



Free, Prior and Informed Consent in Contemporary International Law: Normative Scope, Global Tensions, and Challenges to Its Effectiveness

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Abstract

The norms that regulate social coexistence do not emerge spontaneously or flawlessly; they are built over time through repeated human practices, as customs gradually become law. Among these practices, consent occupies a central place. Asking, listening to, and considering the views of those affected by a decision is a basic form of social interaction that has evolved into a legally protected right at the international level.

This evolution is reflected in the historical development of human rights, from first-generation civil and political rights, through second-generation social rights, to third-generation or collective rights. Within this latter category lies Free, Prior and Informed Consent (FPIC), conceived as a fundamental guarantee for Indigenous Peoples when state or private decisions affect their territories, resources, and ways of life.

FPIC has moved beyond aspiration to become a cross-cutting legal institution in contemporary international human rights law. Its normative foundations are found in ILO Convention No. 169, the United Nations Declaration on the Rights of Indigenous Peoples, and the progressive development of regional human rights jurisprudence. Through a comparative legal analysis, this article identifies persistent tensions between States' international obligations and their domestic implementation.

The article aims to understand the right to prior consultation not only normatively but also relationally, considering both those who consult and those who are consulted, to promote a more accessible and human-centred understanding of this fundamental right. It argues that FPIC cannot be fully effective without questioning the dominant territorial governance models within which it operates.¹

¹ Klier, G., & Folguera, G., *Two sides of the same coin? Biodiversity conservation and extractivism in Latin America*, Letras Verdes, no. 22 (2017).



Key words: Free, Prior and Informed Consent (FPIC), Human Rights Law, Indigenous Peoples Rights

Introduction

Free, Prior and Informed Consent (FPIC) is a fundamental principle of international human rights law aimed at protecting Indigenous Peoples and local communities from decisions that directly affect their territories, natural resources, cultures, and ways of life. Its importance becomes particularly evident when considering that, for many Indigenous Peoples of the South American Amazon, nature is not understood as a set of exploitable resources, but rather as a space of life, identity, and collective memory that is inseparable from social organization and cultural continuity.²

From this worldview, territory is conceived not merely as an economic asset, but as a living environment that sustains community life across generations. This understanding helps explain the heightened vulnerability of Indigenous Peoples in the face of extractive and development projects, as such initiatives may threaten not only the environment but also the social, cultural, and spiritual foundations of Indigenous life. In this context, prior consultation, as a core component of FPIC, has emerged as a central mechanism within contemporary international human rights law to ensure the effective participation of Indigenous Peoples in decision-making processes that affect them, particularly in response to long-standing patterns of exclusion and structural power imbalances.³

Accordingly, FPIC should not be understood as a mere procedural requirement or administrative formality. Rather, it constitutes a substantive legal guarantee grounded in principles such as self-determination, respect for Indigenous legal and governance systems, and the pursuit of substantive equality. Beyond its legal dimension, FPIC can also be understood as the result of a fundamental social practice, consent, which has evolved from everyday interactions among individuals into a right protected under international human rights law. This recognition is not merely conceptual; it is supported by specific legal instruments such as ILO Convention No. 169, particularly Articles 6, 7, and 15, the United Nations Declaration on the Rights of Indigenous Peoples, especially Articles 10, 19, 28, 29, and 32, as well as the jurisprudence of the Inter-American human rights

² Criminal Guarantees Court of Pastaza. (2019). *Protection Action, Case No. 16171201900001*. Judicial Branch of Ecuador. Retrieved from <https://procesosjudiciales.funcionjudicial.gob.ec/>

³ Criminal Guarantees Court of Pastaza. (2019). *Protection Action, Case No. 16171201900001*. Judicial Branch of Ecuador. Retrieved from <https://procesosjudiciales.funcionjudicial.gob.ec/>



system, particularly the decisions of the Inter-American Court of Human Rights, which have consolidated free, prior and informed consent as an essential safeguard against measures or projects that may affect the territories, natural resources, and ways of life of Indigenous Peoples. This dual normative and relational character of FPIC provides the framework for the normative and comparative analysis developed in this article.⁴⁵

International Normative Foundations

The international recognition of FPIC was consolidated with the adoption of Convention No. 169 (1989)⁶ of the International Labour Organization. This instrument imposes legally binding obligations on States to consult Indigenous and tribal peoples whenever legislative or administrative measures may directly affect them. The Declaration of the United Nations on the Rights of Indigenous Peoples (2007) further strengthened this framework by expressly recognizing the central role of FPIC in situations involving high-impact interventions affecting Indigenous lands, territories, and natural resources.

These instruments must be interpreted within the broader framework of the right to self-determination, as enshrined in the 1966 International Human Rights Covenants. From this perspective, FPIC operates as an effective limitation on State authority: consultation cannot be reduced to a unilateral exchange of information but must instead ensure real and meaningful participation in decision-making processes that directly affect Indigenous peoples' rights, livelihoods, and forms of social organization.⁷

Essential Elements of FPIC

International practice has progressively identified a set of core criteria that make it possible to assess whether FPIC processes meet minimum standards of legitimacy. The focus is therefore not placed solely on the formal existence of consultation mechanisms, but on how these processes are

⁴ See M. Barelli, *Free, prior and informed consent in the aftermath of the UN Declaration on the Rights of Indigenous Peoples*, IJHR 16(1), 2012, pp. 1–24; J. S. Anaya, *Indigenous Peoples in International Law*, 2nd ed., OUP, 2004.

⁵ International Work Group for Indigenous Affairs (IWGIA). (2019, April). *Indigenous Peoples' Rights to Autonomy and Self-Government as a Manifestation of the Right to Self-Determination*. Report of the International Seminar on Indigenous Autonomy and Self-Government.

⁶ International Labour Organization, *Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries* (1989).

⁷ United Nations General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (2007).



carried out and experienced by Indigenous peoples.⁸

FPIC is structured around a set of elements that complement one another and together define the procedural standard that should guide consultation processes. The prior dimension requires that consultation take place before the State adopts a definitive decision, so that Indigenous participation can effectively influence the outcome. The informed component, in turn, requires that clear, sufficient, and culturally appropriate information be provided regarding the potential impacts, risks, and benefits, thereby enabling meaningful collective deliberation. These conditions can only be fulfilled if the process is free, that is, conducted without pressure, coercion, manipulation, or interference with Indigenous forms of organization and decision-making. Likewise, the principle of good faith requires the State to engage in genuine dialogue aimed at reaching agreement or, where appropriate, obtaining consent, rather than carrying out merely formal procedures designed to legitimize decisions already made. Finally, the intercultural and culturally appropriate character of consultation ensures that the process respects Indigenous institutions, timelines, and decision-making practices. Taken together, these elements reinforce one another and allow FPIC to function as an effective mechanism for participation and as a practical expression of the right to self-determination.

Comparative Jurisprudential Development of FPIC

The consolidation of FPIC as a legally binding standard has been decisively shaped by the progressive development of international and comparative jurisprudence. Judicial and quasi-judicial bodies across different regions have contributed to clarifying not only the normative content of FPIC, but also its practical and relational dimensions, particularly in contexts marked by long-standing power asymmetries between States, private actors, and Indigenous Peoples.

A landmark precedent within the Inter-American human rights system is *Kichwa Indigenous People of Sarayaku v. Ecuador* (Inter-American Court of Human Rights, 2012)⁹. In this case, the Court examined State responsibility for authorizing oil exploration activities within Indigenous territory without conducting an adequate consultation process. The Court held that prior consultation constitutes a non-delegable obligation of the State, even when extractive activities are

⁸ International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, 1989 (No. 169).

⁹ Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of June 27, 2012.



carried out by private companies. It further established that consultation must be conducted in good faith, through culturally appropriate procedures, and with the genuine aim of reaching agreement. From a relational perspective, the Court emphasized that the duty to provide information extends beyond communicating potential economic benefits and requires transparent disclosure of environmental, cultural, and health-related risks, thereby enabling informed collective deliberation by the affected community.

Comparable developments can be observed within the African human rights system. In *Endorois v. Kenya* (African Commission on Human and Peoples' Rights, 2010)¹⁰, the Commission addressed the forced displacement of the Endorois people from their ancestral lands for conservation purposes. It found that the absence of effective consultation and consent violated multiple provisions of the African Charter, including rights to collective property, culture, religion, and development. The Commission explicitly rejected consultation processes that are merely informational, stressing that meaningful participation requires Indigenous communities to have a genuine capacity to influence decisions affecting their territories and ways of life.

This reasoning was subsequently reaffirmed by the African Court on Human and Peoples' Rights in *Ogiek v. Kenya* (2017)¹¹, a case concerning the eviction of the Ogiek people from the Mau Forest. The Court recognized the deep cultural, spiritual, and economic relationship between Indigenous Peoples and their ancestral lands, holding that forced displacement without prior consultation or consent constitutes a serious violation of protected collective rights. Together, *Endorois* and *Ogiek* illustrate how consultation processes that lack cultural appropriateness and good faith undermine the protective function of FPIC.

In the Asian context, domestic jurisprudence in India has made significant contributions to strengthening consent requirements in high-impact development contexts. In the *Vedanta Mining* case, the Supreme Court of India reviewed the legality of a mining project affecting tribal communities living in forest areas. The Court ruled that consent must be obtained through the communities' own traditional decision-making institutions, thereby recognizing collective

¹⁰ African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003 (2010)

¹¹ African Commission on Human and Peoples' Rights. (2017). *African Commission on Human and Peoples' Rights v. Kenya (Ogiek case)* (Application No. 006/2012).



autonomy and Indigenous agency. This decision highlights the intercultural dimension of FPIC and underscores the importance of respecting Indigenous governance systems rather than imposing externally designed procedural models.¹²

In North America, the evolution of the duty to consult doctrine in Canada reached a critical stage with the Supreme Court's decision in *Tsilhqot'in Nation v. British Columbia*. In this case, the Court recognized Aboriginal title over a specific territory and held that, once such title is established, the State must obtain Indigenous consent before authorizing projects that would substantially affect the land, unless it can justify the infringement under strict constitutional standards. Although Canadian jurisprudence does not explicitly employ the language of FPIC, the Court's reasoning reflects a functional convergence with international norms by placing consent and meaningful participation at the centre of territorial decision-making.¹³

Taken together, these cases reveal a converging jurisprudential trend across regions toward recognizing FPIC as an effective safeguard rather than a purely procedural requirement. At the same time, they expose persistent tensions between States' international commitments and their domestic implementation, particularly in contexts where economic, extractive, or conservation interests are prioritized over Indigenous rights. This body of comparative jurisprudence thus reinforces the understanding of FPIC not only as a legal obligation, but also as a relational process whose legitimacy depends on the lived experience of those who are consulted.

Extractivism vs. Conservation

The tensions surrounding the effective implementation of FPIC cannot be fully understood without considering the dominant models of territorial governance within which consultation processes take place. In Latin America - and increasingly in other regions of the "Global South" - the conflicts that trigger FPIC procedures are often embedded in two overarching frameworks that are commonly portrayed as opposing yet share important structural assumptions: extractivism and certain hegemonic forms of environmental conservation. As Klier and Folguera argue, both models tend to conceptualize territory through a global and abstract lens, detached from the concrete practices of life of the communities that inhabit it, thereby creating conditions in which

¹² Supreme Court of India, *Orissa Mining Corporation Ltd. v. Ministry of Environment & Forests*, (2013) 6 SCC 476.

¹³ Supreme Court of Canada, *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.



consultation risks becoming a formal requirement rather than a genuine space for collective decision-making.¹⁴

Extractivism, in its multiple manifestations - such as mining, hydrocarbons, large-scale agribusiness, or infrastructure development - operates based on a conception of territory as a repository of strategic resources integrated into transnational economic circuits. Within this framework, Indigenous and local communities are frequently perceived as obstacles to the efficient exploitation of space, leading to systematic practices of displacement, social fragmentation, or territorial emptying.¹⁵ When consultation occurs, it is often embedded within decision-making structures that have already been defined, reducing FPIC to a mechanism for managing social conflict rather than enabling meaningful participation. From a relational perspective, such processes hollow out the substance of FPIC by denying the conditions necessary for genuine consent, including the absence of coercion, the possibility of real influence, and the recognition of the social, cultural, and spiritual ties that bind peoples to their territories.

Seemingly in contrast, certain conservation-oriented approaches have generated comparable dynamics of exclusion by promoting environmental protection through the creation of “natural” spaces conceived as uninhabited or subject to strict state or private control. As Klier and Folguera note, this form of conservation reproduces a reification of territory by separating it from the communities that have historically inhabited and cared for it, transforming it into an abstract heritage of “Humanity”¹⁶

In such contexts, FPIC faces challenges: consultation may be reduced to an informational exercise designed to legitimize decisions adopted in the name of biodiversity protection or the general interest, without recognizing Indigenous Peoples as political subjects capable of defining their own modes of coexistence with the environment. Thus, both extractivism and hegemonic conservation reveal a structural limit of FPIC: its effectiveness depends not only on legal norms and procedures, but also on a deeper transformation of territorial models that conceive land as an object of

¹⁴ Klier, G., & Folguera, G. (2017). *Two sides of the same coin? Biodiversity conservation and extractivism in Latin America*. *Letras Verdes. Revista Latinoamericana de Estudios Socioambientales*, (22), 182–204.

¹⁵ Criminal Guarantees Court of Pastaza. (2019). *Protection Action, Case No. 16171201900001*. Judicial Branch of Ecuador. Retrieved from <https://procesosjudiciales.funcionjudicial.gob.ec/>

¹⁶ Klier, G., & Folguera, G., *Two sides of the same coin? Biodiversity conservation and extractivism in Latin America*, *Letras Verdes*, no. 22 (2017), pp. 182–204.



administration rather than as a shared space of life.

Conclusion

FPIC has become a key element of international human rights law for the protection of Indigenous Peoples against decisions that directly affect their territories, resources, and ways of life. As this article has shown, FPIC should not be understood as a mere administrative or procedural requirement, but as a substantive guarantee aimed at ensuring meaningful participation in decision-making processes, particularly in contexts shaped by historical exclusion and structural inequality.

From this perspective, extractive activities are not inherently incompatible with human rights. States may pursue economic development and promote extractive projects, provided that Indigenous rights are respected. The problem arises when consultation is not carried out in a prior, free, informed, and good faith manner, and is instead reduced to a formal exercise intended to legitimize decisions already taken. In such cases, the central premise of FPIC - the effective right to be consulted and to influence decisions that affect Indigenous territories - remains unfulfilled.

Comparative experience shows that, despite the existence of increasingly clear international standards, a significant gap persists between States' international commitments and their domestic implementation. In both extractive and certain conservation contexts, territory continues to be treated as an object of management rather than as a living space for the communities that inhabit it.

Accordingly, the main challenge of FPIC lies not only in improving consultation procedures, but in embracing its transformative potential. Recognizing consent as a real limit on State power requires moving beyond formal compliance and advancing toward more inclusive models of territorial governance, in which consultation becomes a genuine tool for dialogue, participation, and respect for diverse ways of relating to and understanding territory.

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