

2005 International Conference on Engaging Communities
Brisbane, Australia

**Engaging Indigenous Peoples in governance processes: International
legal and policy frameworks for engagement**

UN Workshop on Engaging the Marginalized: Partnerships between Indigenous Peoples,
governments and civil society

*Background Paper prepared by the Secretariat of the UN Permanent Forum on
Indigenous Issues
Division for Social Policy and Development/UN Department of Economic and Social
Affairs*



Brisbane, Australia
15 August 2005

Introduction

1. The field of international and national development is witnessing an increasing trend in participatory governance, which involves the meaningful participation of civil society in the policy making and administration processes. Various concepts and methodologies have evolved for policy makers to engage civil society or for civil society to integrate itself into the governance process. Despite numerous methodologies and concepts of engaged governance, indigenous peoples and their organizations often find themselves excluded from the policy making, budget discussions, design, implementation and evaluation processes. Many indigenous communities are in fact adversely affected by policies, projects and programs, since their distinct visions of development, their concerns and way of life are all too often ignored by national or local level policy makers or administrators. The international indigenous movement and the increasing number of indigenous organizations created have been vocal in underlining the problems of non-participatory development.

2. Indigenous peoples are often severely affected by large scale infrastructure projects, internal displacement, environmental toxicity and pollution caused by extractive industries, abrogation of their treaty rights, grabbing of their lands, territories and natural resources, loss of culture via educational systems that denigrate their cultures and languages and other problems caused by non-inclusive policies, development and governance models. Moreover, even where policy and service delivery models are targeted towards indigenous communities, they often operate in a non-inclusive, top-down manner, which creates dependency on government services and does not promote sustainable human development that protects and promotes the cultural, political, social and economic integrity of indigenous communities. Besides the ethical and cultural implications of such lack of participation, development experts have by now realized that such programs are not even financially sustainable.

3. In recent years, however, there has been an emergence of international legal and policy frameworks, especially in the United Nations system, that advocate specifically for full and effective participation of indigenous peoples in matters that concern them in national and local governance. These frameworks are premised on the human-rights based approach to development, which is now policy in the United Nations system and which changes the relationship of addressees of development programs, including indigenous peoples, from passive recipients to rights holders and active participants. The human rights based approach (HRBA) is premised on the understanding that human rights principles guide all programming in all phases of the programming process, including assessment and analysis, program planning and design, implementation, monitoring and evaluation. These principles include universality and inalienability, indivisibility, interdependence and inter-relatedness, non-discrimination and equality; participation and inclusion; accountability and the rule of law.¹ The United Nations Development Group has identified a number of elements that constitute good programming practices for operationalizing the human rights based approach to

¹ The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies. Adopted by UN Development Group in 2003.

development, such as an assessment and analysis to identify human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers, as well as the immediate and underlying structural causes of the non-realization of rights; programs that assess the capacity of rights-holders to claim their rights and duty-bearers to fulfill their obligations; programs that monitor and evaluate outcomes and processes guided by human rights standards; and programming that is informed by the recommendations of international human rights bodies.²

4. A human-rights approach to development thus has the human being at its center and also focuses on how development outcomes are brought about, and not simply on achieving outcomes themselves. Its focus on accountability of the duty-holders (mainly national or local government, but also others), and participation of the rights-bearers, such as indigenous peoples, shapes a different process, which will certainly lead to a different set of development outcomes.

5. Since its inception, the United Nations Permanent Forum on Indigenous Issues (UNPFII) has been formulating and advocating policies for the full and effective participation of indigenous peoples in all matters that concern them and stands firmly behind the human rights based approach to development and the principle of free, prior and informed consent.

A. Legal frameworks and the principle of free, prior and informed consent

6. One of the fundamental emerging frameworks, which provides the rationale of fully and meaningfully engaging indigenous peoples in governance is the principle of free prior and informed consent. The principle is acknowledged in various documents within the field of international human rights law, such as Article 6 of the ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, which refers to the principle of free and informed consent in the context of establishing mechanisms for free participation at all levels of decision-making in “elective institutions and administrative bodies responsible for policies and programmes which concern them”. The article also refers to consultations through representative institutions whenever consideration is being given to legislative or administrative measures which may directly affect indigenous peoples. Furthermore, Article 7(1) and (2) of the ILO Convention state that:

“The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, the extent possible over their own economic, social and cultural development. In addition they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development, which may affect them directly...Governments shall ensure that whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual,

² Ibid

cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities”.

7. Article 15 refers to procedures for consultation by the state even where the state retains ownership of mineral or subsurface resources “with a view to ascertaining whether and to what degree their interests would be prejudiced before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands”. Article 16 of ILO Convention 169 refers to the principle of free, prior and informed consent within the context of relocation, if necessary.³

8. The Draft United Nations Declaration on the Rights of Indigenous Peoples (E/CN.4/1995/2), is an important emerging instrument which explicitly recognizes the principle of free, prior and consent when indigenous peoples are affected by policies, programs and development projects (articles 10, 20, and 30. Article 10 of the Draft Declaration states that “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation, and where possible, with the option of return.” Article 20 refers to the right of indigenous peoples to “...participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures”. The principle of free, prior and informed consent is also clearly encapsulated in Article 30 of the Convention, which states that “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources...”

9. The principle of free prior and informed is increasingly emerging as a practical methodology within the UN system for designing programs and projects, which either directly or indirectly affect indigenous peoples. It is also a mechanism for operationalizing the human-rights based approach to development.

B. The UN Permanent Forum on Indigenous Issues, UNDP and IFAD: recommendations and policies of the UN system

10. The United Nations Permanent Forum on Indigenous Issues, a new advisory body of the Economic and Social Council, has emerged as a unique high-level body of indigenous peoples’ and government-nominated experts to provide advice and recommendations to the Economic and Social Council in the areas of health, human rights, economic and social development, education, culture, and the environment. These recommendations are intended to serve as a framework in the development and implementation of both policies and programs by UN agencies, other intergovernmental

³ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries

organizations, states, as well as indigenous peoples, the private sector and civil society at large.

11. Participation and consultation underpin the recommendations of each session of the Forum and over its last four sessions the Forum has issued a number of recommendations, which specifically require the full and meaningful involvement, participation, and consultation of indigenous peoples. For example, the Second session of the Permanent Forum emphasized participation within the area of economic and social development in recommendations 26, 28, and 29. The Forum recommended that international financial institutions rethink the concept of development, with the full participation of indigenous peoples in development processes, and expressed concern over “development practices that did not take into account the particular characteristics of indigenous communities as groups with distinct cultural identities and their own systems of representation, thus significantly undermining meaningful ways of participation in the assessment, preparation, execution and evaluation of development programs of their concern”.⁴ Recommendations within the sphere of economic and social development have also emphasized the necessity of ensuring full and effective participation of indigenous people, including indigenous women and youth in poverty reduction strategy papers, and country strategy papers. Furthermore the Forum also recommended that the rights to indigenous land, forests, marine and other natural resources should be clearly identified in these documents with the “role of and control by indigenous peoples of these assets being specified”.⁵

12. In addition to recommending that members of the UN system and states develop institutional policies on indigenous peoples in consultation with them, there are specific recommendations to states on participation of indigenous women in the areas of governance, technical cooperation and capacity-building. The Forum has recommended that the concerns of indigenous women be fully taken into account and concrete steps be taken to increase their participation in governance and decision-making structures at all levels, as well as ensure equal access to decision-making bodies, political parties, the judiciary and other sectors. Recommendations are also focused on increasing indigenous women’s capacity for decision making by ensuring adequate representation in political leadership, governance and public administration⁶

13. A number of recommendations of the Forum are intended to serve as a basis for designing programs, and in particular programs in specific sectors such as in education and health. Some recommendations refer to increased access to government budgets as well as increased budgetary allocations by states in certain sectors such as education.⁷ A specific example of guiding the design of educational programs is recommendation 19 of the Third Session which states that national governments should have goals of “...establishing effective arrangements for the participation of indigenous parents and community members in decisions regarding the planning, delivery and evaluation of

⁴ Recommendation 28, Report on the Second Session May 2003, E/2003/43.

⁵ Recommendations 18 and 21. Report of the Fourth Session, May 2005, E/2005/43

⁶ Recommendation 14(a), (e), and (g), Report on the Third Session, May 2004, E/2004/43.

⁷ Recommendation 57 of the Third Session and Recommendation 48 of the Fourth Session, E/2004/43.

educational programs for their children, young people and other community members”. It also recommends that an increased number of indigenous people should be employed as educational administrators, curriculum adviser, teachers, etc. In addition the Fourth Session of the Forum recommends that governments should review current national curricula and textbooks to erase culturally discriminatory materials, and reiterates the need for effective arrangements for the participation of indigenous parents and community members in the design and implementation of their own education.⁸

14. Within the health sector, recommendations have focused on training and employing qualified indigenous people in further designing, administering and managing their own health care programs, setting up monitoring mechanisms to report neglect in health care systems, including traditional and indigenous health practitioners within state health-care systems, augmenting HIV/AIDS programs by providing educational materials in indigenous languages, and using specially trained indigenous HIV/AIDS health workers to conduct outreach, as well as voluntary testing and counseling.⁹ The Forum has also recommended that states develop, in collaboration with indigenous women, programs to inform and sensitize indigenous women and men about cultural practices which have negative impacts on health such as female genital mutilation, violence against women, etc.

15. The Forum’s recommendations with respect to targeted policies and programs to be adopted by states for indigenous peoples are clear and the Forum consistently underlines the fact that these policies and programs should be developed on the basis of disaggregated data and indicators on the situation of indigenous peoples obtained with the full participation of indigenous peoples. In doing so, the Forum recommends that states follow the principle of free prior and informed consent and take into account provisions on “...human rights and fundamental freedoms and data collection regulations and privacy guarantees. For indigenous peoples living in voluntary isolation, data-collection exercises should not be used as a pretext for establishing forced contact” and it is key that “indigenous peoples’ representatives are involved in designing, implementing and monitoring data collection and disaggregation by ensuring their membership in the mechanism of national commissions on population censuses and related institutional arrangements.”¹⁰

16. In January 2005, following a decision of the UNPFII, an international expert meeting took place on free prior and informed consent bringing together experts from the UN system, other intergovernmental organizations, indigenous experts and governmental experts to discuss institutional policies, examples, and challenges in implementing the principle and to make recommendations to the Permanent Forum. The Workshop also discussed elements of a common understanding of free prior and informed consent, which are reproduced in Annex I. This was an important outcome of the Workshop. The

⁸ Recommendation 48(b) (d) and (e). Report on the Fourth Session, May 2005, E/2005/43.

⁹ Recommendation 89 of the Third Session, E/2004/43.

¹⁰ Recommendation 86 and 89 of the Fourth Session, E/2004/43

full report of the Workshop and the documentation submitted by the participants appear on the website of the Secretariat of the UNPFII (www.un.org/esa/socdev/unpfii).¹¹

17. Another example of increased institutional engagement on indigenous issues within the UN is the United Nations Development Program and its policy of engagement with indigenous peoples.¹² The policy states that the rationale for engaging indigenous peoples is based on UNDP's "mandated areas of work; processes and agreements of development cooperation; and the aspirations of indigenous peoples" and it is underpinned by the human rights framework.¹³ UNDP's position is that historically indigenous peoples have often not benefited from economic and social development, including many projects supported by international agencies, and some projects have had a negative affect on indigenous peoples. Therefore the policy states the need to institute special measures to protect the rights of indigenous peoples and also ensure their inclusion and participation. The policy's overall objectives of engagement with indigenous peoples include the fostering of an enabling environment that promotes indigenous peoples' participation in all decision-making levels; ensures the co-existence of their economic, cultural and socio-political systems with others; and develops the capacity of Governments to build more inclusive policies, and programs; and to integrate indigenous peoples' perspectives and concepts of development into UNDP work". The UNDP policy fosters the full participation of indigenous peoples in development processes, which speaks to the issue of free prior and informed consent.

18. UNDP's policy of engagement with indigenous peoples focuses on priority areas of democratic governance and human rights, poverty reduction, conflict prevention and peace-building, and environment and sustainable development. Each area is guided by the overall objectives of participation and integration of indigenous peoples' perspectives. UNDP's country office and regional programs play a central role in defining the partnership with indigenous peoples, including support for networking activities of indigenous peoples organizations so that they "may effectively participate in the formulation of human development related policies and activities at the local, national, regional, and international levels".¹⁴ Among some key mechanisms for participation are the establishment of local civil society organization advisory committees through which indigenous peoples can provide strategic policy advice, multi-stake holder dialogues and initiatives, as well as inclusion of indigenous peoples in UNDP project and programming cycles.

19. Among the international financial institutions, the International Fund for Agricultural Development is working closely with UNPFII in a process of documenting IFAD-finance projects on participatory development in four indigenous communities in Bolivia, Brazil, Peru and India.¹⁵ For example, IFAD projects of MARENASS (Management of Natural

¹¹ Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent , document submitted to the Fourth Session of the UNPFII, E/C.19/2005/3.

¹² UNDP and Indigenous Peoples: A Policy of Engagement

¹³ Ibid, p.2

¹⁴ Ibid, p.10

¹⁵ Victoriz Tauli-Corpuz. Helping Achieve the MDGs: Case Studies of IFAD-funded projects in Bolivia, Brazil, Peru and Northeast India. May 2005

Resources in the Southern Highlands Project) and the Puno-Cusco Corridor Project (CORREDOR) in Peru provide cases of how projects can enhance indigenous governance and capacity. The indigenous community participated directly in the selection of project personnel and trainers of these projects, and self-evaluation processes were undertaken to illustrate works done on natural resource management in previous years. The North Eastern Region Community Resource Management for Upland Areas (NERCRMP) in India successfully supported indigenous political systems while introducing innovative community organizations. These and other case studies are revealing that decentralization, administrative and technical autonomy of project management facilitates processes of productive engagement of indigenous communities.¹⁶ Detailed findings of these case studies undertaken by indigenous experts are currently being presented to IFAD officials in order to develop a strategic framework for advocacy to assist IFAD and other intergovernmental development institutions to integrate indigenous peoples' perspectives into their planning, programming, implementation and evaluation cycles.

C. The UN Common Country Assessment and UN Development Assistance Framework (CCA/UNDAF) and bilateral guidelines – mechanisms for developing programs with indigenous peoples at the country level

20. The United Nations has adopted the CCA/UNDAF as strategic planning tools for coordinated UN programming at the country level. The CCA is a first step in analyzing the national development situation and identifying key development issues for a country, which are aligned with the national poverty reduction strategy papers and other national processes of governments. The CCA then informs the UNDAF process which takes into account the priorities identified by the government and the CCA. The UNDAF represents an agreement of the government and UN system agencies to work collectively to achieve development results, which are expressed as UNDAF outcomes and derived from the CCA.¹⁷

21. The 2004 Guidelines for the preparation of CCAs and UNDAFs by UN Country Teams (UNCTs) include specific references to indigenous peoples. The Guidelines mention, *inter alia*, that the CCA process should identify the root causes of poverty, including group specific situations, such as that of indigenous peoples. It should also result in strengthened national capacities for data analysis, including efforts to collect accurate data with respect to indigenous peoples.¹⁸ Furthermore the Guidelines have emphasized the need to give priority within the UNDAF to, among others, minorities and indigenous peoples.

22. Most importantly, the Guidelines state that the CCA and UNDAF process should seek the participation of civil society organizations and indigenous peoples along with UN agencies, relevant ministries, regional and sub-regional institutions. The Guidelines also emphasize the necessity of reaching indigenous peoples in this consultative process

¹⁶ Ibid

¹⁷ Guidelines for UN Country Teams preparing a CCA and UNDAF in 2004, July 2004

¹⁸ Ibid, p. 11

through participatory methodologies, particularly where they cannot be engaged easily due to geographic isolation or limits of capacity.

23. Some bilateral donors have also developed their own guidelines and mechanisms for engaging indigenous peoples in the design and implementation of their programs. The Danish International Development Agency (Danida) recently released a toolkit for including indigenous peoples in sector program support. The toolkit links national development objectives such as poverty reduction, democratization, human rights, conflict prevention, gender equality, and sustainable development to very specific lack of indigenous peoples' rights, such as poor health, diversification of the concept of poverty, exclusion from political participation and decision-making, weak access to information and education, severe violation of indigenous peoples human rights, disproportionate representation among refugees and internationally displaced, marginalization of indigenous women, violation of land and resource rights, among others.¹⁹

24. Such a linkage provides an analysis on root causes of poverty amongst indigenous peoples and is based on a human rights framework. The toolkit further seeks to develop strategies within each sector bearing in mind these linkages to the rights of indigenous peoples or lack thereof. Furthermore, the toolkit discusses the development of indicators that reflect the situation of indigenous peoples based on disaggregated data. These indicators, both qualitative and quantitative should be developed bearing in mind indigenous peoples' notions of development and poverty, and also on the basis of comparability with other population groups. Danida's toolkit also highlights the limitations of bilateral funding for sector-program support (SPS), since sectoral approaches may not necessarily address the root causes of indigenous peoples' situations. This is based on inherent contradiction between indigenous peoples' holistic vision of development and the thematic and compartmentalized approach of SPS. The toolkit addresses this concern, and advocates for the inclusion of indigenous peoples in country strategies, and involving them in the implementation of SPS.

Conclusion

25. The above legal, policy, and programming frameworks make explicit the principles of participation and consultation of indigenous peoples in relations to policies, programs and projects that affect their lives. These frameworks have been developed utilizing the human-rights based approach to development, and provide practical guidance on how, specific sector-related programming models can be developed for indigenous peoples, which recognize their rights, promote the end to their exclusion and marginalization and foster their full contribution to development as valued members of national societies and the international community.

¹⁹ Danida Tool Kit: Best practices for including indigenous peoples in sector programme support. 2004

Elements of a common practical understanding of Free Prior and Informed Consent²⁰

Main areas where FPIC is relevant:

- In relation to indigenous lands and territories; including sacred sites (may include exploration, such as archaeological explorations, as well as development and use).
- In relation to treaties, agreements and other constructive arrangements between states and indigenous peoples, tribes and nations.
- In relation, but not limited to, extractive industries, conservation, hydro-development, other developments and tourism activities in indigenous areas leading to possible exploration, development and use of indigenous territories and/or resources.
- In relation to access to natural resources including biological resources, genetic resources and/or traditional knowledge of indigenous peoples, leading to possible exploration, development or use thereof.
- In relation to development projects encompassing the full project cycle, including but not limited to assessment, planning, implementation, monitoring, evaluation and closure - whether the projects be addressed to indigenous communities or, while not addressed to them, may affect or impact upon them.
- In relation to UN agencies and other intergovernmental organizations who undertake studies on the impact of projects to be implemented in indigenous peoples territories.
- In relation to policies and legislation dealing with or affecting indigenous peoples.
- In relation to any policies or programmes that may lead to the removal of their children, or their removal, displacement or relocation from their traditional territories.

Elements of a common understanding of FPIC:

i. What

²⁰ International Workshop on Methodologies regarding free prior and informed consent and indigenous peoples 17-19 January 2005. Excerpt from document E/C.19/2005/3. See also www.un.org/esa/socdev/unpfii/news/news_workshop_fpic.htm

Free should imply no coercion, intimidation or manipulation;

Prior should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/consensus processes;

Informed – should imply that information is provided that covers (at least) the following aspects:

- a. The nature, size, pace, reversibility and scope of any proposed project or activity;
- b. The reason/s or purpose of the project and/or activity;
- c. The duration of the above;
- d. The locality of areas that will be affected;
- a. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;
- e. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
- f. Procedures that the project may entail.

Consent

Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent.

Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

ii. When

FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

iii. Who

Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In FPIC processes, indigenous peoples, UN Agencies and governments should ensure a gender balance and take into account the views of children and youth as relevant.

iv. How

Information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages.

v. Procedures/Mechanisms

- Mechanisms and procedures should be established to verify FPIC as described above, including mechanisms of oversight and redress, such as the creation of national mechanisms.
- As a core principle of FPIC, all sides of a FPIC process must have equal opportunity to debate any proposed agreement/development/project. “Equal opportunity” should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in indigenous language/s as appropriate, or through any other agreed means on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples or an impact on their rights to their territories and/or natural resources.
- FPIC could be strengthened by establishing procedures to challenge and to independently review these processes.
- Determination that the elements of FPIC have not been respected may lead to the revocation of consent given.

It is recommended that all actors concerned, including private enterprise, pay due attention to these elements.