



# RIGHT TO CONSULTATION AND FREE, PRIOR AND INFORMED CONSENT

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## Session 2:

*International instruments, State obligations and the rights of indigenous peoples with respect to consultation.*

### General obligations of the authorities

In the context of Mexico , after the constitutional reform in 2011, it establishes in its first paragraph of Article 1 of the Constitution the obligations of the State in the area of human rights.

On the one hand, it establishes the obligations to promote, respect, protect and guarantee human rights; on the other hand, the obligations to prevent, investigate, punish and repair human rights violations under the terms established by law.

This separation responds to the fact that there are generic obligations and specific obligations to ensure the protection of human rights, without this meaning that there is a hierarchy between them.

### Generic Obligations

#### Obligation to promote

The obligation to promote is oriented towards social awareness in the field of human rights. The State has the obligation to adopt measures aimed at achieving a culture based on human rights through changes in public awareness. The aim is to ensure that the positive morale of society places rights as a known and valued good.

Compliance with this obligation may occur gradually and progressively, although it is immediately enforceable through the adoption of specific measures when there are situations that require special promotion of rights. An example of the fulfillment of this obligation is the awareness and dissemination campaigns on human rights. This would be the case, for example, of an awareness-raising campaign on the rights of people with the human immunodeficiency virus (hiv), which responds to the fulfillment of the obligation to promote.

The promotion obligation can be broken down into three main areas:

- a) Provide people with all the necessary information to ensure that they are able to enjoy their rights;
- b) Adopt measures to sensitize people to human rights so that they respect and promote them, an obligation of the States, and;
- c) The unilateral recognition by individuals of respect for rights, and of the authority that applies the norms beyond what the constitutional and legislative norms require of them.<sup>3</sup> Each of these is discussed in more detail below.

Promoting human rights means that the State has the obligation to ensure that people know both their rights and the mechanisms to defend them, but also the duty to ensure that they know how best to exercise those rights.

### **Obligation to respect**

It requires that the authorities refrain from carrying out actions that violate rights and, in parallel, that they do not prevent or hinder the circumstances that make the enjoyment of human rights possible for all persons. It is an obligation aimed at maintaining the enjoyment of the right, and its compliance is immediately enforceable, regardless of the nature of the right.

The Inter-American Court of Human Rights (IACHR) stated in the judgment of the Velásquez Rodríguez Case that the protection of human rights is based on the affirmation of the existence of "individual spheres that the State cannot violate or into which it can only penetrate to a limited extent. Thus, the protection of human rights necessarily includes the notion of restricting the exercise of state power.

### **Obligation to protect**

The obligation to protect imposes on the State the duty to ensure that people do not suffer rights violations committed by the authorities or by private individuals. The State must ensure that the obligations to respect are fulfilled, but it must also prevent violations of rights, wherever they may come from. For example, it must take the necessary actions to prevent a company from polluting the environment or a criminal organization from terrorizing a population. Protection, then, is not simply the promotion of respect, but effective action.

### **Obligations to guarantee**

The obligation to guarantee refers to the fact that the State must adopt measures that create the necessary conditions for the effective enjoyment of rights. It refers not only to measures that make it possible to maintain a certain degree of realization of rights, but also to those aimed at improving such realization or enjoyment. It is a matter of creating the institutional and material conditions that make the realization of human rights possible.

In other words, compliance with this generic obligation is aimed at providing, facilitating or improving the means for people to be able to exercise their rights on their own behalf. For example, a specific guarantee institution may be created for the right to health or special guarantees for persons with disabilities.

In the obligation to guarantee would be institutions such as the Ministries of Health or Education, the Federal Electoral Institute, the Federal Institute of Access to Information and Protection of Personal Data; that is, all institutions that allow the realization of some right.



## **Specific obligations Duty to prevent**

The duty of prevention encompasses three levels:

- a) The first is an obligation of prevention in general, which implies that the authorities must ensure conditions that inhibit conduct that violates human rights.
- b) The second level translates into a reinforced obligation of prevention when there is a context of discrimination or structural risk towards a group of people in a situation of vulnerability.
- c) The third level is verified when a specific person faces a special risk.

In this case, there is also an obligation of enhanced prevention; for example, if a social leader or journalist has been the object of threats due to the work he or she performs. In this situation, the State must adopt special preventive measures to protect the right to life or physical integrity of that individual. Thus, the duty to prevent is located within the generic obligation to protect.

## **Duty to investigate**

The State is obliged to investigate *ex officio* once it becomes aware of any situation in which human rights have been violated, whether by State agents or by private individuals acting with the acquiescence or tolerance of the State.

This is an obligation of means or conduct and not of result, so the State must conduct a "serious, impartial and effective investigation by all available legal means, aimed at determining the truth," and not one that is doomed to be fruitless.

## **Duties to punish and repair**

Specific obligations impose on the State the responsibility to compensate for the damage suffered as a result of the violation of rights. Depending on the case, this may involve putting an end to the situation causing the violations -for example, by shutting down a company that pollutes the water supplying a community-, compensating the affected persons -for example, when violations of the right to health occur at the State's expense- or punishing the persons who have caused the violation. These are, then, duties linked to the generic obligation of guarantee.

## **Examples:**

The promotion of the right of access to water as a state obligation. According to general comment number 15 (2003) issued by the Committee on Economic, Social and Cultural Rights, access to safe drinking water is not enough. The obligation to promote imposes on the State party the adoption of measures to ensure the dissemination of adequate

information on the hygienic use of water, the protection of water sources and methods to reduce water waste.

### **Obligation to respect and guarantee rights without discrimination**

Case of Rosendo Cantú et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2010.

### **Obligation to adapt internal regulations.**

Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001.

Case of Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005.

Case of the Garifuna Community Triunfo de la Cruz and its Members v. Honduras. Merits, Reparations and Costs. Judgment of October 08, 2015.

Case of the Kuna de Madungandí and Emberá de Bayano Indigenous Peoples and their Members v. Panama. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 14, 2014.

Case of the Garifuna Community of Punta Piedra and its Members v. Honduras. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 08, 2015.

### **Special protection measures for indigenous children and the elderly.**

IACHR Court. Case of the Río Negro Massacres v. Guatemala. Preliminary Objection, Merits, Reparations and Costs. Judgment of September 4, 2012 Series C No. 250.

I/A Court H.R., Case of Chitay Nech et al. v. Guatemala. Case of Chitay Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 25, 2010. Series C No. 212.

### **Obligations of the State with respect to the consultation**

- a) Consult indigenous peoples before adopting or implementing laws or administrative measures.
- b) Consult with indigenous peoples prior to the approval of any project affecting their lands or territories and other resources, particularly in relation to the development, utilization or exploitation of mineral, water or other resources.

c) Consult indigenous peoples before authorizing or undertaking any program of prospecting or exploitation of natural resources found on the lands they inhabit.

d) Consult indigenous peoples before using indigenous lands or territories for military activities.

### **Rights of indigenous peoples with regard to consultation**

1. The right to be consulted through their representative institutions in order to obtain their free, prior and informed consent.
2. The right to participate in the formulation, implementation and evaluation of national and regional development plans and programs.
3. Right to reparation, through restitution.
4. Right to compensation for relocation or relocation for any loss and damage.
5. The right to full recognition and respect for the ownership, dominion, possession, control, development and protection of their tangible and intangible cultural heritage and intellectual property.
6. The right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

### **Cases or resolutions of the Inter-American Court of Human Rights where state obligations have been established.**

Within the analysis of the right to property of indigenous peoples, the Inter-American Commission has made an evolutionary interpretation giving special importance to the right of consultation that indigenous and tribal peoples have through pronouncements in specific cases, as well as in country reports and thematic reports. Due to the characteristics of this paper, we will focus only on the cases.

The IACHR, in pioneering decisions on the issue of prior consultation, ruled in the cases of the *Mayan Indigenous Communities of the Toledo District v. Belize* and in the case of the *Sisters Mary and Carrie Dann v. United States*.

#### **Case of the Mary and Carrie Dann Sisters v. United States.**

In relation to this case, the Commission analyzed the gold mining activity carried out with the consent of the State in the ancestral territory of the Western Shoshone people, without consultation with said people. In the case, the IACHR considered that with respect to such activity, the members should, "at a minimum, [be] fully and completely informed of the nature and consequences of the process and be given an effective opportunity to participate individually or collectively.

## **Case of the Mayan Indigenous Communities of the Toledo District v. Belize**

In the case of the Maya Indigenous Communities of the Toledo District v. Belize, the Inter American Commission referred, among others, to a logging concession granted by the State. The Commission concluded that:

[...] the State, by granting concessions [...] to third parties to use the goods and resources that could be comprised by the lands to be delimited, demarcated and titled or clarified and protected [...], without effective consultation and without the informed consent of the Mayan people, and which gave rise to

5

a harm to the environment, it also violates the right to property [...] to the detriment of the Mayan people. [In this sense, it emphasized that] one of the central elements for the protection of indigenous property rights is the requirement that States establish effective and previously informed consultations with indigenous communities in relation to acts and decisions that may affect their traditional territories [...].

In this regard, it is important to note that, in that case, the IACHR recognized that indigenous peoples have, from the standpoint of international human rights law, collective property rights over their traditional lands and resources, regardless of whether they are recognized at the national level. Therefore, it concluded that the State should consult with the Mayan communities and obtain their informed consent before making any decision affecting their lands.

## **I/A Court H.R., Case of the Saramaka People v. Suriname. Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172.**

The Inter-American Court ruled for the first time on the right to consultation of indigenous and tribal peoples, framing it within the right to property enshrined in the American Convention and making an evolutionary interpretation of it.

In that case, the Court considered that Suriname was obliged to carry out the consultation, even if it had not ratified ILO Convention 169, since it considered that the obligation arose from both the American Convention on Human Rights and other international instruments ratified by the State, such as the International Covenant on Civil and Political Rights.

The Court emphasized that States must guarantee the effective participation of

indigenous peoples, in accordance with their customs and traditions, and free and informed consent in relation to "any development, investment, exploration or extraction plan [...] to be carried out within [their] territory".

Thus, it considered that if the State wanted to restrict "legitimately, communal property rights [it should] consult with the affected communities regarding development projects to be carried out in traditionally occupied territories, share reasonable benefits with them, and carry out prior environmental and social impact assessments".

It is necessary to read the judgment on the merits of the case, together with its interpretation, in which the Court clarified several points, such as the fact that effective participation must be promoted by the State in order to reach an agreement:

[...] which in turn requires the State to accept and provide information in this regard in an understandable and publicly accessible format. Furthermore, [...] in the case of large-scale development or investment plans that could affect the integrity of the (indigenous or tribal) people's lands and natural resources, the State has the obligation not only to consult with them, but also to obtain their free, informed and prior consent, in accordance with their customs and traditions.

Traditions.

Therefore, the Court has stated that in guaranteeing the effective participation of the members of the Saramaka people in development or investment plans within their territory, the State has the duty to actively consult with said community, according to their customs and traditions [...]. This duty requires the State to accept and provide information, and implies constant communication between the parties. Consultations must be carried out in good faith, through culturally appropriate procedures, and must be aimed at reaching an agreement. The Saramaka people should also be consulted, in accordance with their own traditions, at the earliest stages of the development or investment plan and not only when the need arises to obtain community approval, if this is the case. Early notice provides time for internal discussion within the communities and to provide an adequate response to the State.

The State must also ensure that the members of the Saramaka people are aware of the potential risks, including environmental and health risks, so that they accept the proposed development or investment plan knowingly and voluntarily. Finally, the consultation should take into account the traditional decision-making methods of the Saramaka people.

Furthermore, the Court considers that, when it comes to large-scale development or investment plans that would have a major impact within Saramaka territory, the State has an obligation not only to consult the Saramakas, but also to obtain their free, informed and prior consent, in accordance with their customs and traditions. The Court considers that the difference between "consultation" and "consent" in this context requires further analysis.



More significantly, the State also recognized that the "level of consultation required is obviously a function of the nature and content of the rights of the Tribe in question. The Court agrees with the State and further considers that, in addition to the consultation that is required whenever there is a development or investment plan within the traditional Saramaka territory, the safeguard of effective participation that is required when it comes to large development or investment plans that may have a profound impact on the property rights of the members of the Saramaka people to a large part of their territory, should be understood as additionally requiring the obligation to obtain the free, prior and informed consent of the Saramaka people, according to their customs and traditions.

The second guarantee that the State must comply with when considering development plans within Saramaka territory is that of reasonably sharing the benefits of the project with the Saramaka people. The concept of benefit sharing, which can be found in several international instruments regarding the rights of indigenous and tribal peoples, is arguably inherent in the right to compensation recognized in Article 21.2 of the Convention, which states that:

No person may be deprived of his property, except upon payment of just compensation, for reasons of public utility or social interest and in the cases and according to the forms established by law.

The Court considers that the right to receive payment of compensation under Art. 21.2 of the Convention extends not only to the total deprivation of title to property through expropriation by the State, for example, but also includes the deprivation of the regular use and enjoyment of such property. In the present case, the right to obtain payment of "just compensation" under Article 21(2) of the Convention translates into the right of the members of the Saramaka people to share, in a reasonable manner, in the benefits derived from the restriction or deprivation of the right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival.

In the present case, the State did not ensure, in advance, the effective participation of the Saramaka people, through their traditional decision-making methods, with respect to the logging concessions issued within Saramaka territory, nor did it share the benefits with the members of the Saramaka people. According to District Commissioner Strijk, who testified before this Tribunal, it was "not necessary" to consult or obtain the consent of the Saramaka people in relation to the logging concessions in question given that no Saramaka traditional sites in the area had been reported. In the words of District Commissioner Strijk, "if there are sacred sites, burial grounds and agricultural plots, then we proceed with consultation; if there are no sacred sites, burial grounds or agricultural plots, then consultation does not take place." This procedure clearly does not guarantee the effective participation of the Saramaka people, through their own customs and traditions, in the process of evaluating the issuance of logging concessions within their territory. As mentioned above, the question is not whether the State must consult with the Saramaka, but, rather, whether the State must additionally obtain their consent [...].

## **I/A Court H.R., Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Merits and Reparations. Judgment of June 27, 2012. Series C No. 245.**

In June 2012, the Inter-American Court issued a judgment in the aforementioned case, in which two fundamental issues can be highlighted in relation to the right to consultation: on the one hand, the moment from which the State is considered obliged to consult, and the scope of the consent required in the consultation process.

Regarding the first point, the Court concluded that "the obligation of States to carry out special and differentiated consultation processes when certain interests of indigenous communities and peoples are to be affected is clearly recognized today" and that the obligation to consult is a "general principle of international law". To reach this conclusion, it referred to the American Convention "in conjunction with other rights recognized by the State in its domestic laws or in other relevant international norms", to its own jurisprudence in the Saramaka case and made an account of the recognition that some national legislations of the Americas make with respect to the right to consultation.

On the other hand, the Sarayaku ruling is relevant in that the Court is more explicit in the requirements to guarantee the right to consultation of indigenous or tribal peoples.<sup>50</sup> Some of these requirements are:

1. The obligation to consult is the responsibility of the State, so the planning and implementation of the consultation process cannot be delegated to a private company or third parties, "much less to the same company interested in the exploitation of resources in the territory of the community subject to the consultation".
2. Involvement in all phases of project planning and development - and not only when the need to obtain community approval arises - that may affect the territory on which an indigenous or tribal community is settled or other rights essential to their survival as a people.
3. There must be no coercion against the people by the State or by agents or third parties acting with its authorization or acquiescence; e.g., there must be no attempts to disintegrate the social cohesion of the affected communities.
4. Consultation is not a mere formal procedure, but must be conceived as "a true instrument of participation", "in good faith", where there must be "mutual trust" and "with a view to reaching a consensus among them".
5. The processes of dialogue and the search for agreements should be carried out from the early stages of the development or planning of the proposed measure.
6. The State has the duty to consult, actively and in an informed manner, with the communities, according to their customs, traditions and traditional decision-making methods.

7. The State must supervise the environmental impact studies, in light of its duty to guarantee the effective participation of the indigenous people in the concession granting process.
8. Villages should be made aware of the potential benefits and risks, so that they can evaluate whether to accept the proposed development or investment plan.
9. In the case of consultation prior to the adoption of a legislative measure, indigenous peoples must be consulted beforehand at all stages of the legislative process, and such consultations must not be restricted to proposals.
10. It is the duty of the State - and not of the indigenous peoples - to effectively demonstrate, in the specific case, that all the dimensions of the right to prior consultation were effectively

It is then necessary to determine the form and sense in which the State had the obligation to guarantee the right to consultation of the Sarayaku People and whether the acts of the concessionary company, which the State indicated as forms of "socialization" or search for "understanding", satisfy the minimum criteria and essential requirements of a valid consultation process with indigenous communities and peoples in relation to their rights to communal property and cultural identity. To this end, it is necessary to analyze the facts by recapitulating some of the essential elements of the right to consultation, taking into account the inter-American norms and jurisprudence, the practice of the States and the evolution of International Law. The analysis will be made in the following order: a) the prior nature of the consultation; b) good faith and the purpose of reaching an agreement; c) adequate and accessible consultation; d) the environmental impact study, and e) informed consultation.

It is necessary to clarify that it is the duty of the State -and not of the indigenous peoples- to effectively demonstrate, in the specific case, that all dimensions of the right to prior consultation were effectively guaranteed.

Members of Sarayaku stated that there was a military presence in Sarayaku territory during the CGC incursions and that this presence was aimed at guaranteeing the company's work in the face of their opposition. During the hearing, the State questioned that the Army had made incursions with the objective of militarizing Sarayaku territory.

It is uncontroversial that in the area of Block 23, Jungle Brigade No. 17 operated and that, in particular, four military bases were installed around Sarayaku, namely in Jatún Molino, Shaimi, Pacayaku and Pozo Landa Yaku. Witness Ena Santi, referring to the "peace and life camps," stated during the public hearing that the reason these camps were created was because they had heard that "military personnel from Montalvo were coming up [... and they were] very afraid that they would harm [their] husbands, that they would be killed, and that is why we were there." Witness Marlon Santi, who was in the "peace and life camps," testified during the public hearing that "the oil company had two types of security: one called private security, which was provided by a private security company, Jaraseg, and the other was public security, which was provided by the combined Ecuadorian Army and the National Police." These testimonies are supported by images taken by members of Sarayaku and included in the file, as well as by press releases and a video produced by Sarayaku in 2003.

Thus, it is possible to consider that the State supported CGC's oil exploration activity by providing security with members of its armed forces at certain times, which did not favor a climate of trust and mutual respect to reach consensus between the parties.

It is possible to consider, then, that the lack of serious and responsible consultation by the State, at a time of high tension in inter-community relations and with state authorities, favored by omission a climate of conflict, division and confrontation between the indigenous communities in the area, particularly with the Sarayaku people. Although there are numerous meetings between different local and state authorities, public and private companies, the police, the army and other communities, it is also evident that there was a lack of connection between these efforts and a clear will to seek consensus, which led to situations of conflict.

In conclusion, the Court has found that there was no adequate and effective process to guarantee the Sarayaku People's right to consultation before undertaking or authorizing the program of prospecting or exploitation of resources that would exist in their territory. As analyzed by the Court, the acts of the oil company do not comply with the minimum elements of prior consultation. In short, the Sarayaku People were not consulted by the State before oil exploration activities were carried out, explosives were planted or sites of special cultural value were affected. All this was recognized by the State and, in any case, has been confirmed by the Court with the evidence provided.

**I/A Court H.R., Case of the Garífuna Community of Punta Piedra and its members v. Honduras. Case of the Garífuna Community of Punta Piedra and its members v. Honduras. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 304.**

In the case of the Community of Triunfo de la Cruz v. Honduras, the Inter-American Commission alleged that the State failed to protect its ancestral territory from occupation and dispossession by third parties - both private entities and authorities - which has also generated violence and lack of security in the community. It added that the community does not have a suitable and culturally appropriate title to its ancestral territory and, in addition, access to certain parts of it has been restricted due to the creation of protected areas. On the other hand, the case also alleged the lack of prior, free and informed consultation with the community in decisions that have affected their territory, including, among others, tourism projects and megaprojects.

In this regard, the Inter-American Court ruled that the State must demarcate the lands over which collective ownership had been granted within two years.<sup>58</sup> It also stated that if in order to comply with the reparation measure the State must expropriate or relocate third parties, it must pay the corresponding compensation to them.<sup>59</sup> However, the Inter-American Court expressed that in the event that, for duly founded reasons, it is not possible to title a specific portion of the



Garífuna territory, the State must give a collective property title to the community on alternative lands of equal extension and quality to those granted, but the community must always be consulted in order to carry out this reparation.

## **CNDH recommendations on indigenous consultation actions in Mexico**

In 2010, several mining companies carried out operations in the protected natural area and sacred territory called Wirikuta, in San Luis Potosi; these mining projects caused irreparable damage to the community, since, for the exploitation of resources, highly polluting materials were used, violating the right to property, water, health, among others.

Under these circumstances, the Wixárika people took the necessary legal action for the violation of their rights to property, culture and consultation, and obtained the suspension of the mining concessions' exploitation activities.

### **Obligations of the State:**

- The responsible authorities violated the human rights to consultation and participation, to the use and enjoyment of indigenous territories, to cultural identity, to a healthy environment, drinking water, sanitation and health protection for the Wixárika people.
- The Ministry of Economy, SEMARNAT and CONAGUA violated the prior nature of the consultation by omitting to consult on the granting of mining concessions. In this way, it did not carry out a free and informed consultation process, nor did it involve the Wixárika people in the procedures that are or were followed to grant mining concessions or authorizations in their adjacent areas.

# Right to free, prior and **informed** **consultation** and **consent**

