article 1 of the International Human Rights Covenants. When affirming that the requirement flows from other rights, including the right to develop and maintain cultures, under article 27 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the International Covenant on Economic Social and Cultural Rights (ICESCR), the treaty bodies have increasingly framed the requirement also in light of the right to self-determination.

The principle of non-discrimination is also relevant. In its 1997 General Recommendation No 23 on indigenous peoples, the Committee on the Elimination of Racial Discrimination (CERD), calls on States parties to ensure that indigenous peoples have equal rights to participate in public life and stresses that no decisions relating directly to indigenous peoples are to be taken without their informed consent. With specific reference to land and resource rights, the Committee calls for restitution in situations where decisions have already been taken without the prior and informed consent of the affected indigenous peoples. It has also highlighted the obligation of States to ensure that the right of indigenous peoples to free, prior and informed consent is respected in the planning and implementation of projects affecting the use of their lands and resources. More recently, the Committee on Economic, Social and Cultural Rights (CESCR) has further expanded on free, prior and informed consent in general comment No. 21. In its interpretation of cultural rights, the Committee outlines that the right to participate in cultural life includes the right of indigenous peoples to restitution or return of lands, territories and resources traditionally used and enjoyed by indigenous communities if taken without the prior and informed consent of the affected peoples. It also calls on States parties to “respect the principle of free, prior, and informed consent of indigenous peoples in all matters covered by their specific rights” and to “obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk”.

## What is the exact meaning of free, prior and informed consent?

- *Free* implies that there is no coercion, intimidation or manipulation.
- *Prior* implies that consent is to be sought sufficiently in advance of any authorization or commencement of activities and respect is shown to time requirements of indigenous consultation/consensus processes.
- *Informed* implies that information is provided that covers a range of aspects, including the nature, size, pace, reversibility and scope of any proposed project or activity; the purpose of the project as well as its duration; locality and areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail. This process may include the option of withholding consent. Consultation and participation are crucial components of a *consent* process.

## Who should be consulted?

The issue as to from whom the State can seek consent is critical. In this regard, several communities around the world are working on establishing their own protocols on how outsiders should communicate with them to obtain their free, prior and informed consent. The consent of indigenous peoples should be determined in accordance with their customary laws and practices. This does not necessarily mean that every single member must agree, but rather that the consent process will be undertaken through procedures and institutions determined by indigenous peoples themselves. Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities.

## Verifying free, prior and informed consent

In addition, mechanisms and procedures should be established to verify that free, prior and informed consent has been sought. In order for these mechanisms to function properly, indigenous peoples must be included in their development. States are to provide effective mechanisms for redress when the free, prior and informed consent of indigenous peoples has not been sought.

## The work of OHCHR

*OHCHR gives expert guidance on the practical application of the requirement of free, prior and informed consent of indigenous peoples to various key stakeholders ranging from Parliamentarians to national human rights institutions. For example:*

- OHCHR has supported the development of specific laws on the rights of indigenous peoples, which clarified the content of the principle of free, prior and informed consent of indigenous peoples in the Republic of Congo and Indonesia. It has also produced training modules and provided technical assistance and expert advice to ensure that national regulations' initiatives comply with existing international standards on free, prior and informed consent in countries such as Bolivia, Mexico, Peru and Ecuador.
- OHCHR has worked closely with the indigenous experts and United Nations agencies involved in the UN Indigenous Peoples' Partnership (UNIPP) to ensure that all UNIPP country programmes are not merely about indigenous peoples, but also designed and implemented in true partnership with indigenous peoples and States.
- In September 2013, OHCHR launched a Manual for National Human Rights Institutions (NHRIs) together with the Asia-Pacific Forum of National Human Rights Institutions (APF) on the UN Declaration on the Rights of Indigenous Peoples, which benefited from inputs from indigenous peoples and contained practical guidance on how NHRIs can help operationalize the standards concerning free, prior and informed consent of indigenous peoples.
- OHCHR also supports the mandates of the Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples, which have been advocating for the respect of the principle of free, prior and informed consent in their communications, reports, expert advice and thematic studies.

Through its Indigenous Peoples and Minorities Section and field presences, OHCHR continued to build indigenous peoples' capacities to strengthen their own institutions with a view to making respect for the principle of free, prior and informed consent a reality for indigenous peoples.

## Normative standards and further reading

- [UN Declaration on the Rights of Indigenous Peoples \(2007\)](#)
- [Indigenous Peoples and the UN Human Rights System, OHCHR fact sheet No 9 Rev 2 \(2013\)](#)
- [UNDG Guidelines on Indigenous Issues \(2008\)](#)
- [UN Guiding Principles on Business and Human Rights \(2011\)](#)
- [UN-REDD Programme Guidelines on Free, Prior and Informed Consent \(2013\)](#)
- [Reports of the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Rights of Indigenous Peoples to the Human Rights Council](#)
- [Reports of the Working Group on the issue of human rights and transnational corporations and other business enterprises \(2013\)](#)