
SESSION 2 INTERNATIONAL INSTRUMENTS, STATE OBLIGATIONS, AND RIGHTS OF INDIGENOUS WITH RESPECT TO CONSULTATION.

This material was made possible through support provided by the Office of Inclusive Development Hub, Bureau for Inclusive Growth, Partnerships, and Innovation, U.S. Agency for International Development, under the terms of Contract No.7200AA20CA00013. The opinions expressed herein are those of the authors and do not necessarily reflect the views of the U.S. Agency for International Development.



Obligations of the State Authorities

Interpretation

Art. 1 CPEUM

All authorities, within the scope of their competencies, have the obligation to:

- a) Promote,
- b) Respect, human rights
- c) Protect
- and
- d) Guarantee

...in accordance with the principles of:

- Universality,
- Interdependence,
- Indivisibility and
- Progressivity.

Consequently, the State shall:

1. Prevent,
2. Research,
3. Sanction and
4. Repair

...the violations of human rights, in the terms that established by law.

Obligations to promote: it has the obligation to adopt measures aimed at achieving a culture based on human rights through changes in public awareness, i.e. to carry out campaigns to raise awareness and disseminate information on human rights.

Obligations to respect: requires that the authorities refrain from actions that violate rights and, in parallel, that they do not impede or hinder the circumstances that make possible the enjoyment of human rights for all persons.

Obligations to protect: imposes on the state the duty to ensure that people do not suffer violations of rights committed by the authorities or by a private party.

Obligations to guarantee: refers to the fact that the State must adopt measures that create the necessary conditions for the effective enjoyment of human rights.

Generic obligations of States

a) **Obligation to respect and guarantee rights without discrimination**

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

b) **Obligation to adapt internal regulations.**

1. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgment of August 31, 2001.
2. Case of Yakyé Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of June 17, 2005.
3. Case of the Garífuna Community Triunfo de la Cruz and its Members v. Honduras. Merits, Reparations and Costs. Judgment of October 08, 2015.

4. 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.
5. Case of the Garífuna Community of Punta Piedra and its Members v. Honduras. Preliminary Objections, Merits, Reparations and Costs. Judgment of October 08, 2015.

c) **Special protection measures for indigenous children and the elderly.**

1. 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.
2. 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.

Generic obligations of States

Obligations of States

1. Consult indigenous peoples before adopting or implementing laws or administrative measures.
2. 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.
3. Consult indigenous peoples before authorizing or undertaking any program of prospecting or exploitation of natural resources found on the lands they inhabit.
4. Consult indigenous peoples before using indigenous lands or territories for military activities.

Rights of indigenous peoples

- a) The right to be consulted through their representative institutions in order to obtain their free, prior and informed consent.
- b) The right to participate in the formulation, implementation and evaluation of national and regional development plans and programs.
- c) Right to reparation, through restitution.
- d) Right to compensation for relocation or relocation for any loss and damage.
- e) 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.
- f) The right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

Examples or cases on the obligations of the state and the rights of indigenous peoples with regard to consultation

Mayan Indigenous Communities of the Toledo District v. Belize,

Case description:

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 resulted in damage against the environment, also violates the right to property [...] to the detriment of the Mayan people.

Obligations of the State:

- Carry out effective and previously informed consultations with the indigenous communities in relation to the acts and decisions that may affect their traditional territories.
- The State had to consult with the Mayan communities and obtain their consent before taking any decision affecting their land.
- Guarantee the effective participation of indigenous peoples, according to its customs y traditions, y previous free and informed consent in relation to "any development, investment, exploration or extraction plan.
- Violated the right to property, the right to the environment and the right to healthy environment, the integrity of their lands, among others.

Examples or cases on the obligations of the state and the rights of indigenous peoples with regard to consultation

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.,

Case description:

The State of Suriname issued gold mining concessions within the Saramaka territory, without conducting or supervising prior environmental and social impact assessments and without consulting the Saramaka people in accordance with their traditions and without guaranteeing the reasonable participation of its members to the benefits that could be obtained; therefore the state violates the right to property and consultation.

Obligations of the State:

- Consult at people indigenous people of Saramaka on the implementation of the development or investment plans, as well as the such as obtaining free, prior and informed consent.
- It did not guarantee the effective participation of the Saramaka people, through their traditional decision making methods, with respect to logging concessions issued within Saramaka territory

Therefore

- Violated the fundamental rights of the people of Saramaka
- By putting them at risk of losing their traditional lands and territories, suffering eviction, migration or possible resettlement, depletion of natural resources for physical and cultural subsistence, environmental destruction and contamination, social and community disorganization and negative health and nutritional impacts, abuse and violence, among others.

Examples or cases on the obligations of the state and the rights of indigenous peoples with regard to consultation

Court IACHR. Case Pueblo Indigeno People Kichwa Indigenous People of Sarayaku Vs. Ecuador. Background y Reparations. Judgment of June 27, 2012. Series C No. 245.

Case description:

This case refers to the granting by the State of a permit to a private oil company to carry out oil exploration and exploitation activities in the territory of the Kichwa Indigenous People of Sarayaku in the 1990s, without having previously consulted the people or obtained their consent.

In addition, they introduced high explosives in several points of their territory creating an alleged situation of risk to the population since for a period of time it would have prevented them from seeking means of subsistence and free movement.

Obligations of the State:

- The obligation to guarantee the right to consultation in relation to indigenous communal property and identity rights of the Sarayaku people.
- It did not implement measures to ensure that Sarayaku participated through its own institutions and mechanisms, and in accordance with their values, uses, customs and forms of organization, in decision-making on issues and policies that affected or could affect their territory, life and cultural and social identity, affecting their rights to communal property and cultural identity.

Therefore

- Violated the communal property rights and identity of the Sarayaku People.
- By endangering life, personal integrity, personal liberty and access to justice.

Examples or cases on the obligations of the state and the rights of indigenous peoples with regard to consultation

Court IACHR. Case Community Garifuna Community of Punta Piedra its members Vs. Honduras. Exceptions Preliminary, Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 304.

Case description:

The community's land is located within two properties, which together have an area of approximately 643,000 hectares, currently identified with the cadastral registration numbers 175 and 5557 of the Rivadavia Department of the Province of Salta in reference to both properties, "lots 14 and 55". These properties were formally considered, prior to 2014, as "fiscal" lands, owned by the State, called "fiscal lots 14 and 55". In 2012 they were "assigned" for "subsequent adjudication" to indigenous communities and non-indigenous settlers living in the area, and in 2014 they were "transferred", in undivided form, to the same population. In addition to the lack of titling, the State violated the right to property by failing to "undertake effective actions to control the deforestation of indigenous territory", as well as carrying out "public works" and granting "concessions for hydrocarbon exploration" without complying with the requirements of prior "social and environmental impact" studies and "prior, free and informed consultation".

Argentina stated that the National Institute of Indigenous Affairs had "considered that the construction of the International Bridge over the Pilcomayo River La Paz Mission (Argentina) - Pozo Hondo (Paraguay), as well as other roads and various buildings, significantly modifies the way of life of the indigenous communities and that it would have been appropriate to hold consultations, as well as a report on the environmental impact of these works".

The State argues that it is a matter of improvement or maintenance of existing works and not the execution of new works or projects that could imply a consultation.

Obligations of the State:

- Seek adequate mechanisms for free, prior and informed consultation with the affected indigenous communities.

Therefore

- Violated the right to property and the right to participation, in connection with with the obligations to respect and guaranteeing rights.

Examples or cases on the obligations of the state and the rights of indigenous peoples with regard to consultation

Court IACHR. Case Community Garifuna Community of Punta Piedra its members Vs. Honduras. Exceptions Preliminary, Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 304.

Case description:

In 2014 Corporación Minera Caxina S.A. obtained a concession for non-metallic mining exploration for a period of 10 years, over a territorial extension of 800 ha, covering part of the eastern margin of the two property titles granted to the Punta Piedra Community. This concession expressly authorized the company to use the subsoil and carry out mining, geological, geophysical and other work in the concession area.

In 1993, the State granted the Punta Piedra Community a property title over an area of 800 hectares in relation to a territory for which it had had an ejido title since 1920. Subsequently, this Community requested the extension of its territory for an area of 3,000 ha. However, an additional 1,513 ha were demarcated and titled, expressly excluding 46 ha of those who had title in the area.

In the 1999 extension title, it was foreseen that "the areas occupied and exploited by persons outside the Community would be excluded from the adjudication, the State reserving the right to dispose of them in order to adjudicate them in favor of the occupants who meet the requirements of the law.

Obligations of the State:

- To carry out an adequate and participatory process that guarantees their right to consultation.
- Conduct a prior environmental and social impact study.
- Reasonable sharing of benefits arising of the exploitation of natural resources.

Therefore

- It is responsible for the violation of the communal property rights and cultural identity of the Punta Piedra Community and its members.

Examples or cases on the obligations of the state and the rights of indigenous peoples with regard to consultation

CNDH recommendations on indigenous consultation actions in Mexico

Case description:

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 rights of consultation and participation, to the use and enjoyment of the indigenous territories, cultural identity, a healthy environment, potable water, sanitation and health protection for the Wixárika people.
- The Ministry of the Economy, SEMARNAT and CONAGUA violated the prior nature of the consultation, by omitting the Similarly, it did not carry out a free and informed consultation process, nor did it involve the Wixárika people in the procedures followed or to be followed to grant mining concessions or authorizations and in their adjacent areas.

International Legal Instruments on the Right to Consultation

Convention No. 169, concerning Indigenous and Tribal Peoples of the International Labor

State obligations

1. To develop coordinated and systematic action to protect the environment, rights of indigenous peoples and guarantee respect for their integrity.
2. Not to use any force or coercion that violates their human rights.
3. Consult the peoples concerned, through appropriate procedures.
4. Establish the means to participate freely and to the same extent as other sectors of the population.
5. Establish or maintain adequate procedures for consultation.
6. Consultation must be carried out in good faith and in an appropriate manner to achieve the consent of the people.
7. Ensure that Indigenous Peoples receive equitable compensation for any damages they may suffer as a result of their activities.
8. To take measures to protect and preserve the environment in the territories they inhabit.
9. Adopt measures in accordance with the traditions and cultures of the peoples concerned, in order to inform them of their rights and obligations.

Rights of indigenous peoples

- a) To fully enjoy human rights and fundamental freedoms.
- b) The right to decide their own priorities regarding the development process.
- c) Participate in the formulation, implementation and evaluation of national and regional development plans and programs.
- d) Participate in the utilization, administration and conservation of their natural resources in their lands and territories.
- e) The right to non-displacement from the lands they occupy; otherwise, their removal and relocation shall be carried out with their freely given and fully informed consent.
- f) Right to compensation for relocation or relocation for any loss and damage.

United Nations Declaration on the Rights of Indigenous Peoples

State obligations

1. Take specific measures to protect indigenous children from being abused or neglected economic exploitation and against all work when consulted.
2. Will consult and cooperate in good faith with indigenous peoples through their representative institutions before adopting and implementing legislative or administrative measures that affect them, in order to obtain their free, prior and informed consent.
3. Hold effective consultations with indigenous peoples through their representative institutions before using their lands or territories for military activities.
4. Consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories.... .. the utilization or exploitation of mineral, water or other resources.
5. They shall provide effective mechanisms for fair and equitable redress for any such activities, and adequate measures shall be adopted to mitigate harmful environmental, economic and social consequences, cultural or spiritual.
6. In consultation and cooperation with indigenous peoples, take effective measures to facilitate the exercise and ensure the implementation of consultation, including legislative measures for the purposes of the Declaration.

Rights of indigenous peoples

- a) To the full enjoyment of all human rights and freedoms fundamental.
- b) They shall not be forcibly displaced from their lands or territories, ...w i t h o u t free, prior and informed consent, nor without prior agreement on just and fair compensation and, whenever possible, the option of return.
- c) Right to reparation, through restitution, or, when this is not possible, fair and equitable compensation for the lands, territories and natural resources traditionally owned or occupied.
- d) Military activities shall not be carried out in the lands or territories of indigenous peoples, unless justified by a reason of public interest.
- e) The right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
- f) Minimum standards for survival, dignity and well-being

American Declaration on the Rights of Indigenous Peoples

State obligations

1. Guarantee reparation through effective mechanisms, which may include restitution...cultural, intellectual, religious and spiritual property of which they have been deprived without their free, prior and informed consent.
2. Take measures to prevent and prohibit indigenous peoples and individuals from being subjected to research, biological or medical experimentation programs.
3. Carry out consultations and, in cooperation with the indigenous peoples, measures to facilitate the exercise and ensure the enforcement of these rights.
4. Consult and cooperate in good faith with indigenous peoples before adopting and implementing legislative or administrative measures that affect them, in order to obtain their free, prior and informed consent.
5. Adopt measures necessary for national agreements and regimes to provide for the recognition and adequate protection of cultural heritage and intellectual property.
6. Adopt consultations to obtain the free, prior, and informed consent of indigenous peoples.
7. Consult and cooperate in good faith with indigenous peoples before approving any project affecting their lands or territories.
8. Promote the adoption of legislative and other measures.

Rights of indigenous peoples

- a) The right to full and effective participation, through elected representatives in decision-making in matters affecting their rights and related to the development and implementation of laws, public policies, programs, plans and actions related to indigenous affairs.
- b) 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,
- c) Intellectual property rights.
- d) The right to maintain and determine their own priorities regarding their political, economic, social and cultural development, in accordance with their own worldview.
- e) Right to the elaboration of policies, plans, programs and strategies for development and their implementation.
- f) The right to actively participate in the development and determination of development programs.
- g) Minimum standards for survival, dignity and well-being.





