PUBLIC PARTICIPATION IN DECISION-MAKING

How do states inform, consult with and obtain free, prior and informed consent from rights-holders

GUIDE FOR RESEARCHERS

February 2025

AMNESTY INTERNATIONAL

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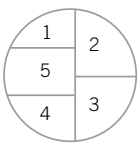

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EXECUTIVE SUMMARY

Decisions taken by local, national or other level of government can violate the human rights of a particular group of people, including Indigenous Peoples, racialized people, ethnic, religious and linguistic minorities, and communities discriminated on the basis of work and descent. Such decisions can violate human rights either through their impact on substantive human rights, such as the right to housing, health, livelihoods, education, cultural integrity, life, or other rights, or because the decision-making process itself violated the state's duty to inform, consult, or obtain the consent of the people affected. This guide focuses on the second category of rights violations, relating to the process of decision-making, and how the affected rights-holders were able to engage in it. It is intended for the use of researchers who wish to investigate the extent to which the human right to participate effectively in decision-making has been violated.

The guide identifies three levels of participation in decision-making:

INFORMATION

where rights-holders are given advance notice of a decision taken that affects them, but a specific process is not established for inviting feedback or consulting, the only available recourse being lobbying, legal challenges or protest;

CONSULTATION

where rights-holders are invited to engage in a process of decision-making; there is a dialogue and a reasonable expectation that the decision-maker will make all efforts to address concerns raised;

FREE, PRIOR AND INFORMED CONSENT (FPIC)

where an Indigenous People is consulted in order to obtain their consent; where there is risk of significant harm to their rights decisions proceed only with their consent.

Photo credit: Fishing communities affected by Climate Change in Shyamnagar, Satkhira, Bangladesh, September 2021.
© Farhan Hossain/Amnesty International

It is vitally important that researchers apply the correct standard, and in doing so respect the rights of the affected people. Which process should apply will depend on a) the nature of the measures proposed; b) how they will impact on people affected; and c) the identity characteristics of the people affected. It will therefore be necessary to gather as much information as possible about all of these. For example, **informing** may be appropriate when reforms are being undertaken nationally to the way a state service is run, without significant human rights impacts being expected. **Ethnic/ religious/linguistic minorities** have the right to participate effectively in decisions that affect them, which in some cases will require a process of **consultation**. When there are human rights impacts on **Indigenous Peoples**, states have the obligation to **consult and cooperate with them in good faith in order to obtain their FPIC.** In some circumstances, projects **should proceed only with their consent**; the more significant the impact of a proposal on a people, the greater the need for a comprehensive process of effective participation that is geared towards obtaining their consent. **Please consult the relevant sections of this document.**

Standards for participation in decision-making are intended to protect human rights. Researchers will need – depending on the situation – to assess a number of aspects of the decision-making process:

- **Identity characteristics of the affected rights-holders:** this will impact on what human rights standards are applicable. There are rights to participation in decision-making that are universally applicable (see Annex 2). The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities requires that minorities be able to effectively participate in decisions affecting them. To date, international human rights bodies have applied the FPIC standard only to Indigenous Peoples, although it has been recently recognized as applying in specific circumstances to other rights-holders. The main international human rights standard to address FPIC is the UN Declaration on the Rights of Indigenous Peoples. Researchers may need to explain the different standards to community representatives, which will require particular sensitivity.
- **How do rights-holders participate?** Do rights-holders participate directly in consultations (e.g. in the form of open public meetings) or do they designate people to represent them? If so, who, and how are they chosen? This can be one of the most difficult issues for researchers. It is normal for any group of rights-holders, even the most cohesive community, to have internal divisions. In addition to this, there may be significant financial opportunities which provide fertile ground for further division to be created – including by the use of financial incentives, or other rewards, to gain the consent of sections of a community. Even in cases where the most basic level of engagement is used – information – it may be necessary for the state to identify a mode of engagement in order to ensure that the information reaches all affected people.

A group of female farmers listening ardently to lectures on how to grow saline-resistent crops in Bangladesh © Farhan Hossain / Amnesty International

- **Internal diversity:** Related to the issue of representation is the question of how the internal diversity of a group of rights-holders, including those often marginalised – women, LGBTI+ people, young people, people with disabilities, among others – is engaged in decision-making. The first principle should be that rights-holders choose themselves how they are represented. But this needs to be consistent with the participation rights of all individuals and sectors within the community. Accordingly, researchers will need to research the extent to which the state has ensured the inclusion of those often marginalised and researchers may need to engage with rights-holders, reaching out beyond traditional power structures, to ensure those who are marginalised are heard in our research. This requires considerable sensitivity, particularly if researchers are not from the community of rights-holders concerned.
- **Researchers' positionality:** particularly in the case of rights-holders affected by racism and colonization, researchers who do not come from the affected community will need to be aware of their own positionality. Before beginning research, time needs to be taken to assess whether it includes elements of power and status relative to the affected rights-holders, as well as their own assumptions and prejudices, and how these are perceived by the affected rights-holders.
- **Coercion:** Researchers will need to assess the degree to which rights-holders are able to make decisions free from coercion – including bribery, blackmail, presence of army / police / paramilitaries in the community, direct and indirect threats towards community leaders or other rights-holders, unequal bargaining power.
- **Process timelines:** The time allocated for an information, consultation or FPIC process will depend on a number of factors, in particular the complexity of what is being proposed and the impact on lives and rights of those affected. Where rights-holders organise themselves for collective deliberation, sufficient time will need to be allowed for their internal decision-making processes, including an iterative process of requesting additional information and feeding that back into the community's deliberation process.
- **Quality of information:** This relates both to the process – how rights-holders are informed about information or consultation meetings, and how to access impact assessment documents, allowing for translation/interpretation – and to the substance, e.g. the quality of information regarding the measures proposed, the content of impact assessments (if they have been carried out); information regarding what alternatives have been considered and why they were not adopted, available grievance / redress mechanisms, etc. Rights-holders should be engaged in the process of developing impact assessments and resettlement action plans (where relevant), as outsiders cannot have the same awareness of certain specific impacts on human rights, for example the impact a development project might have on a site of religious / cultural significance to rights-holders.

Gagik Mkrtchyan in the abandoned caravan where he lives
© Areg Balayan / Amnesty International

- **Technical and legal advice:** In the case of complex projects, for example extractive drilling / mining, there may be a need for rights-holders to access independent technical advice. In cases involving application of national and international law, rights-holders should have access to legal aid and advice.
- **Quality of engagement:** For consultation and FPIC processes, researchers will need to document how concerns of rights-holders have been addressed by the authorities. There is an obligation to consult in good faith, which means taking concerns seriously and making all efforts to address them. The state may be able to make a case that a limited infringement of human rights is necessary in view of the need to implement development projects which will benefit the wider population. However, where the enjoyment of rights will be seriously impaired, there is an obligation to amend plans to ensure that this will not happen or to mitigate the impact. In all cases, authorities should at the least provide robust and legitimate justifications when concerns of rights-holders have not been taken on board.
- **Benefit sharing:** Particularly in the case of natural resource extraction projects, it will be essential to assess the extent of the rights of rights-holders to share in benefits from the project, and where relevant, to document whether / how this has been done.
- **Remedies:** Remedies may be offered as part of consultations over a measure which would involve some loss or harm to the human rights of the rights-holders being consulted. For example, in the case of the eviction of a community from an urban slum area, it will be necessary to document whether alternative accommodation was offered, and if so, its quality and how accessible it was, and other impacts including access to education, health etc.
- **Documenting and monitoring:** Agreements reached must be clearly documented and approved by all parties. Monitoring mechanisms for those agreements – which should allow for participation of rights-holders affected and, where appropriate, regular renewal of consent – will also need to be documented.
- **Equality and non-discrimination:** researchers must explore whether affected rights-holders have been treated fairly and without discrimination on the basis of race, Indigenous belonging, sex, gender, sexual orientation, economic status, disability, age, work and descent, or other status.
- **Evaluating Indigenous Peoples' free, prior and informed consent:** this involves an assessment of whether each of the three necessary conditions (free, prior and informed) have been met. It further involves an analysis of factors including (among others): whether the project proponent has fully and adequately consulted in good faith with the People's representative institutions; whether all concerns have been fully addressed; whether consent was given or withheld; whether the project proponent respected this outcome and if not, whether this constituted a violation of the People's rights.

Researching participation processes can be challenging, particularly if researchers arrive after processes are already underway or have finished. In order to carry out successful research, significant time may need to be spent, building up trust with both rights-holders and duty-bearers, interviewing a wide range of participants, and seeking out documents.

"I joined the lawsuit because my mother is one of the people who suffered in health from the gas flares. I know that the flares caused the cancer that made her get treatment from the doctors in Quito." – Denisse a 15 year old student. © Iván Martínez / Amnesty International

1. INTRODUCTION

1.1 PURPOSE OF THE GUIDE

People's human rights can be affected by projects or decisions implemented by local or national governments. Indigenous Peoples, racialized people, ethnic, religious and linguistic minorities, communities discriminated on the basis of work and descent, rural and urban local communities may be affected in specific ways. Such decisions can violate human rights either through their impact on substantive human rights, such as the right to housing, health, or, education, or because the decision-making process itself violated the state's duty to inform, consult, or obtain the consent of the people affected. This guide focuses on the second category of rights violations, relating to the process of decision-making, and how the affected rights-holders were able to engage in it. It is intended to provide guidance to researchers – who may be part of the affected group of rights-holders, or working for a human rights NGO, or academics – to support them in assessing the extent to which the human right to participate effectively in decision-making has been violated.

The state's failure to ensure participation of rights-holders may be the result of structural issues, including marginalization within the state, in some cases stretching back many generations.

Photo credit: Rohingya refugees walk in the camps outside Cox's Bazar, Bangladesh, February 2019
© Reza Shahriar Rahman / Amnesty International

The focus of the Guide is on rights-holders and their rights to **effective participation** in relation to the formulation and implementation of law, policy and practice that may impact on their enjoyment of rights. In many cases, rights-holders who are being affected by a state measure will be present and may organise themselves in the form of a recognisable community, for example the residents of a village, or an informal urban settlement. However, in international law, **only peoples, including Indigenous Peoples, have collective rights**. In the case of ethnic, religious and linguistic minorities, communities discriminated on the basis of work and descent, and rural or urban communities, **it is the members of those groups individually that are rights-holders**, although they may act collectively to assert and defend those rights, and the enjoyment of the rights has a collective dimension.

Guidance will be given on how to identify when states should be **informing** and **consulting** and when international standards require that states consult with Indigenous Peoples in order to obtain their **free, prior and informed consent** in relation to a proposed measure that will impact on them.

There are a variety of such situations in which people are collectively affected by decisions taken by local or national government. Such decisions may concern:

- the eviction of an informal settlement in order to redevelop an urban area;
- the granting of licences for oil exploration on the land of an Indigenous People(s);
- the building of a dam which will affect communities' access to water downstream;
- the developing of policy or laws that will significantly impact on a community, for example regarding service provision, or response to a humanitarian emergency.

In such cases in order to assess the degree of impact on the enjoyment of the human rights of the people concerned, it may be necessary to research not only the impacts on human rights substantively, but also the process of decision-making, and in particular how affected rights-holders were involved.

The aim of this guide is to support researchers in:

- identifying the rights-holders/ communities that are affected in a given situation, and what are the applicable standards in international human rights law;
- identifying the requirements regarding the level of engagement of rights-holders in decision-making;
- assessing whether information provided has been sufficient and timely; whether participation has been effective; and whether - in the case of Indigenous Peoples - consent was given and if it can be considered to have been free, prior and informed;
- understanding how rights-holders represent themselves, including internal diversity within a group of rights-holders; and how opposing interests of the state and rights-holders are balanced;
- assessing whether any remedies the state has provided are sufficient and appropriate.

A note on terminology: the guide will consider a hypothetical research study into a process of consultation to obtain free, prior and informed consent. For ease of reading the singular of "People" will be used, assuming that the research concerns one Indigenous People. However it should be noted that a consultation may need to engage with several sovereign Indigenous Peoples.

Amnesty International would like to thank the following experts who gave invaluable comments and suggestions, without which the guide would not have been possible: Aminatu Samira, Åsa Larsson Blind, Beverley Longid, Chris Foley, Hector Huertas, Joshua Cooper, Naomi Barasa, Pratima Gurung.

It is essential that rights-holders can effectively participate in decisions made relating to the research, including whether it happens at all, methodology, and what the main focus is.

1.2 ASSESSING WHETHER A PROCESS SATISFIES HUMAN RIGHTS STANDARDS

There is no simple tick-box format that allows researchers to assess whether human rights requirements have been satisfied. To do this, researchers will need first to identify:

- who is affected, including specific identity characteristics (see 2.1);
- how the proposed measures have impacted / will impact on rights-holders, including any human rights harms (see 2.2);

This will enable the researchers to determine:

- the applicable human rights standards (see the relevant annex – regarding **informing rights-holders** (Annex 1), **effective participation** (Annex 2), and **free, prior and informed consent** (Annex 3);

Finally researchers must assess:

- **how has information been provided; how have rights-holders been able to effectively participate** in decision-making; **what agreements were reached,** if any; and **what recourse** is available if agreements are broken.

One of the greatest challenges for researchers will be to show whether participation was effective or not. The word 'effective' guards against sham processes which aim to give the impression that human rights requirements have been complied with, when in fact there is no intention to change a decision that has already been taken.

1.3 RESEARCHERS AND THEIR POSITIONALITY

Research into public participation processes often concern the situation of rights-holders who face discrimination, including Indigenous Peoples, ethnic, religious and linguistic minorities, racialized people, and people discriminated on the basis of work and descent. Before beginning research, an assessment should be made of the positionality of the members of the research team. Researchers may themselves come from the affected group of rights-holders, bringing with them immeasurable advantages in terms of an understanding of rights-holders' lived experience. Researchers, particularly those who are not members of these groups of rights-holders, must be aware of each aspect of their own status and identity. Before beginning research, time needs to be taken to assess how it includes elements of power and status relative to the affected rights-holders, as well as their own assumptions and prejudices, and how these are perceived by the affected rights-holders. This analysis should include both the individual's positionality, and that of the organization to which they belong. Researchers, regardless of whether they are members of the community or not, should assess their positionality with regard to internal dynamics and power structures, including personal relationships, and how this might impact on conversations about sensitive issues.

It is essential that rights-holders can effectively participate in decisions made relating to the research, including whether it happens at all, methodology, and what the main focus is. Situations where external researchers make assessments of the complex dynamics involved

in public participation processes (for example, the internal dynamics of an affected community), without engaging on these with rights-holders, and incorporate these into their research findings, will entrench and exacerbate negative power dynamics and should be avoided.

Māori academic Linda Tuhiwai Smith writes, about research into Indigenous Peoples:

Research 'through imperial eyes' describes an approach which assumes that Western ideas about the most fundamental things are the only ideas possible to hold, certainly the only rational ideas, and the only ideas which can make sense of the world, of reality, of social life and of human beings. It is an approach to indigenous peoples which still conveys a sense of innate superiority and an overabundance of desire to bring progress into the lives of indigenous peoples - spiritually, intellectually, socially and economically. It is research which from indigenous perspectives 'steals' knowledge from others and then uses it to benefit the people who 'stole' it […] These practices determine what counts as legitimate research and who count as legitimate researchers.[1]

In such situations there can be advantages to forming mixed teams, with researchers both external and internal to the group of rights-holders; however, care must be taken to ensure there are no abusive power dynamics within the team, and that the researcher from the rights-holder group is not being put at any risk.

An older man without electricity or gas boils water on a canister in Kharkiv region, Ukraine. October 2022. © Amnesty International

Finally, researchers should be aware that an appropriate resolution of such dynamics may not be possible, despite best efforts, and that the research may have to be abandoned.

Resource: Linda Tuhiwai Smith, Decolonizing Methodologies: Research and Indigenous Peoples, London/Dunedin, 1999.

1.4 SECURITY CONSIDERATIONS

Some of the initiatives which give rise to the duty to inform/consult, in particular large-scale resource extraction or other development projects may involve high-level corruption and/or the involvement of organised crime/armed groups. Researchers will need to assess security risks (to them and to rights-holders) and explore and adopt ways to mitigate those risks.

1 Decolonizing Methodologies: Research and Indigenous Peoples, London/Dunedin, 1999, p56.

1.5 HOW TO USE THIS GUIDE

The structure of the document takes into account that the different types of engagement with rights-holders – informing, consultation, and free, prior and informed consent – are three different points on a spectrum, but also consecutive steps in a process. Informing is part of a consultation process, and informing and consulting are part of a free, prior and informed consent process, so for each of these, **all the relevant chapters need to be read**. This table should help you to get an overview of the sections of the document which will be relevant to the process you are researching:

Process stage, and relevant section in this doc	Information	Consultation	FPIC
Identify the rights-holders affected (2.1)	✓	✓	✓
Identify how the rights-holders represent themselves (3)	✓	✓	✓
Communicate proposed measures to rights-holders (5)	✓	✓	✓
Communicate consultation modalities to rights-holders (6)		✓	✓
Social, environmental and human rights impact assessment (5)	In some cases	In some cases	In some cases
Provide independent technical/legal advice (6.2)		In some cases	✓
Allocate sufficient time for deliberation processes (6, 7.2.2)		✓	✓
Process feedback from rights-holders, and respond (6.3)		✓	✓
Repeat previous step as necessary with aim of reaching agreement		In some cases	✓
Obligation to consult in order to obtain consent (7, 7.1, 7.3, 7.4)			✓
Agree benefit sharing mechanism (6.4)	In some cases	In some cases	In some cases
Agree remedy with rights-holders (6.4)		In some cases	✓
Document agreement and ratify it with all parties (6.5)		✓	✓
Monitor the agreement, with participation of rights-holders (6.6)		✓	✓

Fig. 1: Elements of effective participation processes

2. WHO IS AFFECTED, AND WHAT IS THE LEVEL OF HARM

2.1 IDENTIFYING WHO IS AFFECTED

States must identify everyone who is potentially affected by a proposed measure. Most crucially, this determines who needs to be involved in decision-making. States may not fully appreciate who needs to be included; for example, an extractive industry project may have impacts outside of the immediate project area (air pollution, downstream water impacts, etc.).

People affected by a state project might be discriminated against in their right to participate in decision-making, based on aspects of their identity. This can include **Indigenous Peoples, ethnic, religious or linguistic minorities, racialized people, women and girls, LGBTI+ people, communities discriminated on the basis of work and descent, people with disabilities, urban or rural communities, stateless people, refugees and migrants**, or others; researchers will need to be aware of any discrimination against such groups, and any cases where the specific rights of a group have not been respected (for example Indigenous Peoples' rights to self-determination and free, prior and informed consent).

Photo credit: Older women at a market - Borno State, northeast Nigeria © The Walking Paradox / Amnesty International

It can be particularly hard for people who do not have citizenship of a country, such as stateless people, refugees and migrants, to access their rights. Human rights apply to all persons in a country, not only citizens, and there will be a duty to inform/consult them where they are potentially affected by a proposal, in order to identify and mitigate human rights harms. The right to participate in state decision-making is an essential safeguard against human rights violations, which all people benefit from, and people must not be discriminated against in their access to human rights based on their citizenship status (see Annex 2).

When identifying rights-holders who may have specific protected characteristics, the first principle is that of self-identification. That is, the individual rights-holder, and (where community organisation exists) the community collectively, decides how they wish to be identified. Cases of dishonest or misinformed self-identification are extremely rare. In case of doubt, it is particularly useful to take note of whether the community's self-identification is accepted by other similar communities in the country and internationally. Unless there is credible information supporting a different conclusion, self-identification should be accepted.

Within a group of affected rights-holders, there may be sections who are particularly at risk of negative impacts from the proposed measure (for example women, older people, or people with disabilities), and the state must clearly identify such discrepancies. This must be done in a transparent and non-discriminatory manner, and must involve the potentially affected rights-holders, as it is not always obvious who will be affected by a measure.

As different profiles of rights-holders have different rights protections under international standards, it is possible that tensions will arise. For example, a mine may be proposed in an area where both Indigenous Peoples and non-Indigenous communities live. In the case of the Indigenous People, international standards will require that their free, prior and informed consent be sought before going ahead, and if the project is being funded by an International Financial Institution such as the World Bank, they may have an applicable safeguard policy which must be followed. Other standards may apply to the non-Indigenous rights-holders.

In many cases, researchers report that this does not give rise to any tensions, and that all concerned understand and respect the reasons for special measures. If questions do arise, it is recommended that researchers explain clearly that Indigenous Peoples' right to free, prior and informed consent is based on their status as peoples and that therefore they have the right to self-determination as other peoples do, and because of their history of experience of colonization, marginalisation and dispossession, for which the state has an obligation to provide redress. Free, prior and informed consent provisions exist because if a proposed project on an Indigenous People's land causes damage to sacred sites, or prevents the community from engaging in traditional livelihoods, it could cause irreparable damage to the culture and therefore the very existence of the people. Ethnic, religious and linguistic minorities and communities discriminated on the basis of work and descent, similarly, require specific measures, taking into account their situation of marginalisation, to ensure that their voices are heard in decisions that affect them. These specific measures are established as part of international human rights law.

Among the elements researchers should look for are:

- Notices of the proposed initiative posted in public places, announced on radio/TV/internet - in local language(s) where appropriate
- Invitation to the public to signal their wish to be involved in consultations
- Clear invitation to self-identify
- Proactive efforts by the state to identify affected rights-holders, including by consulting with civil society (local and national), local government, academics, and other experts
- Laws, policies and practice of the state recognising specific categories of rights-holders, for example Indigenous Peoples or communities discriminated on the basis of work and descent, and their rights

2.2 IDENTIFYING THE LEVEL OF HARM

With regard to harm, it is necessary to consider the following:

- A failure to inform/consult constitutes a human rights violation by itself, even if there is no other substantive human rights harm (however in many cases there will be);
- the greater the potential for harm, the greater the need for rigorous participation processes;
- what harm have affected rights-holders already experienced? The existence of unaddressed prior human rights violations, or other forms of marginalisation and vulnerability, also point to the need for a more rigorous standard;
- what other developments are affecting the same rights-holders, and are any decisions pending on new initiatives? The need for careful consideration of cumulative/ concurrent impacts.
- Thresholds for informing / consulting / obtaining FPIC will need to be assessed on a case-by-case basis. The following examples therefore are **illustrative only**; a final assessment would need to **consider all the facts of the case**:
  - > Proposal to redesign traffic layout in a neighbourhood causing temporary minor slowing of access to schools (affected rights-holders are not Indigenous) **DUTY TO INFORM** (bear in mind that many initiatives will be discussed and decided in local or national parliaments/ assemblies, thus arguably discharging the state's obligation to ensure an opportunity to influence decisions via elected representatives)
  - > Proposal to knock down slum housing and rebuild higher quality housing in another area (affected rights-holders are not Indigenous) **DUTY TO CONSULT**
  - > Proposal to relocate Indigenous People(s) from their land in order to carry out mining operation **DUTY TO CONSULT, AND OBTAIN FPIC**
  - > To date, international human rights bodies have applied the FPIC standard only to Indigenous Peoples, although it has been recently recognized as applying in specific circumstances to other rights-holders.[2]

2 For example, UN Committee on Economic, Social and Cultural Rights, General comment No. 21 (Right of everyone to take part in cultural life), E/C.12/GC/21, 2009, para 55(e).

Photo credit: In the Canadian province of British Columbia on unceded land, the Indigenous Wet'suwet'en Nation is protecting its territory and sacred sites against the construction of a gas pipeline. © Amnesty International

3. HOW RIGHTS-HOLDERS REPRESENT THEMSELVES, & INTERNAL DIVERSITY

States must respect the right of rights-holders to determine how they will participate in a process. Where such participation is not direct but through representatives, those representatives must have a mandate to represent, and be accountable to, the affected rights-holders. Rights-holders can also choose to be represented through several institutions, not just one. Effective participation requires that all rights-holders have a meaningful opportunity to participate in a decision, particularly those who might be disproportionately affected by it.[3] No group or community is homogeneous so the state will need to identify categories of people within the group who are likely to experience the impact of the proposed measure in a different way to other rights-holders and ensure that the perspectives of those people are sought in an appropriate way.

3 UNDRIP, Art. 22(2): "States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."

Photo credit: The informal Romani settlement of Gianturco that was forcibly evicted by local authorities in Naples, southern Italy. © Claudio Menna / Amnesty International

Note that even in the case of information processes, where rights-holders are organised as a community, it is likely that researchers will need to identify community decision-making mechanisms. Engaging with such mechanisms will allow more efficient communication of proposed measures to the community and make it easier for the authorities to respond in a constructive way if there is resistance to the measures.

The groups that may not have equal access to decision-making within a larger group of rights-holders will vary according to the nature and situation of the group. They may include:

- Women, girls and non-binary people
- lesbian, gay, bisexual, transgender and intersex (LGBTI) people
- racialized people
- ethnic, religious or linguistic minorities
- Indigenous individuals within a larger non-Indigenous community
- communities discriminated on the basis of work and descent
- refugees and migrants
- stateless people
- people with disabilities
- young people
- older people
- supporters of rival leadership candidates / opposition parties
- men/women from rural communities or informal settlements
- people living in poverty, unemployed people
- factory / industrial / agricultural workers
- domestic workers
- partners who have married in from outside the community, as well as their partners within the community
- internally displaced people
- sex workers
- people who have had little or no access to education

It may be necessary for researchers to speak with bodies / associations which work directly with such groups to understand their perspectives and to interview affected people directly to hear about the substantive challenges they face as a result of the project and to understand if and how they were consulted.

Barriers to participation can be internal and external to the community. They can include the tokenistic appointment of women in contexts where their participation is not effectively enabled (for example as a proxy, i.e. they have been placed there by a man to channel his opinions); and/or their role not appropriately recognised (e.g. their views discounted or having information kept from them about the issues, leading to them being unable to give informed input). The impact of stereotypes and other norms and attitudes may discourage or devalue the participation of specific members of a community, such as younger people, people discriminated on the basis of work or descent, or stateless people, or if state officials only speak to people with a higher level of wealth or education, or meetings are held at times when women are unable to take part due to activities relating to cultural norms. If affected rights-holders have organized and presented an internal decision-making process, the state should respect and give space to it, but if this process excludes specific sectors of the community, the state also has an obligation to make sure the voices of those excluded are sought.

Researchers need to speak to relevant community groups and affected individuals to understand the varying impact on individuals of the project, and any exclusion from decision-making. Here, it is essential that researchers take into account power relations and their positionality, as further explained in Section 1.3.

In order to avoid creating tensions within the community, it is important that the state is accountable and transparent in its decision-making. Different opinions exist in any group of people and expecting a community to have a united position may not be realistic. Decision-making may be manipulated by self-interested elites, and the state or other external actors (such as companies) may attempt to influence sectors of the community (including elites) in order to

Indigenous representation systems may be highly inclusive and robust, and the collective decision-making model can be highly effective in allowing diverse groups in the community to have a voice.

obtain their support for the proposed measure, for example through bribery or intimidation (a process known as elite capture), or a reasonable offer may be made but only to a restricted number of people.

Divisions can occur not only between elites and the rest of the community but within communities and even within families. In investment projects, tensions can occur between those who depend more on environment/land/biodiversity etc., and those who welcome new potential job opportunities. When a project begins operating, those who have gained employment (and their families) may support the project, and may feel forced to ignore environmental and other impacts, especially if the availability of jobs responds to a genuine need. Researchers must be aware of these dynamics and seek the views of all parties.

This can be one of the most challenging aspects for researchers to assess, but also a very important one. If the state is involved or complicit in manipulation of elites, this will be key to demonstrating its failure to respect its obligations regarding effective participation.

Indigenous Peoples may be represented by a variety of institutions. These range from customary systems such as the Aty Guasu of the Guarani-Kaiowá in Brazil, or iwi governance structures in New Zealand, to structures which are more formally embedded in national systems, for example the Sami Parliaments of Norway, Sweden and Finland. Customary and legally formalised systems may exist side by side, as in the case of First Nations in Canada, where elected band councils were created by national legislation, but hereditary chiefs are seen as representing community decision-making in accordance with long-standing tradition, and tensions between the two do arise. Customary representative institutions are integral aspects of their cultures. They are entitled to establish and maintain them as an aspect of their right to self-determination. Consultation and consent processes should be consistent with and supportive of those systems and must not contribute to their erosion or marginalization.

Indigenous representation systems may be highly inclusive and robust, and the collective decision-making model can be highly effective in allowing diverse groups in the community to have a voice. In some cases, the decision-making forum is a general meeting in which all members can participate. In others, representation may be delegated to a smaller body, but there will usually be a system for this body to report back to the whole community for matters to be deliberated. The tradition of collective decision-making means that community members – even those who may have concerns with what is being agreed – often accept the principle that compromises and unified positions are necessary in order for the community to maintain its existence and cultural integrity. Indigenous decision-making processes, ideally, are designed so that efforts can be made to accommodate – as far as possible – opposing voices. For this reason, when the internal processes are credible and transparent, they are by far the most appropriate for accommodating internal divisions. However, if all discussions take place in a public space, subtle forms of pressure not to speak can be exerted. In some cases, because of the impact of colonization and ongoing state persecution, traditional structures have been weakened. There can be problems with accountability and transparency in decision-making. In some cases, when the state has systematically denied or obstructed self-government rights, and/or has forcibly evicted and dispersed the community, institutions have been undermined to the point of making consultation/consent processes difficult or impossible.

Particularly in the case of Indigenous Peoples, there are significant dangers in researchers

determining unilaterally that the people's decision-making institution is not representative, and therefore discounting its voice in research findings, or only speaking to sectors that appear not to participate. This can contribute to a further entrenching of marginalization and denial of the right to self-determination. Where researchers have concerns about particular sectors being excluded, these should be discussed with the representative institution. A balance needs to be struck between respecting the right of the Indigenous People to represent themselves through their chosen institution, and ensuring excluded voices are heard. Bear in mind researchers' positionality in this process (see Section 1.3).

The following are some possible tools for understanding internal dynamics around leadership, representation and exclusion:

- spending significant time in the community and getting involved in day-to-day community activities outside of a formal interview setting can help to build trust and familiarity, enabling community members to feel more at ease and feel more comfortable discussing issues of inclusiveness. Women researchers may find it easier to get involved in traditional activities in a community (if these exist) and gain the trust of women. Similarly, male researchers may find it easier to gain the trust of men in the community when collecting information about gender issues. This should be done in a way that is transparent and accountable to the community as a whole, whilst ensuring that the security of the interviewee is not compromised. Care must be taken not to appear to be tricking interviewees into letting their guard down. Standard research consent protocols must be followed if any information obtained in this way is to be used;
- analysis of representative bodies – how diverse are they? What is the age break-down? Are specific families over-represented? What do we know about the professions / livelihoods of members?
- observation – if possible – of community meetings, in particular those relating to the consultation being researched, with a view to picking up dynamics, who is invited to speak, who may be discouraged, who is present at the meeting, observing non-verbal communication. If there are obvious absences of individuals / groups within the community, try to find out why;
- if actual presence is not possible, going through recordings / minutes of meetings;
- consulting external experts with in-depth knowledge of the community. Opinions may not be impartial, and researchers will need to consider the profiles, positions and interests of those they are speaking to in assessing the information provided, but consulting as wide a range of sources as possible will help in developing a picture;
- consulting members of the community who have left, even those living abroad, who may feel more able to speak freely.

Note that this can be significantly time-consuming. Time will need to be built into the research plan from the beginning.

Proposed projects often lead to the creation of factions within communities and conflicts with adjacent communities. States may be indifferent to such divisions, use them as an excuse for not engaging with the community, or actively promote them in order to weaken opposition. This can amount to an interference with the right to participate in decision-making.

Once the process by which rights-holders represent themselves has been determined, this should be documented by the state in writing (see Section 6.5). Researchers should try to obtain a copy of this documentation.

QUESTIONS/TIPS FOR RESEARCHERS:

- How have representatives of rights-holders been identified?
- What assessment can be made of the legitimacy these representatives have with the rights-holders?
- How have different voices been allowed for within decision-making processes, e.g., women, youth, racialized people, older people, peoples with disabilities, supporters of rival leadership candidates?
- Are there groups among the rights-holders who may be particularly affected by the decision, for example, because of gendered impacts, patterns of land use, differences in occupations etc., and have their concerns been listened to and accommodated?
- If such voices are not accommodated, have those excluded individuals or groups voiced protest at their exclusion, either internally or outside the group of rights-holders?
- What steps has the community or the state taken to address this?
- Did consultations happen in meetings open to all affected rights-holders? If so, did this impact on the ability and security of those wishing to voice a controversial or opposing view, especially if a proposed measure has led to tensions in the past? What about cultural expectations regarding who can and who cannot speak?
- How have the community's decision-making processes been taken into account by the authorities in the design of consultations?
- Has the state supported or actively undermined community decision-making processes?
- Has the state created a public narrative, for example via the media, around real or alleged divisions among rights-holders? How has this narrative impacted on the right of all rights-holders to participate in decision-making?
- How has necessary information (see Section 5) been provided to rights-holders? Was it made available to all members, in a format that they can access and understand? Were meetings held at times and using formats that allowed all sectors to participate?
- Has the necessary time been allowed, considering the need for a deliberation and consensus-building process among rights-holders? This will vary depending on contextual factors, including whether the required process is information, consultation or FPIC.

4. EFFECTIVE PARTICIPATION – INFORMATION, CONSULTATION AND FREE, PRIOR AND INFORMED CONSENT

> ***" [T]he qualifier 'effective' in the right of persons belonging to minorities to effective participation in public affairs refers to the fact that the 'presence' of minority representatives in decision making processes should be translated into 'influence' on the outcome of the decision making."*** [4]

There are three stages involved in effective participation:

- identification of the proposed measure, of all affected rights-holders, and of potential human rights impacts (pending further exploration with rights-holders)
- rights-holders' effective participation in the decision-making process;
- rights-holders' participation in independent monitoring, evaluation and accountability processes regarding the decisions reached.

4 Annelies Verstichel, Participation, Representation and identity, the Right of Persons belonging to Minorities to Effective participation in Public Affairs: Content, Justification and Limits, Intersentia, 2009, p. 656.

Photo credit: Most of the population of coastal south-western Bangladesh is at high risk from the effects of climate change. © Amnesty International

An older woman with a disability being evacuated in Kharkiv region, Ukraine. October 2022. © Amnesty International

There are three levels of participation in decision-making:

INFORMATION

Rights-holders are informed of the proposed measure, but there is no consultation on it, and consent is not sought.

CONSULTATION

Rights-holders are informed of the proposed measures and a process of dialogue is engaged. Rights-holders are invited to give feedback, including, possibly, suggested modifications or rejection of the proposal, to which the authorities must respond; where suggestions are rejected, this should be justified.

FREE, PRIOR AND INFORMED CONSENT (FPIC)

Indigenous Peoples are consulted, drawing on their right to self-determination; there are specific obligations such as to engage with the people's own representative, customary or traditional institutions, and the objective of consultations is explicitly to gain consent for the proposed measures.

The greater the potential impact on rights-holders, the greater the need for comprehensive, robust and effective engagement and participation throughout the process.

Although merely informing rights-holders is a process which does not explicitly invite interaction or engagement, it allows them – if done properly, that is with adequate information about the proposed measure and sufficient advance notice – to decide how to respond, including by:

- demanding to be consulted, or otherwise lobbying decision-makers
- legal challenges such as injunctions
- protest

The level of participation in the decision-making process will depend on the profile of the rights-holders and the measure proposed. The greater the potential impact on rights-holders, the greater the need for comprehensive, robust and effective engagement and participation throughout the process.

Merely informing will not be sufficient if there are significant human rights concerns at stake. Rather, informing should be considered to be the first stage on a spectrum. Informing allows stakeholders to identify potential human rights harms that the state may not have considered, and to demand to be consulted.

In the case of Indigenous Peoples, in line with the right to self-determination and self-government, it should be noted that the default should always be free, prior and informed consent, even if in some cases there will not be an absolute requirement to obtain consent (see Section 7.1).

Please refer to the table in Section 1.5 which indicates the elements that would normally be required in order to give effect to participation rights in the three categories mentioned above.

Resources:

UN Office of the High Commissioner for Human Rights, Guidelines for States on the effective implementation of the right to participate in public affairs

Sherry Arnstein, "A Ladder of Citizen Participation", in Journal of the American Institute of Planners, Vol. 35, 1969, Issue 4 (note that Arnstein radically critiques standard institutionalized mechanisms and argues that true participation requires a transfer of power)

QUESTIONS/TIPS FOR RESEARCHERS:

- What approach have the authorities used – information, consultation, FPIC?
- How have they justified this choice?
- Are the affected rights-holders satisfied with this choice?
- If not, have they contested it? How?
- Does this approach comply with the state's human rights obligations – given the profile of the rights-holders in question and the level of impact?

5. INFORMATION

If a law, policy or project will impact on the enjoyment of human rights, the state must disclose all relevant information relating to it, and its assessment of all rights and interests of all parties that are likely to be affected by the proposal. In addition, the state should provide information on monitoring, evaluation and accountability processes e.g. how to obtain redress for violation of rights.

The manner in which information is conveyed is important. **It must:**

- be timely – people must be informed sufficiently in advance of the process in order to be able to process the information, and activate internal deliberation processes;
- be in a format(s) accessible and understandable to all affected rights-holders, taking into account local languages, visual impairments, illiteracy etc.; if illiteracy is prevalent, oral and visual media may need to be used;
- be conveyed to (although in some cases not exclusively) the rights-holders' representative institutions, if they have them;
- use appropriate and accessible venues taking into account gender, cultural and religious considerations (for example, timing of meetings around women's other responsibilities including providing childcare) and other factors that may make the difference between inclusion and exclusion;
- explain all necessary technical concepts and jargon in an accessible way; where necessary there should be agreement on definitions;
- clearly identify who is proposing and implementing the proposed measure;
- notice may need to be given at various stages; in the case of an eviction, for example, advance notice will need to be given of the plan to evict, before consultations start; specific notice will also need to be given, with sufficient advance notice, of the precise date and time the eviction will take place.

Photo credit: A displaced ethnic Kachin woman gathers clothes that have dried at Trinity IDP Camp, Myitkyina, Kachin State, Myanmar on 10 December 2018. © Hkun Lat / Amnesty International

As much information as possible should be shared at the beginning of the process (part of the value, in human rights terms, of the process of informing, is that it allows affected rights-holders to contest the decision to merely inform; based on their interpretation of the issues and human rights at stake, they may legitimately demand that consultation or FPIC is required). The state's assessment of which rights will be impacted by the measure is very important, because the affected rights-holders must have the opportunity to challenge that assessment and identify affected rights that may have been overlooked. The generation of information must be seen as a **two-way process.** As the state is not likely to fully understand the nature of possible harms to rights-holders (for example location of sacred / burial sites that could be affected by natural resource extraction), the identification of interests should be done with the effective participation of rights-holders. In the case of a large-scale infrastructure or development initiative, comprehensive information may be conveyed through a participatory social, environmental and human rights **impact assessment.** These should be completed early in the process; however, such assessments are often not produced until a project development is quite well advanced – if they occur at all. All relevant information needs to be made available to rights-holders in advance – in part so that they can advocate for the kind of consultation they need and any necessary additional impact assessments.

Different terms are used to refer to impact assessments – they should cover human rights, but many institutions do not use this term. Much information will be gathered and disclosed through these assessments and they should be done with full participation of rights-holders. All relevant dimensions of impact should be addressed: physical, psychological, social, economic, environmental, cultural and emotional. The assessment will also require information and analysis of how men, women, older people, people with disabilities, racialized people and people with other statuses or identities, will be affected differently. For example, in projects involving extractive industries, assessments will need to capture how displacement, reduced access to common property resources, and inward migration of workers are likely to impact upon women's lives differently to men's.

A chart that details cyclone hazard levels and other climate threats. Satkhira, Bangladesh, September 2021. © Amnesty International

In reality such assessments are often not accessible to, or done in consultation with, affected rights-holders. They may be shared only with a limited number of people, or at the end of the process, or not at all. They may be very long and highly technical; rights-holders often don't have the technical expertise or time to assess them properly and submit responses or objections within the established deadlines. They might not be done in the language used by the rights-holders likely to be impacted.

Impact assessments are often required and guided by national legislation and/or the safeguard policies of donors and International Financial Institutions such as the World Bank. Where such legislation or policies are found to apply to a project being researched, it will be necessary to assess whether they meet the standard of protection required by international human rights law and research how they have been implemented in the case in question.

The state's assessment of which rights will be impacted by the measure is very important, because the affected rights-holders must have the opportunity to challenge that assessment and identify affected rights that may have been overlooked.

The following is information that **the state in most cases must communicate** to affected rights-holders:

- full disclosure of the process of informing / consulting / obtaining consent;
- comprehensive information on the rights of rights-holders under national and international law, as they relate to the project (regarding both process and substantive issues), and relevant safeguard policies of any involved donors or International Financial Institutions;
- information on channels available to seek remedy for harms done;
- disclosure of proposed objectives; scope and scale, and expected duration of activities;
- which rights-holders have been identified as being directly or indirectly impacted;
- what alternatives have been considered, and why they were not adopted;
- disclosure of legal and financial information, where money will be coming from, which companies are involved if any, who is in charge;
- how affected rights-holders will receive social and economic benefits; and how the level and cultural appropriateness of these benefits will be established;
- the full range of predicted impacts on human rights enjoyment with an analysis of how each will impact on different sectors within rights-holders;
- when potential adverse effects are identified, how those adverse effects will be avoided, minimized, mitigated, or compensated for;
- impacts on the social cohesion of rights-holders e.g. introduction of outside workers and income;
- proposed monitoring mechanisms and involvement of rights-holders in them.

"Our homes got destroyed each year during [Cyclones] Aila, Sidr and Amphan" - Hindu woman who experiences caste-based discrimination, Koyra, Khulna district. © Farhan Hossain / Amnesty International

Local residents of Cedeño, Honduras, dig up the beach searching for small clams and oysters. © Amnesty International

The following is further information that, **depending on the nature of the proposed measure, and context, may in addition need to be communicated** to affected rights-holders (each element will need to be judged by researchers according to context, but as a rule, if the information will help to understand what human rights impact the measure will have, it must be communicated):

- baseline studies on pre-existing conditions: ethnic, religious and linguistic demographics, housing and accommodation, employment, educational situation, health status and security situation of rights-holders, with a gender analysis of each;
- channels available to raise concerns arising during the implementation of the measure, including harms which may potentially occur in the future;
- information on systems of land tenure and use of resources e.g. individual and collective customary rights to minerals, hydrocarbon resources, forests, water, agricultural areas, hunting/fishing grounds, burial grounds, and ritual or ceremonial activities and historical monuments;
- the cultural and spiritual values that rights-holders attribute to such lands and resources;
- possible impacts on Indigenous/traditional knowledge and natural resources management practices and the long-term sustainability of such practices;
- detailed information on proposals to resettle rights-holders (e.g. resettlement action plan), if relevant;
- the impact of the project on different generations, and the present and future ability of affected rights-holders to pass traditional / Indigenous knowledge on to succeeding generations;
- regarding corporate projects, information about the company/companies involved, including nationality of parent companies, corporate structure, major suppliers, sub-contractors and financiers;
- disclosure of previous related activities undertaken elsewhere by the companies involved (and by affiliated organizations), including impacts on rights-holders.

Benjamin and Carlos Herrera stand in their fishing boat on the Nicaraguan Sea, October 2022. © David Estrada / Amnesty International, May 2023

These are some of the **questions** researchers will need to ask in order to assess the human rights compliance of a process of disclosure:

- What information was shared with rights-holders (see checklist above)? Was there a human rights impact assessment?
- Was any information withheld citing national security or other concerns? What evidence was provided of the need to withhold?
- Were impact assessments developed with meaningful participation of rights-holders?
- Did the information take account of all relevant social, environmental and human rights impacts, and differential impacts on different identities within rights-holders?
- Was a full copy made available in the language of rights-holders, or only a summary?
- How far in advance of meetings was information shared? How long did rights-holders have to consider the information?
- Was this long enough to allow for customary consensus-building processes?
- Did they have access to independent technical and legal advice, and was enough time factored in for this?
- If illiteracy is prevalent, how were the contents of proposals/assessments shared?
- Where were written notifications about information / consultation meetings posted? In what language? For how long?
- Was it likely to be seen and understood by all sectors among rights-holders?
- Can the researcher(s) get copies of notices?
- How much advance notice of meetings was given?
- If illiteracy is prevalent, how was information about meetings distributed, and how effective was this? For example, if by radio, how widespread is radio ownership, is there a reliable electricity supply, what station(s), who listens to this station, what time, how many announcements (with dates and times), would the affected people be listening at these times?
- If there was outreach to speak to rights-holders directly, who was spoken to, were women, older people, people with disabilities and other marginalized groups informed?
- Where were information / consultation meetings held?
- Was this accessible?
- At what time of day?
- Did this allow for all rights-holders to participate and engage meaningfully in a safe and enabling environment (considering livelihoods, child-care responsibilities)?
- Who came to information/consultation meetings?
- Can researchers get a participant list (signed if possible) (ensure this is genuine, and not a list for some other purpose)?
- Were minutes/recordings of meetings taken? Were those present given an opportunity to corroborate minutes and were their questions and concerns properly reflected?
- Can researchers attend meetings or get minutes/recordings?

6. CONSULTATION

[A reminder that consultation and consent processes necessarily include a process of informing rights-holders, which is covered in the previous section. For this reason, it will be necessary to refer to Sections 2 to 5 if you have not already done so.]

Many of the elements of a consultation process, and a free, prior and informed consent (FPIC) process (with Indigenous Peoples), are the same, the main difference being in the case of FPIC, the assumption is that the state will consult in order to obtain consent. However, note that Indigenous Peoples may also refuse to engage in such a process, and withhold their consent; they will be fully within their rights to do so (See Section 7.4.). Also, with regard to Indigenous Peoples, there is an **obligation to recognise and cooperate with the community's representative institutions.**[5] The developing of consultation modalities must be done together with affected Indigenous Peoples; only they can fully understand how their decision-making processes function and how they can be engaged.

For a process of consultation to constitute effective participation in decision-making, a dialogue between rights-holders and the state, in good faith and eliminating as far as possible all power imbalances, will need to be established early on in the process.

5 UNDRIP, Art. 19.

Photo credit: Severe drought and food insecurity in southern Angola. © BwalaMidia

The right to participate in decision-making also includes national and sub-national level legislative and policy discussions, including for example on tax policy and the financing of public services. Some states will take the position that the electoral process takes care of the duty to ensure participation. However, unfortunately, the majoritarian nature of electoral democracy can be very exclusionary - "winner takes all" can tend to also mean "loser gets nothing". Some aspects of fiscal and public policy may have a disproportionate impact on marginalized groups within society (for example, people with disabilities impacted by the provision of health services or the poorest paying a greater proportion of their income in taxation due to relatively high levels of consumption taxes). These dynamics will need to be considered by researchers wishing to assess whether the state has fully respected and facilitated the right of such groups to meaningfully participate in the process.

Consultations may need to be held at various stages of a proposed project, and when a project is significantly amended. As a starting point, states/companies must enter into planning with the understanding that the project not going ahead is one possible outcome. What is required, therefore, is that rights-holders and the state enter into discussions to explore in more detail the conditions under which the project might be accepted by both parties. Importantly, the process itself needs to be designed and set up with rights-holders' effective participation.

Researchers should be aware that states/companies may intentionally confuse informing with consulting. They may organize consultations whose sole purpose is to present pre-prepared information describing the benefits of the proposed initiative. No genuine interaction takes place, and the information provided may be inadequate.

Researchers may also need to look into dynamics between peoples/communities affected by a project or measure, or between affected communities and neighbouring communities that are not adversely affected but may benefit through access to jobs or other economic benefits. There may be dynamics of tension or disagreement, or fragile agreements, which could be adversely affected by the project or measure.

Climate change and other environmental degradation are seriously damaging the livelihoods of fisherfolk in the Fonseca Gulf area of Honduras, exacerbating poverty and inequalities. © Amnesty International

Any worsening of tensions could result in conflict, which is likely in turn to negatively impact on human rights, and the state would have an obligation to avoid this.

In parallel to the consultation, there may be targeted actions to intimidate the group of rights-holders as a whole, or specific members of the group (often official or informal leaders, human rights defenders, journalists etc.), by the state, companies, or third parties such as organised criminal groups. This may have the aim of discouraging opposition to the proposed measure. It can take the form of direct violence, threats, criminalization, or legal action such as defamation suits, designed to intimidate individuals and tie up community resources (known as Strategic Lawsuits against Public Participation or SLAPP suits).

It is important to determine whether the minimum conditions for a consultation process to take place are present. For example, in situations of conflict, rampant state violence and other forms of systematic human rights violations, this may not be the case. In such cases, states/companies should halt any attempts at consultation – and consequently, any projects which are the subject of those consultations – until the right conditions are re-established.

QUESTIONS FOR RESEARCHERS:

- What is the objective in carrying out the proposed measure?
- Was the process of consultation clear to all involved?
- Were rights-holders involved in developing the process of consultation?
- Where Indigenous Peoples are affected, was the process developed collaboratively with them, were their representative institutions engaged in the process? Was this engagement respectful?
- What is the timeline of engagement?
- Has the state accepted that the final decision on whether the project goes ahead will depend, in part, on feedback from rights-holders?
- Who represented the state / project proponent at consultations? How many were there?
- Was their appearance intimidating in any way? Were any of them carrying weapons? How were they dressed?
- Was their behaviour respectful, or threatening? How did they respond towards speakers who asked questions or voiced concerns?
- Were any direct or veiled threats made (during the consultation or at any other time, including through methods such as legal cases / SLAPP suits)?
- What information was provided, and how? (see list of elements in Section 5)
- Did the consultation go according to plan? If not, why not?
- If things went wrong, did the government/company/community leaders/anyone else try to do anything about it? What was that and did it work? Why/why not?
- What was the engagement of rights-holders with the consultation process?
- If the proposal impacts on Indigenous Peoples, did the state accept that FPIC is the required standard?
- How were marginalised people within the affected rights-holders engaged? Did they have the opportunity to meaningfully influence the process?
- Were the questions / concerns of the rights-holders answered?
- Are there dynamics between affected communities, or between affected communities and non-affected neighbouring communities, which the project might impact on?
- If so, has the state done everything possible to avoid possible tensions, or the risk of human rights violations?
- Have individuals or the group of rights-holders as a whole been subjected to any violence, threats, criminalization or other legal action?
- If so, do the rights-holders see a link between this and the consultation process?
- How has this affected their ability to effectively engage in the consultation?

6.1. WHO SHOULD MANAGE A CONSULTATION PROCESS

In all cases, the state has the final responsibility for guaranteeing the human rights of potentially affected rights-holders. However, responsibility for implementing a consultation process may be delegated to another body. This could be a state or an independent body established by a state such as a National Human Rights Institution, or in some cases a private actor such as a company that wishes to undertake a project. It should be noted that in the case of companies, there is a conflict of interest – the company has a financial interest in the project going ahead. While the state may also have an interest in ensuring that a project goes ahead, it is also the bearer of obligations under national and international law, including a duty to ensure the human rights of affected rights-holders, and is accountable for compliance with them. However, in the case of Indigenous Peoples, James Anaya, the former UN Special Rapporteur on Rights of Indigenous Peoples, argues that in accordance with their right to self-determination, it is their right to negotiate directly with the company if they so wish.[6] Where states delegate consultation processes, or where an Indigenous People chooses to engage with a private company, **the state retains ultimate responsibility for ensuring that rights are protected**. In the event of inadequate consultation, the state is expected to act to correct the process or to reject the proposed project.

We will therefore refer here to the party with whom rights-holders are dealing in consultations as the "project proponent".

Whichever body is leading the process, the state must ensure that it is adequately resourced. It should also be noted that there is potential for significant power imbalance in the negotiating process (see Section 6.2). An independent oversight mechanism with a clear mandate to assess human rights compliance may be appropriate, and in the event of dispute over the outcome of the process, the state must ensure rights-holders have access to redress.

QUESTIONS FOR RESEARCHERS:

- Who is managing the consultation process?
- Are the affected rights-holders satisfied with the arrangement?
- Are there any identifiable conflicts of interest, and if so how are they mitigated?
- Were affected rights-holders involved in the design of the process?

6.2. INEQUALITY OF BARGAINING POWER

Inequality of bargaining power is one of the most significant barriers to a human rights-compliant consultation process. This is particularly the case when processes are led by large, sometimes multinational companies with significant financial resources, but can also be the case with states, who can employ full-time legal and technical experts, and are able to engage significant resources, including human resources, for example in defending court cases brought by rights-holders.

6 Special Rapporteur on the Rights of Indigenous Peoples, Report on Extractive industries and indigenous peoples, 1 July 2013, UN Doc A/HRC/24/41, para. 61

Where the project proponent is a company, the state can find itself in the position of attempting to reconcile the interests of the company – which may be cast in terms of furthering the economic development of the country – and those of affected rights-holders. In such situations the company may be able to use its resources to gain access to decision-makers, obtain useful (possibly confidential) information, and influence decisions in its favour. In some situations, the state is also captured by corporate interests, or at least very amenable to them due to a close relationship. In these situations, the balance of power is very much in favour of the company.

One way to tackle inequality of bargaining power is to ensure rights-holders have the resources, where needed, to enable them to fully understand the technical aspects of the proposals being made, their rights under national and international law and the channels available to invoke them, and other protections, for example under the safeguard policies of involved project proponents and/or donors.

The project proponent should consult with the affected people regarding the need for **sufficient human, financial, technical, and legal resources** for effective participation in all phases of a consultation / consent process and provide them where needed. There is a conflict of interest when a project proponent provides funding for a process that it has an interest in. It is not desirable for the project proponent to pay lawyers/technical experts directly as confusion can arise as to whose interests they are working to support. Funds can be paid directly to the community who then commission the experts, after a reasonable level of funding has been agreed, or an independent body may be established to monitor the process, determine appropriate fees, and administer payment. The state must maintain overall oversight, particularly to ensure funding is adequate.

The project proponent can also suffer from a knowledge shortfall - when they do not understand the impact the proposal will have on affected rights-holders. In such cases it is essential that rights-holders have the resources to participate on their own terms in order to present their perspective and the issues at stake for them, including the impacts on culture, society and traditional livelihoods.

QUESTIONS FOR RESEARCHERS:

- Do rights-holders and the project proponent have equal access to necessary information?
- Do they have equal access to political processes and decision-makers?
- Have rights-holders had access to independent technical and legal advice?
- If so, how has the provision of advice been funded? Does the funding mechanism safeguard the independence of the advisers?
- Are rights-holders happy with the quality of the advice?
- Is availability of advice ongoing, including in cases where new developments trigger the need for a new phase of consultations?
- Is all relevant information on process and impacts being shared with affected rights-holders (see also Section 5)?
- In the case of initiatives of private companies, is there evidence that the company is exercising undue influence over decision-makers in government?
- Are rights-holders able to devote human resources to take part in negotiations effectively and collect information?

A shrimp factory destroyed by the rising water levels at Cedeño Beach, Honduras. October 2022. © David Estrada / Amnesty International

6.3. INCORPORATING CONCERNS INTO THE DECISION-MAKING PROCESS

In effective consultation processes, all affected people must have the opportunity to raise their concerns, based on fair and clear information, and these concerns must be given due consideration as part of a decision-making process. It is not sufficient for the project proponent to claim that effective participation has taken place, if during that process the views of the affected groups or their alternative suggestions have not been adequately considered. The project proponent should be able to clearly explain why they were not implemented.

The communication of rights-holders' concerns and proposed amendments, and the response of the project proponent, may take place in meetings or through written communications. In either case this should be documented (meeting minutes or recordings). Whether or not researchers are able to attend meetings, they should try to gain access to such records. If these do not exist, this is a cause for concern in itself, and information will need to be obtained by interviewing a range of participants.

Depending on the potential impact on rights enjoyment of the proposed measures, the process should be iterative, allowing for affected rights-holders to analyse the information provided, ask questions, consider the response of the project proponent, make counter-proposals or objections, analyse the response to these, and respond, possibly making amended or alternative suggestions. This process may need to be repeated until both parties are satisfied that all alternatives have been explored and all concerns addressed to the extent possible.

In all cases, the intent of good faith consultation is to arrive at a mutually acceptable agreement; depending on the potential severity of impacts, the proposed activity may need to be cancelled if there is no consent from rights-holders. In the case of Indigenous Peoples, there are specific provisions around free, prior and informed consent, which are explained further in Section 7.

QUESTIONS FOR RESEARCHERS:

- What space was provided for the views of rights-holders to be heard? In what form?
- Was it sufficient? What time was allocated to it?
- What objections / suggestions / modifications were presented by rights-holders?
- Were these taken on board by the project proponent?
- If not, what justification was given (if any?)
- What was the response of rights-holders to this?
- Was technical support available where necessary to assess the project proponent's response?
- Was there space provided for a further round of input from rights-holders?
- If not, what was the justification?
- Was this exchange followed by all rights-holders or only leadership? Were the issues discussed at public meetings, or fed back to rights-holders in another way?
- Are there sections among rights-holders who are affected more/differently to others? Did they participate? What did they say? Were these concerns acted on by the decision-maker?
- How do people feel about the process? Do they feel they have been heard?
- If not, do they have a means of challenging the process?

6.4. REMEDIES AND BENEFIT SHARING

The right to an effective remedy is a human right found in all major international and regional human rights treaties as well as many national constitutions. When a proposed measure involves exploitation of natural resources, there will be a financial benefit – often to the state and to the project proponent concerned. As this process will almost inevitably impact on rights-holders' enjoyment of human rights, and because under international standards they may have rights over the resources in question, it is normal for them to receive a share of benefits. Indigenous Peoples, for example, have a right to the lands they have traditionally occupied, including natural resources (Art. 26 UNDRIP); their rights to resources exploited on their traditional lands derive from this right, and also from their right to self-determination (Art. 3 UNDRIP), and their right to "determine and develop priorities and strategies for the development or use of their lands or territories and other resources" (Art. 32.1 UNDRIP). Rights-holders may be happy to consent to a proposal if they are confident that there will be a benefit to them, for example improved services (assuming potential harms are mitigated).

In some cases, funds are agreed specifically in order to compensate for environmental damage, and a mechanism is set up to fund clean-up operations.

In the case of evictions, the state must ensure that no one is left homeless or at risk of other human rights violations. Where this is the case, the state must provide "fair and just compensation"[7] in the form of adequate alternative accommodation, if the affected people cannot otherwise afford it, along with the required documentation confirming ownership / tenancy. This means not only that the housing itself should be of comparative size, quality and condition, but that it should be comparable in terms of access to services and place of work.[8]

7 UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Report: Basic Principles and Guidelines on Development-based Evictions and Displacement, 5 February 2007, UN Doc A/HRC/4/18, para 60.

8 See CESCR, General comment 4: The right to adequate housing (art. 11 (1)), 13 December 2014, for an elaboration of the required standard of housing.

For this reason, alternative accommodation must be part of the consultation process, to allow affected persons to raise objections, and propose different options. Compensation should also be provided for loss of wages (when moving house) and possessions lost as a result of the eviction. Remedies should reflect the fact that different sectors among rights-holders (for example women and girls, older persons, members of communities discriminated on the basis of work and descent, people with disabilities) may experience impacts differentially and disproportionately.

Resources: Amnesty International's Know Your Rights – Stop Forced Evictions leaflet.

Benefits can be in kind (construction of needed infrastructure – schools, health centres etc.) or financial. In all cases, but particularly in the latter case, it will be necessary to agree a transparent mechanism for disbursing of funds, and whether it will be collective (for example to a fund which can be used based on collective decision-making) or individual. Project proponents may argue – wrongly - that the negative impacts of their projects are cancelled out by the benefits they bring, even if there is no connection (e.g., the building of a school, to compensate for contamination of water).

In the case of Indigenous Peoples, if the community will lose land or access to land (whether they have consented to it or not), the provision of financial compensation alone will most likely undermine the right of the people concerned to their collective culture and identity, as the process of using the funds to buy alternative plots (if that is what it is used for) will disperse community members, unless they are able to use the funds to buy one piece of land for the whole community (unlikely in the case of large communities). In some cases, communities may already be dispersed and financial compensation could allow them to reconstitute their territories, or move to more desirable land. In all cases, in accordance with UNDRIP, there should be an offer of compensation in the form of comparable lands, and the form of compensation is to be determined with the FPIC of the affected peoples.

Researchers may also explore how remedies/ benefits would also benefit generations to come. While potentially more of an internal question for rights-holders, it is of course increasingly relevant in view of the climate crisis.

The residents of the villages of Punta Ratón, Cedeño, Guapinol and Pueblo Nuevo in Marcovia province, Choluteca department rely on subsistence fishing as their main source of income and food, which is highly vulnerable to climate shocks and other environmental factors. © David Estrada / Amnesty International

In the case of Indigenous Peoples, if the community will lose land or access to land (whether they have consented to it or not), the provision of financial compensation alone will most likely undermine the right of the people concerned to their collective culture and identity, as the process of using the funds to buy alternative plots (if that is what it is used for) will disperse community members, unless they are able to use the funds to buy one piece of land for the whole community (unlikely in the case of large communities).

QUESTIONS FOR RESEARCHERS:

- Will the affected people suffer any impairment of human rights as a result of the proposed measures?
- If so, what remedies are being offered? (for example, alternative housing in the case of evictions)
- Are these remedies of sufficient value to compensate the human rights impact suffered?
- What remedies do rights-holders want? What will amount to just satisfaction for them?
- Do the remedies compensate for any gendered impacts, or any other differential impacts on different identity groups within rights-holders?
- Will all rights-holders benefit from the proposed measures or will some sections among them be excluded?
- Are there any benefits of the proposed measures that will be shared with rights-holders?
- If so how was this benefit sharing mechanism decided? Is the level of benefits allocated to rights-holders in compliance with human rights standards and fairly distributed?
- How will the benefits be channelled to rights-holders?
- Will rights-holders access benefits collectively or individually?
- If financial compensation for land is offered to an Indigenous People, did they provide their FPIC for this? How has their right to collective culture, right to self-determination and identity been taken into account?
- How will the provision of benefits be monitored? Will rights-holders be involved in this?
- Is there a mechanism to address grievances that is transparent, effective and accessible?
- Is safety and security guaranteed to rights-holders who submit grievances?
- Has the state / project proponent created a public narrative around benefits / remedies that have been proposed? Does this narrative reflect reality, and does it impact on the ability of rights-holders to engage in consultations?
- How will remedies/benefits also benefit generations to come?

The steps that will need to be taken to avoid human rights violations taking place as a result of the proposed action should be documented in the agreement.

6.5. DOCUMENTING THE AGREEMENT

The result of the consultation process should be an agreement between project proponent and rights-holders, in a language and format that is accessible to all and should be signed off by them. The precise contents will depend on the nature of the proposed activity, but at a minimum should contain:

- A specific description of the agreement between the project proponent and rights-holders
- Details of what activities will take place, when, with full relevant details (for example in the case of an infrastructure / development project on community land: vehicles / machinery to be used, numbers of external workers involved, where they will be housed, how long they will be in the community, will they be accompanied by their families)
- Infrastructure to be built - buildings including temporary housing, roads/airstrips/rail lines
- Requirements regarding access routes (roads/rivers)
- Benefit sharing mechanism including jobs to be made available to rights-holders
- Grievance / dispute resolution mechanism
- What changes will trigger a new consent seeking process
- Under what circumstances might consent be withdrawn
- Arrangements for ongoing technical / legal advice for rights-holders
- How the agreement will be monitored and enforced, and the role of rights-holders in this
- How will the project be closed, including removal of temporary infrastructure and waste, and cleaning up.

The steps that will need to be taken to avoid human rights violations taking place as a result of the proposed action should be documented in the agreement. However, the fact that a given issue was not addressed in the agreement, does not give the project proponent freedom to commit violations (for example carrying out an eviction at night, with no government officials present, with use of unnecessary or unreasonable force, etc.).

QUESTIONS FOR RESEARCHERS:

- If and when agreement is reached, how is this documented?
- How were affected rights-holders involved in this?
- If they were dissatisfied with how the agreement was documented, were they able to voice this and were their concerns taken into account?
- Does the agreement include all necessary elements (see above)?
- Has the document been made available to rights-holders, in an accessible format and language?
- Can this be shared with researchers?

Indigenous Sengwer woman speaking about forced evictions in Embobut forest, Kenya. © Amnesty International

6.6. MONITORING AND DISPUTE RESOLUTION

In order to ensure full and effective implementation of the agreement, and to avoid disagreements over what constitutes effective implementation, an independent process to monitor and evaluate the formulation and implementation of proposed measures may be needed. This should provide for the effective participation of affected rights-holders, a full evaluation of the process upon closure, and should be accessible, transparent and effective.

The same, or a separate mechanism, can also deal with complaints and grievances relating to the actions of the project proponent and allegations of non-compliance with the agreement.

It is important that these processes be objective, and independent; and that it is clear who will represent rights-holders and the project proponent in the monitoring and dispute resolution process. If an independent body is set up to monitor the agreement, the funding of the body must be transparent and not allow for coercion of the body's staff. With rights-holders' consent, this or another relevant mechanism could also be available for the resolution of internal representation issues within the affected community, and for disputes with neighbouring communities.

QUESTIONS FOR RESEARCHERS:

- How will the implementation of the agreement be monitored?
- If a monitoring mechanism exists, is it independent, impartial and transparent?
- Are rights-holders represented on the monitoring mechanism?
- How are they represented and by whom?
- Are there guarantees for the safety and security of rights-holders who participate?
- What happens when the monitoring mechanism identifies breaches of the agreement? What powers does it have to take action?
- Is there a dispute resolution mechanism, and is it impartial, transparent and accessible?

7. FREE, PRIOR AND INFORMED CONSENT

[A reminder that Informing and Consultation are essential parts of an FPIC process – therefore this section must be read in conjunction with sections 5 and 6]

Indigenous Peoples' rights regarding free, prior and informed consent (FPIC) were recognised in response to a demand from the global movement of Indigenous Peoples. They have been formalised in a series of standards, notably CERD's General Recommendation no. 23 (1997), and culminating in the UN Declaration (UNDRIP). The unanimously adopted outcome document of the UN World Conference on Indigenous Peoples (2014) reaffirmed member states' support for UNDRIP, and specifically calls for implementation of FPIC. Indigenous Peoples participated in the drafting and supported the adoption of UNDRIP, as clearly expressed in the Indigenous Peoples and Nations' Alta Outcome Document of 2013.[9]

9 Alta Outcome Document, Global Indigenous Preparatory Conference for the United Nations High Level Plenary Meeting of the General Assembly to be known as the World Conference on Indigenous Peoples, 10 – 12 June 2013.

Photo credit: In the Canadian province of British Columbia on unceded land, the Indigenous Wet'suwet'en Nation is protecting its territory and sacred sites against the construction of a gas pipeline. © Amnesty International

As stated by the UN Expert Mechanism on the Rights of Indigenous Peoples:

Free, prior and informed consent is a human rights norm grounded in the fundamental rights to self-determination and to be free from racial discrimination […] Consistent with the right to self-determination, indigenous peoples have always had the inherent power to make binding agreements between themselves and other polities. The contemporary concept and practice of mutually negotiated, consensual agreement among indigenous peoples and State governments is deeply grounded in the historic treaty-making process that characterized indigenous-state relations for several hundred years in many regions of the world […].[10]

FPIC applies in all cases where the rights of an Indigenous People are impacted by a particular law, policy or development project, or **when decisions are taken which overlap with the jurisdiction of Indigenous Peoples as exercised as part of their right to self-government.** This jurisdiction may or may not be recognised in domestic law. In fact, the failure of the state to recognise the continued jurisdiction of Indigenous Peoples under their own laws and traditions is likely to be a violation of their rights to self-determination and autonomy. Researchers should take particular care to know what both international law and the constitution/national laws say about self-government rights; in case of contradiction, the higher standard prevails.

Useful resources:

Indigenous Rights and Resource Governance Research Group: curated collection of resources on FPIC (fpic.info/en/resources/)

Asia Indigenous Peoples Pact, Training Manual for Indigenous Peoples on Free, Prior and Informed Consent (aippnet.org/wp-content/uploads/2020/02/10.-FPIC_Manual-Small.pdf)

Series of reports by the former UN Special Rapporteur on Indigenous Peoples, James Anaya, on the right to participation, duty to consult, corporate responsibility, and extractive industries (unsr.jamesanaya.org/?cat=12)

UN Expert Mechanism on the Rights of Indigenous Peoples: 'Study on free, prior and informed consent' (ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/StudyFPIC.aspx)

QUESTIONS FOR RESEARCHERS:

- What impact is the proposed measure likely to have on the affected people's rights?
- Will it harm their ability to maintain their culture and integrity as a people?
- Will the proposed mitigation measures provide an acceptable safeguard to prevent this impact on the enjoyment of rights?
- What do UNDRIP, ILO 169 and national law say about the people's FPIC rights in this case?
- Do bilateral donors or International Financial Institutions involved in the project have specific safeguard policies on FPIC and if so what do they require? Have they been implemented? Are the affected rights-holders satisfied with the implementation?
- Does the state have a ministry, department, focal point, ombudsperson or other agency responsible for Indigenous Peoples' rights? If so, has the project proponent engaged with this agency to ensure their practice conforms to relevant standards or guidance?

10 Free, prior and informed consent: a human rights-based Approach, 10 August 2018, UN Doc A/HRC/39/62, Paras 3-4.

7.1. THE OBLIGATION TO OBTAIN CONSENT

There has been much analysis of the extent of the obligation **not to proceed with a measure without the FPIC** of an Indigenous People, or whether the state in some cases satisfies its FPIC duties by engaging in consultations in good faith, working to obtain consent, developing a robust consultation process, and doing everything to mitigate harms and address the community's concerns – even if that means that in the end, it proceeds without the people's consent. The wording of the UN Declaration, analysis by the former UN Special Rapporteur on Indigenous Peoples, James Anaya, and international case-law indicate that in a given case, the starting point for this analysis is **the potential impact / harm to the rights of Indigenous Peoples.** Researchers should apply this harm/impact framework, also referred to as a "sliding-scale" approach – **the more significant the impact on human rights, the more the duty to obtain consent hardens.**[11] Each case will need to be looked at on its merits, and this section aims to sketch out certain general principles.

Anaya starts by affirming that, according to UNDRIP, Articles 10 and 29 identify *"two situations in which it is necessary to obtain the consent of the indigenous peoples concerned prior to moving forward with the proposed initiative"* (these are: forcible removal from their lands/territories; and storage or disposal of hazardous materials on their lands/territories). But he argues that this **obligation to obtain consent also applies to** *"situations involving the establishment of natural resource extraction projects within indigenous peoples' lands and other situations in which projects stand to have a* ***significant social or cultural impact on the lives of the indigenous peoples concerned."***[12] In the case of natural resource extraction projects, he argues, it is hard to imagine a situation when the level of impact would not trigger a requirement of consent.[13] This reflects the principle affirmed at the Inter-American Court of Human Rights that FPIC must be obtained for development or investment plans that "may have a profound impact" within indigenous territories.[14] In its 2008 interpretation judgment in Saramaka, the Court elaborated on the applicable standard, stating that:

> ***" … depending on the level of impact of the proposed activity, the state may additionally be required to obtain consent from the Saramaka people. The tribunal has emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people's lands and natural resources, the state has a duty not only to consult with the Saramakas, but also to obtain their free, prior and informed consent in accordance with their customs and traditions."***[15]

It is clear that if there is significant potential for harm to the rights – for example to their cultural integrity as a people – the state should not proceed as it would be violating, in this case, Articles 7 (right to life), 8 (right not to be subjected to forced assimilation), 11 (right to practice their culture, and to redress for

11 UN Expert Mechanism on the Rights of Indigenous Peoples: Study on free, prior and informed consent, 10 August 2018, UN Doc A/HRC/39/62, paras 35-40; Mauro Barelli, 'Free, Prior and Informed Consent in the United Nations Declaration on the Rights of Indigenous Peoples - Articles 10, 19, 29(2) and 32(2)', in Jessie Hohmann and Marc Weller (editors), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary,* 2018, p. 258.

12 UN Special Rapporteur on Rights of Indigenous Peoples, Report to the General Assembly on the Rights of indigenous peoples, 10 August 2011, UN Doc A/66/288, para. 84.

13 UN Special Rapporteur on the Rights of Indigenous Peoples, Report on Extractive industries and indigenous peoples, 1 July 2013, UN Doc A/HRC/24/41, paras 29-31

14 Inter-American Court of Human Rights, Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs), Series C No. 172, adopted on 28 November 2007, corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf, paras 134 & 137

15 Inter-American Court of Human Rights, *Saramaka People v. Suriname (interpretation of the judgment on preliminary objections, merits, reparations, and costs),* 12 August 2008, Series C No.185, para. 17.

stolen cultural property), 31 (right to maintain, control, protect and develop all aspects of their culture). Then why is FPIC needed? Because a) FPIC rights are not just about process – a means to protecting other rights – but are also a substantive right – an expression of Indigenous Peoples' right to self-determination; b) one of the most important purposes of FPIC is to identify possible harms – and mitigation measures - that may not be clear to the state/ project proponent (NB – it is not just states who may not understand the impacts a project can have on an Indigenous People – researchers who are not from the affected people may also fail to see this).

An illustration of this last point is as follows. Many states have proposed projects to formally recognise land title in law in areas where communities – often Indigenous Peoples – have occupied land on the basis of customary title. Such customary land ownership is usually collective – the land is considered to be owned by the community, rather than individuals. However, if the state only recognises individual title, it may seek to convert this collective customary title into individual legally formalised title. A fact that may not be identified by the state is the significant danger that the community's cultural integrity will eventually be destroyed by such a process, especially where high levels of poverty exist; individuals who find themselves in desperate need may leave the community, selling their land to people from outside the community, allowing the piecemeal break-up of the community's land. Good faith consultations with the objective of obtaining consent would reveal this risk.

"Significant impact" on Indigenous Peoples requires consideration of the nature, scale, duration, and the long-term impact of the action. Such actions may include, not only the more obvious ones e.g. relocation, damage to community lands, or harm to the community's cultural integrity, but also actions impacting on freedom of speech and assembly, administration of justice, violence against women and other forms of gender-based

Severe drought and food insecurity in southern Angola in 2021. © Amnesty International

discrimination. In the Saramaka case, the Inter-American Court noted that environmental and social impact assessments need to address the "cumulative impact of existing and proposed projects. This allows for a more accurate assessment on whether the individual and cumulative effects of existing and future activities could jeopardize the survival of the indigenous or tribal people".[16] A consideration of the historical context, especially the nature and severity of past harms and the extent to which adequate restitution has been provided, is also needed, as this helps to assess vulnerability to harm and the cumulative impact that new initiatives – which might on the face of it appear to be relatively insignificant – could have.

Other articles of UNDRIP shed further light on the framework within which FPIC rights must be interpreted. In line with other international standards, Art. 46.2 places limits on what restrictions on human rights are permissible:

16 Inter-American Court of Human Rights, *Saramaka People v. Suriname (interpretation of the judgment on preliminary objections, merits, reparations, and costs)*, 12 August 2008, Series C No.185, para. 41. See also UN Expert Mechanism on the Rights of Indigenous Peoples, Advice No 2: Indigenous peoples and the right to participate in decision making, 2011, Para. 22.

> ***In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.***

Art. 46.3 of UNDRIP requires that the Declaration must be interpreted "in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith". The state must ensure that it acts within this framework, for example, if it proposes to take any action in the absence of an Indigenous People's consent. Art. 46 also places limits on the actions of the Indigenous People when exercising FPIC; as is the case with any entity exercising decision-making powers, these cannot be in violation of human rights, whether with regard to substance or process.

Note: it is extremely important that researchers **do not use the term 'veto'**, when situations do amount to an obligation not to proceed without consent. The term has been used by states to try to undermine the legitimacy of the FPIC concept.[17] It implies an arbitrary and one-way process that does not in any way do justice to the collaborative, iterative nature of consultations foreseen by UNDRIP.

In summary, the Declaration, intergovernmental case-law and the analysis of UN special procedures, read as a whole, support the "sliding scale" approach to the obligation not to proceed with a measure without the consent of the affected people (note that the broader obligation to **consult** in order to obtain FPIC is **not on a sliding scale** and applies in all cases described in Section 7.0). Researchers will need to examine each case on its merits. Note that this is not unusual in human rights research – consider the kind of analysis needed to determine whether a restriction of the right to freedom of expression is necessary "[f]or respect of the rights or reputations of others" or "[f]or the protection of national security or of public order (ordre public), or of public health or morals" (ICCPR, Art. 19.3).

7.2. ESSENTIAL ELEMENTS OF A FREE, PRIOR AND INFORMED CONSENT PROCESS

For an FPIC process to be compliant with international standards, it must be:

7.2.1 FREE

Consent must be given freely without manipulation, coercion, threat, fear of reprisal, corruption, or inequality of bargaining power (see Section 6.2) – for example, where security forces are used by the state to intimidate and threaten Indigenous Peoples into granting approval to projects. The mere presence of security forces during scoping or consultations can be unduly threatening. The state / project proponent must refrain from bribing or otherwise co-opting community leaders, or any explicit or implicit threat that state services will be withheld if consent is not given.

17 The Arctic Center, "Canada's Acceptance of the United Nations Declaration on the Rights of Indigenous Peoples: Implications for the Inuit", 9 August 2016, thearcticinstitute.org/canadas-acceptance-declaration-rights-indigenous-peoples/

QUESTIONS FOR RESEARCHERS:

- Were any open or veiled threats made, in consultation meetings, in other fora, or privately?
- Were any suggestions made that state services (social services, health, education etc.) would be withdrawn if consent was not given?
- Were any inducements offered to individuals, for example community leaders?
- Was there any verbal or physical intimidation of community members?
- Were any state or private security agents present in the community during consultations? How many? Where they armed?
- Do rights-holders believe the process was fair?

7.2.2 PRIOR

At a very early stage of planning, the project proponent should determine whether Indigenous Peoples will be affected by the project and establish a process of consultation with them. At this point, it will be necessary to assess whether a one-off consent or a series of consents will be needed, which will depend on the nature and potential impact of the proposed activities. In any case, if the proposed project proceeds, unforeseen developments may require renewal of consent. Consultations should allow for the potential for harm to be addressed while there is still opportunity to make all the necessary accommodations, and in such a way that Indigenous Peoples' own goals or plans are not precluded.

How much advance notice is needed will also depend on the nature and complexity of the proposed measures – sufficient time is needed to understand and digest the technical and legal issues, including the time needed to arrange for legal and technical advice. Indigenous Peoples' internal deliberation processes will differ from community to community. But in many cases, if representatives are delegated to engage in talks, they will not be mandated to take decisions in the name of the community. They will be expected to bring proposals back for deliberation in community meetings. In some cases, project proponents will be negotiating in open meetings with the community as a whole. There may be a further process whereby community members leave the meeting and consider the information further. Sufficient time will need to be allowed for such processes, including an iterative process of requesting additional information, seeking clarifications, and making counter-proposals. The responses to these will then be fed back into the community's deliberations.[18]

In some cases, governments grant licences to project proponents to carry out a specific project, before any FPIC process has begun. This is likely to constitute a failure to respect the 'prior' element of FPIC - consultation/ consent should be sought before major decisions such as the awarding of a permit, particularly in the case of high-impact projects such as resource extraction. Researchers should also note that this may be evidence that the state is not willing to accept that cancelling the project is an option – and seek to collect more evidence on this aspect. Researchers should also investigate how the community sees the sequencing of such steps as the granting of licences, and how it affects their ability to trust the consultation process.

18 Forest Peoples Programme, "Free, Prior and Informed Consent and the Roundtable on Sustainable Palm Oil", 2008, forestpeoples.org/en/topics/palm-oil-rspo/publication/2009/free-prior-and-informed-consent-and-roundtable-sustainable-pal, p. 21

On 7 April 2017, the informal Romani settlement of Gianturco was forcibly evicted by local authorities in Naples, southern Italy.
© Claudio Menna / Amnesty International

QUESTIONS FOR RESEARCHERS:

- How far in advance of taking action did the project proponent consult with rights-holders/seek their consent?
- Was it enough time, taking into consideration the time needed for the people's representative institutions to deliberate, and the complexity of the proposed measures?
- Have any measures been taken before the beginning or end of consultations? If so, what impact has that had on what faith the people has in the process?

7.2.3 INFORMED

For consent to be informed there must be full, clear, objective disclosure of all the material aspects of the project including scale of activities, time duration, potential adverse (or beneficial) effects on human rights and the environment, and mechanisms for benefit sharing, monitoring, dispute resolution and grievances. Of major importance for informed decision-making in the case of Indigenous Peoples and FPIC are **participatory social, environmental and human rights impact assessments.** It is essential that such assessments be carried out with effective participation of the affected Indigenous Peoples, in a manner agreed in consultation with the community's own designated representative institutions.

For a checklist of information that may be required, questions for researchers, and more on impact assessments, see Section 5.

Resource: for an example of research that comprehensively investigates an FPIC process, see Amnesty International, Don't Mine Us out of Existence: Bauxite mine and refinery devastate lives in India, February 2010.

7.3. HOW TO ASSESS WHETHER CONSENT HAS BEEN REACHED

Firstly, researchers will need to assess whether the project proponent is engaging with the community's representative institution as determined by the Indigenous People; and whether all members of a community have been included.

On the first point, when Indigenous Peoples give their consent, it should be according to their internal decision-making processes. It will be important to assess whether the project proponent has engaged fully with the self-designated institutions of the Indigenous People – which may not be the channel officially recognised by the state – and also whether there are any sectors of the community potentially excluded from decision-making processes (for more on this, see Section 3, but also, on the risks of non-Indigenous researchers assessing such questions, Section 1.3).

Some policies on Indigenous Peoples' FPIC state that consent does not need to be unanimous. The International Finance Corporation (a part of the World Bank Group which lends to private companies) states for example that "FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree."[19] This is overly simplistic. It will depend on who the people who disagree are, and why they disagree. If, for example, all people who depend on land for their livelihoods disagree with a community's decision regarding an initiative that will remove or harm their land, even if they are a minority, their concern must be taken seriously. The same is true if all or most women in a community are opposed to a decision.

Researchers will need to ascertain that consent has been expressed explicitly by the community, and not just reported by the state or project proponent.

QUESTIONS FOR RESEARCHERS:

- Has the project proponent proceeded with the clear objective of obtaining consent? Has it been clear from the beginning that not proceeding with the project was an option?
- Has the project proponent engaged with the community's representative institutions?
- Has the project proponent effectively included all sections of the community?
- Do the people's representative institutions allow spaces for voices from all groups within the community?
- If not, how are the project proponent and the representative institutions dealing with this? Are they working to bring in those voices?
- Are there divisions within the community, or with neighbouring communities, regarding the proposed measures?
- If so, how have the community and the project proponent dealt with these differences?
- Has the community clearly expressed its consent, and has this been clearly documented and agreed upon by all parties?
- Was a fair balance struck between the needs of the community, and the business/development/ environmental needs cited as a justification for the project?

19 International Finance Corporation, https://www.ifc.org/en/insights-reports/2012/ifc-performance-standard-7, Performance Standard 7, 2012, para 12.

7.4. WHAT HAPPENS IF THERE IS NO CONSENT?

There are five possible situations which could result in failure to achieve consent:

1. The people rejects the proposal after consulting
2. The people rejects a proposal before consultations start
3. There is no consensus in the people after consulting
4. The people gives its consent, then later withdraws it
5. The people consents to a proposal but subject to conditions that the project proponent rejects.

The result in terms of the state's obligations is reasonably similar in each case. As the former UN Special Rapporteur James Anaya puts it:

> ***'As a basic principle, it is necessary to be aware that, with or without the consent of the Indigenous party, the state has the obligation under international law to respect and protect the rights of Indigenous Peoples in accordance with the established international standards'.***[20]

Anaya notes that in most cases where consent is sought, the measure proposed involves a restriction on the enjoyment of human rights by the community – that is why consent is being sought. If the project proponent goes ahead with a measure against community opposition, it will most likely be restricting the community's rights in some way (see remarks on Art. 46 of UNDRIP in Section 7.1). Therefore Anaya notes that:

> ***when there is no consent, in order to proceed with the proposed measure, the state would need to demonstrate that the restrictions that the measure places on rights are necessary and proportionate in relation to a valid objective of the state within the framework of human rights.***[21]

Many states will assert that the general economic development of the country is just such a valid objective (and therefore that, for example, a mine on an Indigenous People's territory is justified). However, Anaya notes that, where projects involve such a serious violation of the rights of the Indigenous People concerned, e.g. forced relocation from their land, 'this usually makes it difficult in these situations to demonstrate that need and proportionality exist, without the consent of the Indigenous party, even assuming that there is a valid objective of the state.'[22]

Indigenous Peoples have the right to challenge, reject or withdraw from a process in which their consent has been inappropriately acquired – for example under duress, or on the basis of misrepresentations; in such cases in fact, consent cannot be said to exist in the first place, because of the fraudulent circumstances under which it was given, violating both the 'free' or the 'informed' criteria of FPIC. Otherwise, once given, consent should not be arbitrarily withdrawn. But when is it reasonable for Indigenous Peoples to withdraw consent? This may be conceivable for example, if, after the project has begun, the project has impacts on the lands and resources of the community that were not foreseen during consultations, or if workers associated with the project are involved in significant criminal, offensive or

20 J. Anaya, http://unsr.jamesanaya.org/?p=802, Presentation at the event, "*El rol de los Ombusdman en América Latina: El derecho a la consulta previa a los pueblos indígenas*", Lima, Peru, 2013 (translation from Spanish by Amnesty International)
21 El deber estatal de consulta a los pueblos indígenas dentro del Derecho Internacional (previously cited)
22 El deber estatal de consulta a los pueblos indígenas dentro del Derecho Internacional (previously cited)

culturally inappropriate behaviour. If the project proponent withheld information related to these new concerns, such developments could effectively invalidate the earlier decision, given that it could no longer be said that consent was 'informed'. Modalities for dealing with new developments of this type should be part of the consultations between the project proponent and the community and clearly outlined in the agreement. Issues concerning withdrawal of consent can also be referred to a dispute resolution process, if one exists.

In a situation where a community refuses to engage in consultations, Anaya notes that it can be then considered that the community has waived its right to be consulted. It has not, however, waived its right to withhold its consent. In this case the community is refusing to give its consent, in the same way as if it had entered into consultations and had then withheld its consent. Usually in such cases, the people will have held its own internal deliberation on the measures proposed and will have decided to reject them.[23]

Finally, as noted in Section 3, an Indigenous People's representative institutions may be significantly disrupted by state interference, previous (and sometimes repeated) displacement, humanitarian disaster or violent conflict, meaning that no meaningful FPIC process is possible. This can be challenging to research because researchers' main source of authority should be the people's representative institution itself. It may be possible to build up a picture of the situation from a diverse range of interviews across the community. Here again, researchers who are not from the community itself, should be aware of their positionality, and the potentially problematic dynamics that can arise, as described in Section 1.3.

Where the representative institutions are not operative, the state should not proceed with a project; if it does, it may be responsible for violating the people's right to self-determination, and/or other human rights violations directly caused by the project.

QUESTIONS FOR RESEARCHERS:

- Are the people's representative institutions sufficiently active and functional to enable an FPIC process to take place? If not why not?
- Has the community withheld consent, and if so, what are the reasons?
- Have those reasons been communicated to the project proponent, and if so, what was the response?
- Have the reasons been noted in the consultation documentation?
- If the project proponent has proceeded or intends to proceed without the community's consent, did it provide reasons? Are its actions in compliance with human rights?
- Does the project involve a limitation of the human rights of the community or definable sectors within the community?
- Does the project contribute to a valid state interest?
- Is the resulting limitation on human rights "non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society"?[24]

23 El deber estatal de consulta a los pueblos indígenas dentro del Derecho Internacional (previously cited).
24 UN Declaration on the Rights of Indigenous Peoples, Art. 46.2.

ANNEX 1
STANDARDS REGARDING INFORMATION

The main standard governing the right to information is Article 19.2 of the International Covenant on Civil and Political Rights: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The Human Rights Committee, in its General Comment on this Article, has laid out further how this right applies to information "of public interest":

To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information. States parties should also enact the necessary procedures, whereby one may gain access to information, such as by means of freedom of information legislation […] Authorities should provide reasons for any refusal to provide access to information. Arrangements should be put in place for appeals from refusals to provide access to information as well as in cases of failure to respond to requests.[25]

25 UN Human Rights Committee (HRC), General Comment 34: Freedoms of opinion and expression (Art. 19), 12 September 2011, UN Doc CCPR/C/GC/34, para. 19.

Photo credit: In the Canadian province of British Columbia on unceded land, the Indigenous Wet'suwet'en Nation is protecting its territory and sacred sites against the construction of a gas pipeline. © Amnesty International

With regard to ethnic, religious and linguistic minorities, the Committee states that: "Under article 27, a State party's decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities".[26]

General comments of human rights treaty monitoring bodies lay out that there is an obligation on the state to provide information when the state is proposing actions that will impact on human rights. For example, the Committee that oversees the International Covenant on Economic, Social and Cultural Rights has stated that, when the state is proposing to carry out evictions, it must provide, inter alia: "[I]nformation on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected".[27]

Concerning the right to water, the Committee states that: "Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties".[28]

At the regional level, the UN has developed the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean ("Escazú Agreement"), which provides that:

1. Each Party shall ensure the public's right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure.
2. The exercise of the right of access to environmental information includes:
   (a) requesting and receiving information from competent authorities without mentioning any special interest or explaining the reasons for the request;
   (b) being informed promptly whether the requested information is in possession or not of the competent authority receiving the request; and
   (c) being informed of the right to challenge and appeal when information is not delivered, and of the requirements for exercising this right. [29]

The agreement also requires states, among other things, to ensure that Indigenous Peoples and groups "in vulnerable situations" are guaranteed necessary support in accessing information,[30] and to establish "institutions with autonomy and independence to promote transparency in access to environmental information". [31]

26 HRC, General Comment 34 (previously cited), para. 18.
27 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 7: The right to adequate housing (Art. 11 (1)), para. 15
28 CESCR, General Comment 15: The right to water (Arts. 11 and 12), 20 January 2003, E/C.12/2002/11, para. 48.
29 cepal.org/en/escazuagreement, Art. 5(1) and (2).
30 Art. 5(4).
31 Art. 5(18).

ANNEX 2
STANDARDS REGARDING EFFECTIVE PARTICIPATION

Standards relating to participation in decision-making can be broken down as follows:

- standards requiring that all people be consulted on decisions affecting them
- standards requiring that people with specific characteristics – such as persons belonging to minorities, people with disabilities, peasants and other rural land users, and Indigenous Peoples – are able to participate in decisions that directly affect them.

With regard to the right to participate in the conduct of public affairs, the **Universal Declaration on Human Rights** (Universal Declaration) specifies in Article 21: "(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country."

These principles were further codified in Article 25 of the I**nternational Covenant on Civil and Political Rights** (ICCPR), which establishes the right and the opportunity of citizens to take part in the conduct of public affairs without discrimination on any ground.

Photo credit: High Level Mission Salinas Grandes, Jujuy, Argentina, 2018. © Demian Marchi / Amnesty International

According to the UN Human Rights Committee, which monitors the implementation of the covenant, the conduct of public affairs:

> ***… is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels […] Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government. […] Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.[32]***

The UN Committee on Economic, Social and Cultural Rights has stressed that the right of individuals and groups (a right not restricted to citizens) to participate in decision-making must be an integral part of government policies, programmes and strategies to realise rights contained in the ICESCR.[33] For example General Comment 15 on the right to water states that:

> ***The formulation and implementation of national water strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water.[34]***

With regard to discrimination in the exercise of the right to participation, the **Convention on the Elimination of All Forms of Discrimination Against Women** requires states to eliminate discrimination against women in political and public life, ensure the right, on equal terms with men, to vote and to stand for election, and 'to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government."[35] The Committee on the Elimination of Discrimination against Women notes that states have the obligation to "ensure that barriers to women's full participation in the formulation of government policy are identified and overcome. These barriers include complacency when token women are appointed, and traditional and customary attitudes that discourage women's participation."[36]

32 UN Human Rights Committee (HRC), General Comment 25 (Art. 25), 27 August 1996, CCPR/C/21/Rev.1/Add.7, paras 5, 6, 8.
33 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14: The Right to the Highest Attainable Standard of Health (Art. 12), 11 August 2000, E/C.12/2000/4, para. 54; General Comment 16: The equal right of men and women to the enjoyment of all economic, social and cultural rights (Art. 3), 11 August 2005, E/C.12/2005/4, para. 37; General Comment 21: Right of everyone to take part in cultural life (Art. 15, para. 1 (a)), 21 December 2009, E/C.12/GC/21, para. 16 (c); General Comment 7: The right to adequate housing (Art. 11 (1)), 16 May 1997, para. 15.
34 CESCR General Comment 15: The right to water (Arts. 11 and 12), 20 January 2003, E/C.12/2002/11, para. 48.
35 UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 7(b).
36 CEDAW, General Recommendation 23: Political and public life, 1997, para. 27.

The **International Convention on the Elimination of All Forms of Racial Discrimination** (ICERD) requires states to:

> ***[P]rohibit and to eliminate racial discrimination in all its forms [with regard to the exercise of] Political rights, in particular the right to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.***[37]

The **Convention on the Rights of Persons with Disabilities** requires states to "Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs" (Art. 29(b)).

The African Commission on Human and Peoples' Rights, regarding states' obligations under the **Banjul Charter,** has stated that:

> ***Provision of all the necessary information as negotiations for exploration and development starts and in an accessible manner as well as substantive and rigorous participation is particularly peremptory where exploration and extraction of resources necessitate expropriation of land from affected people (and hence their resettlement) or such other restriction to resources that they depend on for their livelihood. People who may be affected by plans for exploration and extraction activities should in particular be provided with not only the relevant information in terms of how they may be affected in the language that they understand but also the opportunity to participate meaningfully and have their views incorporated in any decision on the measures to be taken to limit and rectify the impacts.***[38]

Regarding the rights of **ethnic, linguistic or religious minorities,** articles 2(2) and 2(3) of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities ('Minorities Declaration') provide that:

> ***Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic, and public life [and] the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation.***

Although not legally binding, the Human Rights Committee's decisions indicate that its interpretation of Art. 27 of ICCPR (which protects the rights of minorities) is in line with these provisions of the Minorities Declaration. For example, in a decision on a complaint, the UN Human Rights Committee has stated that "measures must be taken to ensure the effective participation of members of minority communities in decisions that affect them."[39]

37 Convention on the Elimination of All Forms of Racial Discrimination, Art. (Art. 5(c)).

38 State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment, Para. 22.

39 UN Human Rights Committee (HRC), Views: Ilmari Länsman et al. v. Finland, 26 October 1994, CCPR/C/52/D/511/1992, para. 9.5. See also Länsman (Jouni E.) et al. v. Finland, 30 October 1996, CCPR/C/58/D/671/1995, para. 10.4, and HRC, General Comment no. 23: Rights of Minorities (Art. 27), 8 April 1994, CCPR/C/21/Rev.1/Add.5, para. 7.

Operationalising the right to participate in decision-making at the national and local levels will significantly depend on context. The UN Working Group on Minorities, in its commentary on the implementation of the Minorities Declaration, noted that, to give effect to the right of minorities to participate in decisions affecting them, states should consider a range of measures including decentralisation of powers, advisory or consultative bodies, and specifically designed voting mechanisms, depending on the context in question.[40] At the regional level, the High Commissioner on National Minorities of the Organization for Security and Cooperation in Europe has developed detailed guidelines to implement the right of minorities to public participation.[41]

The only legally binding instrument specifically relating to minorities is a regional instrument – the Council of Europe's Framework Convention for the Protection of National Minorities, which provides that "*Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them*".[42]

Regarding **Communities discriminated on the basis of work and descent,** the UN Committee on the Elimination of Racial Discrimination asserts that states should:

> ***Ensure that authorities at all levels in the country concerned involve members of descent-based communities in decisions which affect them […] Take special and concrete measures to guarantee to members of descent-based communities the right to participate in elections, to vote and stand for election on the basis of equal and universal suffrage, and to have due representation in Government and legislative bodies […] Promote awareness among members of the communities of the importance of their active participation in public and political life, and eliminate obstacles to such participation [and] Organize training programmes to improve the political policy-making and public administration skills of public officials and political representatives who belong to descent-based communities.[43]***

With regard to **Indigenous Peoples,** specific measures may be required to ensure that they can participate in decision-making. This requires a reading together of standards governing self-determination, participation, freedom of expression, association and assembly, and non-discrimination. The Inter-American Court of Human Rights found Nicaragua in violation when it refused to register the Indigenous Peoples' Organisation Yatama to stand in national elections, based on its insistence that political representation take place through a centrally defined model of political parties that did not allow for Indigenous Peoples' own forms of organisation and representation.[44] See also Art. 18 of UNDRIP: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions." Consultation and participation mechanisms for Indigenous Peoples must always take into account the fact that their rights are exercised collectively.

40 UN Working Group on Minorities, Commentary to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 4 April 2005, E/CN.4/Sub.2/AC.5/2005/2, paras 38-50.

41 Lund Recommendations on the Effective Participation of National Minorities in Public Life, 1 September 1999.

42 European Treaty Series No. 157, 1 February 1995, Art. 15. See also Conference on Security and Co-operation in Europe (now Organization for Security and Co-operation in Europe), Document of the Copenhagen Meeting on the Human Dimension, 29 June 1990, para. 35

43 UN Committee on the Elimination of Racial Discrimination, General recommendation 29: Art. 1(1) of the Convention (Descent), 2002, paras 6(aa-dd).

44 Inter-American Court of Human Rights, *Case of YATAMA v. Nicaragua*, Series C No. 127, 23 June 2005, corteidh.or.cr/docs/casos/articulos/seriec_127_ing.pdf, paras 218, 227.

The International Labour Organisation's Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (Art. 6) requires that:

1. In applying the provisions of this Convention, governments shall:

   (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

   (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

   (c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 15 requires states to establish mechanisms to consult Indigenous and Tribal peoples, in order to assess the possible prejudice to their rights, "before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands". It also establishes requirements for benefit sharing and compensation for damages suffered.

ILO Convention 169 replaces Convention 107 which also addresses Indigenous and Tribal peoples' rights but – having come into force in 1956 – has an outmoded approach based on the assimilation of Indigenous Peoples. However Convention 107 contains rights regarding consultation, as well as land rights and a range of economic, social and cultural rights (e.g. health and social security), and has been ratified by countries that have not ratified Convention 169.[45] It is therefore subject to the usual ILO monitoring process, which interprets it in a progressive manner with reference to more contemporary human rights norms on Indigenous Peoples, including the UN Indigenous Rights Declaration.

In 2018, the UN General Assembly approved the Declaration on the Rights of **Peasants and Other People Working in Rural Areas[46]**. The Declaration states that:

> ***Without disregarding specific legislation on indigenous peoples, before adopting and implementing legislation and policies, international agreements and other decision-making processes that may affect the rights of peasants and other people working in rural areas, States shall consult and cooperate in good faith with peasants and other people working in rural areas through their own representative institutions, engaging with and seeking the support of peasants and other people working in rural areas who could be affected by decisions before those decisions are made, and responding to their contributions, taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.[47]***

45 See Ratifications of C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107)
46 A/C.3/73/L.30, 30 October 2018.
47 Art. 2.3.

Furthermore:

> ***States shall promote the participation, directly and/or through their representative organizations, of peasants and other people working in rural areas in decision-making processes that may affect their lives, land and livelihoods; this includes respecting the establishment and growth of strong and independent organizations of peasants and other people working in rural areas and promoting their participation in the preparation and implementation of food safety, labour and environmental standards that may affect them.[48]***

Members of these communities will further have the right to:

> ***[P]articipate equally and effectively in the formulation and implementation of development planning at all levels,[49] [..] participate in peaceful activities against violations of human rights and fundamental freedoms,[50] […] participate in the application and review of safety and health measures,[51] […] determine their own food and agriculture systems, recognized by many States and regions as the right to food sovereignty. This includes the right to participate in decision-making processes on food and agriculture policy and the right to healthy and adequate food produced through ecologically sound and sustainable methods that respect their cultures,[52] […] participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture.[53]***

The Escazú Agreement on Access to Information, Public Participation and Justice in Environmental Matters (see Annex 1) provides (among other things) that:

> ***Each Party shall ensure the public's right to participation and, for that purpose, commits to implement open and inclusive participation in environmental decision-making processes based on domestic and international normative frameworks.***

> ***Each Party shall guarantee mechanisms for the participation of the public in decision-making processes, revisions, re-examinations or updates with respect to projects and activities, and in other processes for granting environmental permits that have or may have a significant impact on the environment, including when they may affect health.[54]***

It also specifically requires measures to "guarantee a safe and enabling environment" for environmental human rights defenders.[55]

Note that in some cases, national law will also lay down requirements for effective participation that may be higher than international standards.[56]

48 Art. 10.2.
49 Art. 4.2.a.
50 Art. 8.2.
51 Art. 14.1.
52 Art. 15.4.
53 Art. 19.1.c.
54 cepal.org/en/escazuagreement, Art. 7 (1) and (2)
55 Art. 9(1).
56 For an extensive summary of national legislation and court judgements relating to consultation of Indigenous Peoples, see Inter-American Court of Human Rights, Kichwa Indigenous People of Sarayaku v. Ecuador, Series C No. 245, 27 June 2012, corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf, footnotes 191-219.

ANNEX 3
STANDARDS REGARDING FPIC

The UNDRIP provisions on FPIC build on the provisions of the earlier ILO Convention 169 requiring consultation and consent. They are also an important vehicle for giving effect to the right of Indigenous Peoples to self-determination (Art. 3 UNDRIP). The Committee for the Elimination of Racial Discrimination calls on states to "[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent",[57] and the Committee on Economic, Social and Cultural Rights requires that "States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights".[58]

57 Committee on the Elimination of Racial Discrimination, General recommendation 23: rights of indigenous peoples, 1997, para. 4(d).
58 Committee on Economic, Social and Cultural Rights, General comment 21: Right of everyone to take part in cultural life (art. 15, para. 1 (a)), 21 December 2009, E/C.12/GC/21, para. 37.

Photo credit: Illegally logged timber in Uru-Eu-Wau-Wau territory in Rondônia state, Brazil. © Gabriel Uchida / Amnesty International

Consultation/consent requirements are found in several articles of UNDRIP, with some differences in the wording used. These are (our emphasis):

- States shall 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;**[59]
- States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of **any project affecting their lands or territories and other resources,** particularly in connection with **the development, utilization or exploitation of mineral, water or other resources;**[60]
- Indigenous peoples **shall not be forcibly removed from their lands or territories. No relocation shall take place** without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return;[61]
- States shall take effective measures to ensure that **no storage or disposal of hazardous materials** shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent;[62]
- **Military activities shall not take place in the lands or territories of indigenous peoples, unless** justified by a relevant public interest or otherwise **freely agreed with or requested by the indigenous peoples concerned;**[63]
- States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to **using their lands or territories for military activities;**[64]
- States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their **cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent** or in violation of their laws, traditions and customs.[65]
- Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the **lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged** without their free, prior and informed consent.[66]

The language of Art.19 would appear to apply to a very wide range of situations. In a report on the duty to consult, the former UN Special Rapporteur remarked (our emphasis):

It would be unrealistic to say that the duty of States to consult directly with indigenous peoples through special, differentiated procedures applies literally, in the broadest sense, whenever a State decision may affect them, since almost all legislative and administrative decisions that a State adopts may affect the indigenous peoples of the State along with the rest of the population in one way or another. Rather, a purposive interpretation of the various relevant articles of the United Nations Declaration on the Rights of Indigenous Peoples, in light of other international instruments and related jurisprudence, leads to

59 Art. 19
60 Art. 32.2
61 Art. 10
62 Art. 29.2
63 Art. 30.1
64 Art. 30.2
65 Art. 11.2.
66 Art. 28.1

the following assessment of the scope of application of the duty to consult: **it applies whenever a State decision may affect indigenous peoples in ways not felt by others in society.** Such a differentiated effect occurs when the interests or conditions of indigenous peoples that are particular to them are implicated in the decision, even when the decision may have a broader impact, as in the case of certain legislation. For example, land or resource use legislation may have broad application but, at the same time, may affect indigenous peoples' interests in particular ways because of their traditional land tenure or related cultural patterns, thus giving rise to the duty to consult.[67]

The sources of FPIC are not only found in UNDRIP – a soft-law text. The Inter-American Court of Human Rights found in the Saramaka case that Suriname was legally obliged to seek the consent of the Saramaka people for activities on their territory, based on a legal analysis that took into account the inter-relation between the Declaration, ILO Convention 169 (to which Suriname is not a party), the American Convention on Human Rights, and established state practice in the region.[68]

FPIC rights have also been established in decisions of the UN Human Rights Committee[69], the African Commission on Human and Peoples' Rights[70] and are enshrined in policies of UN agencies.[71]

As noted by the UN Special Rapporteur on Rights of Indigenous Peoples:

> ***[W]hatever its legal significance, the Declaration has a significant normative weight grounded in its high degree of legitimacy. This legitimacy is a function not only of the fact that it has been formally endorsed by an overwhelming majority of United Nations Member States, but also the fact that it is the product of years of advocacy and struggle by indigenous peoples themselves. The Declaration is the result of a cross-cultural dialogue that took place over decades, in which indigenous peoples took a leading role. The norms of the Declaration substantially reflect indigenous peoples' own aspirations, which after years of deliberation have come to be accepted by the international community.*** [72]

The International Law Association, a civil society organisation made up of experts in international law, has further stated that the following rights of Indigenous Peoples are to be considered customary law obligations: the right to self-determination; right to autonomy / self-government; recognition and preservation of their cultural identity; right to their traditional lands and natural resources; rights to reparation and redress for the wrongs suffered; right to expect that all treaties/ agreements negotiated with a state shall be honoured.[73] As already noted, FPIC is an expression of Indigenous Peoples' right to self-determination; but also a safeguard which allows for timely identification and mitigation of risks to land, resources and cultural heritage, among others.

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67 UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Report: Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 15 July 2009, A/HRC/12/34, para 43.

68 Inter-American Court of Human Rights, Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs), Series C No. 172, adopted on 28 November 2007, corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf, paras 133, 137.

69 UN Human Rights Committee, Views: *Ángela Poma Poma v. Peru*, adopted on 24 April 2009, UN Doc CCPR/C/95/D/1457/2006, para 7.6.

70 African Commission on Human and Peoples' Rights, Endorois Welfare Council v. Kenya, Case no. 276/2003, 4 February 2010, para 291.

71 See The UN Development Programme and Indigenous Peoples: A policy of engagement (2001): "Consistent with United Nations conventions such as ILO Convention 169, UNDP promotes and supports the right of indigenous peoples to free, prior informed consent with regard to development planning and programming that may affect them." at para. 28, p. 7. The Guidelines on Indigenous Peoples' Issues developed by the United Nations Development Group recognize informed consent and self-determination. UN Food and Agriculture Organization Policy on Indigenous and Tribal peoples: "FAO's objectives for engagement with indigenous peoples are formulated in light of its expertise and in recognition of the rights to which indigenous peoples are entitled under international law. Consultation and free, prior and informed consent will be sought when FAO projects directly affect indigenous peoples", p. 14.

72 UN Special Rapporteur on Rights of Indigenous Peoples, Report to the General Assembly, 9 August 2010, UN Doc A/65/264, para. 60.

73 International Law Association, Rights of Indigenous Peoples - Report of the Hague Conference, 2010, pp. 51-52.

ANNEX 4

THE HUMAN RIGHTS RESPONSIBILITIES OF COMPANIES

Public activities formerly carried out by states are increasingly delegated to companies (e.g. responsibilities in the housing sector). Companies also engage in major resource development projects affecting Indigenous Peoples, minorities and other local communities.

Photo credit: Nickel mine affecting the Pala'wan Indigenous People, Philippines. © Amnesty International

States have a duty to protect people against human rights abuses committed by third parties – including companies, both national and overseas-based.[74] But state failure to protect human rights does not absolve companies of responsibility for the impact of their operations on human rights. In line with the "Guiding Principles on Business and Human Rights" (UNGPs), developed by the former UN Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, companies have – at a minimum – a responsibility to respect all human rights.[75] This responsibility exists *"independently of States' abilities and/or willingness to fulfil their own human rights obligations".*[76] In addition, victims need access to an effective remedy for violations of human rights. The Guiding Principles seek to provide for the first time an authoritative global standard for addressing the risk of adverse human rights impacts linked to business activity.

Resource: Amnesty's manual, *Injustice Incorporated*, deals with issues concerning access to information, consultation, remedy and power imbalances between companies and affected communities.

Policy commitments on human rights are not enough; according to the UNGPs, companies must actively seek to understand and prevent violations of human rights that may occur as a consequence of their operations. The UN SRSG has described this as human rights due diligence, which comprises the steps a company must take to become aware of, prevent and address adverse human rights impacts. Principle 18 of the UNGPs states:

> In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:
>
> (a) Draw on internal and/or independent external human rights expertise;
>
> (b) Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.[77]

The commentary to this principle further clarifies:

> ***To enable business enterprises to assess their human rights impacts accurately, they should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement.*** [78]

Although increasingly processes to inform, consult and, where required, obtain the consent of Indigenous communities are left to corporate actors, the state retains the overall responsibility to ensure these processes are conducted in line with international human rights law and standards.

74 UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Reports: 'Business and human rights: mapping international standards of responsibility and accountability for corporate acts', 19 February 2007, UN Doc A/HRC/4/35, paras. 10 to 18; and 'Clarifying the Concepts of "Sphere of influence" and "Complicity"', 15 May 2008, UN Doc A/HRC/8/16, paras. 27 to 50 and 82 to 103.

75 Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, 21 March 2011, UN Doc A/HRC/17/31.

76 Guiding Principles on Business and Human Rights, para II.A.11.

77 Guiding Principles on Business and Human Rights, II.B.18.

78 Guiding Principles on Business and Human Rights, II.B.18.

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PUBLIC PARTICIPATION IN DECISION-MAKING

How do states inform, consult with and obtain free, prior and informed consent from rights-holders

We all have the right to have a say in decisions that affect us. Each time we vote in local or national elections, we are exercising this right. However, some government decisions can affect the rights of a specific group of people, and in those situations, those people should be consulted. At an absolute minimum, they should be informed in good time of decisions that will affect them so that they can decide how to respond – for example by demanding to be consulted, protesting, or going to the courts. Indigenous Peoples must in addition be consulted and their free, prior and informed consent obtained for decisions that affect them.

But do states always do this right? They do not, and researchers may decide that this process of public participation needs to be researched. The aim of this guide is to support such research, providing guidance into methodologies, the kind of questions that need to be asked, and the human rights standards that must be respected.

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