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The Right to Free, Prior, and Informed Consent (FPIC) in International Law: A Legal Fiction?

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Abstract

This paper argues that Free, Prior, and Informed Consent (FPIC) operates as a legal fiction in international law - formally recognised, yet frequently circumvented in practice. Through case studies of Maasai evictions in Tanzania, Karen displacement in Thailand, and India's selective enforcement in Niyamgiri, the analysis reveals how structural weaknesses in FPIC frameworks enable state and corporate avoidance. Three key issues are identified: (1) deliberate ambiguities in foundational instruments such as UNDRIP and ILO 169 that prioritise state sovereignty over Indigenous self-determination; (2) active resistance from states and corporations through bureaucratic formalities, violence, and certification loopholes; and (3) the absence of meaningful enforcement mechanisms. The paper demonstrates how legal fragmentation creates 'boundary-crossing' norms (Kingsbury, 2000) that allow powerful actors to exploit definitional inconsistencies while maintaining a facade of compliance. Despite FPIC's roots in the right to self-determination (ICCPR/ICESCR Article 1), states often resist granting Indigenous groups the "people" status required under Article 1, reducing FPIC to a procedural theatre. The analysis concludes that current FPIC frameworks function as "safe spaces" (Wiessner, 2008) that legitimise dispossession through performative participation. To transform FPIC from fiction to enforceable right, the paper proposes hybrid tribunals, trade sanctions, and Indigenous-led oversight, although acknowledges the political challenges of implementation. Ultimately, without systemic reform, international law remains complicit in the very rights violations it purports to address.

Keywords: Indigenous rights, FPIC, Norm Fragmentation, State Sovereignty

Introduction

In 2022, the Tanzanian government designated the ancestral lands of the Maasai a 'protected area', evicting thousands of Indigenous people without their consent, to make way for luxury safaris on a World Heritage Site designated in 1979 (United Nations (UN), 2022: 14). This eviction represented the systematic exclusion of Indigenous peoples from the management of their ancestral lands, en-

dangerous their physical and cultural survival (UN, 2022: 14). These evictions exemplify the violation of a core precept in international law: the right to free, prior, and informed consent (FPIC).

FPIC guarantees Indigenous peoples the right to 'freely approve, negotiate, or reject' projects affecting their land, territories, and resources (UN, 2007: Art. 19). Rooted in the right to self-determination under international law (UN, 1966a: Art. 1; UN, 1966b: Art. 1), FPIC requires states to ensure consent processes are free from coercion (UN DESA and FAO, 2016: 15), prior to project authorisation (UN, 2007: Art. 19), and informed through culturally appropriate disclosure of impacts (UN DESA and FAO, 2016: 15). As portrayed in the Maasai example, the failure of the state's duty to engage in this universal norm can have real-world consequences that are detrimental to Indigenous peoples, as well as minorities and peasants (UN DESA and FAO, 2016: 32; UN, 2022: 6). FPIC's sui generis foundations are fragmented across contradictory instruments, ranging from soft-law declarations in the United Nations Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP), to binding treaties, such as the International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples 1989 (ILO 169), alongside the key rights of the International Bill of Human Rights (Rösch, 2023: 2). Even within these documents, there exist contradictions, such as UNDRIP's Article 3 (self-determination) and Article 46 (state sovereignty) (UN, 2007), which create avenues for states to circumvent the FPIC obligations. Normative fragmentation creates what Kingsbury (2000) calls 'boundary-crossing' norms (2000: 34), where the meaning and legal force of FPIC change depending on the context, creating a situation that favours states and corporations, allowing them to choose the most favourable interpretation, while Indigenous peoples are forced to navigate contradictory legal frameworks. The deliberate ambiguities involved in these frameworks create what Wiessner (2008) calls 'safe spaces.' This concept refers to bounded zones of consultation that give the appearance of inclusion while preserving the state's ultimate decision-making authority, thus circumventing the need to transfer real power to Indigenous peoples (Wiessner, 2008, 1174).

When examined collectively, these structural weaknesses render FPIC a legal fiction – a right formally recognised in international law but routinely circumvented in practice. This practice is exemplified by the strategic adherence of states to the normative status of the FPIC, while violating its substantive requirements, as shown in the Maasai evictions and the Kaeng Krachan case studies. This paper argues that three key factors contribute to the issues of FPIC: (1) legal ambiguity in key FPIC instruments, (2) resistance of duty-bearers and primary actors, and (3) the absence of FPIC enforcement mechanisms.

To demonstrate FPIC's fabrication as a concept, this paper will firstly examine FPIC's contested legal status, highlighting the tensions between self-determination rhetoric and state sovereignty (Rösch, 2023: 42). Next, it explores systemic barriers, including state repression and corporate 'greenwashing', while considering why states resist FPIC politically and economically (Kanosue, 2015: 663-664; Feichtner, 2019: 5). To highlight the implementation gap, the case studies of Niyamgiri in India and Kaeng Krachan in Thailand are examined (UN DESA and FAO, 2016: 18; UN, 2022: 13).

Legal Foundations and Ambiguities of FPIC

The FPIC framework exists in a state of deliberate paradox within international law. It is simultaneously celebrated as a cornerstone of Indigenous self-determination and systematically neutered through legal ambiguities that prioritise state sovereignty and corporate interests. This paradox reduces FPIC to a procedural formality rather than a substantive right. Although instruments such as the UNDRIP and ILO 169 rhetorically enshrine FPIC, their flexible implementation provisions make consent optional in practice. The paradox is not accidental; rather, states embrace the normative language of FPIC precisely because its operational weaknesses pose no real threat to their authority. Its status ultimately preserves the ultimate sovereignty of the state over land and resources. As mentioned previously, the 'safe spaces' for Indigenous participation create bounded zones of con-

sultation that never threaten the state's monopoly over final decisions (Wiessner, 2008: 1174). This results in a legal fiction that masks ongoing dispossession behind the language of rights, a contradiction epitomised by UNDRIP's simultaneous recognition of Indigenous self-determination in Article 3 and its explicit protection of state territorial integrity in Article 46 (UN, 2007: Art. 3, Art. 46). This section unpacks these contradictions and seeks to reveal how the legal foundations of FPIC are structurally predisposed to fail.

UNDRIP's adoption by 143 states was celebrated as an international turning point for Indigenous peoples, with the right to self-determination being opened beyond its original confinement of states and colonised peoples (Rösch, 2023: 46; Quane, 2011: 259-260, cited in Rösch, 2023). However, the soft-law nature of the Declaration, while creating significant political legitimacy, fails to establish binding obligations (Lenzerini, 2019: 55). UNDRIP's deliberate ambiguities, particularly the protection of the territorial integrity of Article 46(1), make its provisions selectively enforceable at the discretion of the state (Rösch 2023: 67; UN, 2007: Art. 46(1)). In addition, its preamble distinguishes Indigenous peoples from the state, indicating that Indigenous peoples are not seen as full holders to the right of self-determination (UN, 2007: preambular paras 2, 16).

UNDRIP is also exposed to state weaponisation against Indigenous peoples due to its weak language. Article 30(2) states that Indigenous peoples should be effectively consulted prior to using their land for military activities, yet Article 30(1) states that the military does not require consent when acting in the public interest (UN, 2007: Art. 30(2), Art. 30(1)). In this context, 'public interest' is not a neutrally defined concept but is often a state-defined, strategically deployed justification, encompassing economic development, national security, or environmental conservation, which is used to override Indigenous rights without their consent. An example of this can be found in Thailand. The Indigenous Karen people of Thailand were forcibly evicted from Kaeng Krachen in the name of public interest to create a national park (UN, 2022: 13). Hence, the military weaponises the legal loophole, redefining 'public interest', forcing the Karen people to create a national park that seeks the status of a World Heritage Site and is deemed within public interest (Rösch 2023: 76; UN, 2022: 13). The vague language of the Declaration can also be seen in Article 19 'consult and cooperate... to obtain consent', which threatens to create performative compliance while still allowing forced evictions. Another example can be found in the Philippine Indigenous Peoples' Rights Act. However, supported by UNDRIP, the Act obliges extractive companies to obtain FPIC prior to operations on Indigenous land, but the law simply reduces FPIC to a 'tick-box' formality exercise and a certification grant without meaningful consultation and agreement with Indigenous peoples (Kanosue, 2015: 663).

Compared to UNDRIP, ILO 169 has far fewer ratifications (at 24) as of 2025. The convention is binding and 'guarantees the rights of Indigenous peoples to their land and involvement in decision making in cases that affect their resources and livelihoods (UN DESA and FAO, 2016: 32). The document also prohibits the removal and relocation of indigenous or tribal populations from their territories without 'their free and informed consent.' (UN DESA and FAO, 2016: 32) The binding nature of the document paired with the low ratification rate points to a strategic avoidance by several states with sizeable Indigenous peoples within their borders, notably Canada, New Zealand, the United States and Norway (Lenzerini, 2006: 167). This reflects the fear of sovereign states that FPIC can threaten resource governance, particularly in the case of energy sources (UN DESA and FAO, 2016: 6). Peru, however, has ratified ILO 169, but the case of *Poma Poma v. Peru* demonstrates how, despite the seemingly binding nature of ILO 169, breaches of FPIC-supporting documents are empty without an enforcement mechanism. In the legal case, Peru conducted zero consultations with the Indigenous Aymara community (UN Human Rights Committee, 2009: para. 7.6). The Human Rights Commission (HRC) based its decision on the ICCPR, finding that Peru was in violation of Article 27 of the ICCPR, since they had destroyed the pastoral livelihood of Aymara (UN Human Rights Committee,

2009: para. 7.7), but also exposed Peru's non-compliance with ILO 169 based on Article 15(2), which requires states to protect both Indigenous land and resources (ILO, 1989: Art. 15(2)). Hence, in theory, the HRC's ruling was ground-breaking, as FPIC is seemingly recognised under the ICCPR. However, no material restitution was ordered – under Section 9, the reparatory language was vague and did not reference concrete measures to the rights or livelihoods of the Aymara. In addition, the directive has no follow-up mechanism in the case of non-compliance. The HRC's ruling caused reputational damage for Peru, but it did not have any mechanism to enforce material consequences or guarantee reparations for the Aymara community. This absence of a follow-up procedure is indicative of a broader enforcement gap, where even successful legal challenges may not yield tangible restitution to victims. The decision thus admits FPIC violations but offers no guaranteed reparatory justice for victims, exemplifying Rösch's (2023) proposal of FPIC's fragmentation by design (2023: 143). The broader pattern demonstrated by the ruling demonstrates the lack of teeth for even 'binding' FPIC-supporting legislation.

ILO Convention 169 itself contains a critical provision that facilitates this flexibility. Article 34 states:

'The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country.' (ILO, 1989).

Although ostensibly intended to allow for culturally sensitive implementation, this flexibility clause has been leveraged by states to justify a diluted, case-by-case application of FPIC that often prioritises national conditions over Indigenous rights. This is not a theoretical concern; it occurs in practice. For instance, the Norwegian government invoked Article 34 to justify its failure to place a Sámi health service under Sámi responsibility and control as required by Article 25 of the Convention (ILO 169, 1989), arguing that the provision allowed for flexible implementation (The Sámi Parliament of Norway, 2023: 28). The Sámi Parliament condemned this as a fundamental misreading, noting that Article 34 requires adaptation through consultation, not unilateral derogation from obligations (The Sámi Parliament of Norway, 2023: 28). This misuse of Article 34 in the context of health services demonstrates the potential of the provision for much broader abuse, including in critical areas of land and resource consent where FPIC is meant to apply. This creates a fundamental tension within the Convention, establishing rights in Articles 6 and 16, only to qualify their enforcement through the deferential language of Article 34. The provision thus acts as a built-in escape hatch, allowing states to argue that a one-size-fits-all approach to consent is not mandated, thereby weakening the normative force of FPIC and making it susceptible to the very fragmentation this paper identifies.

The right to self-determination forms the basis of FPIC and is codified in the International Conventions: The International Covenant on Civil and Political Rights (ICCPR), and The International Covenant on Economic, Social, and Cultural Rights (ICESCR). However, Article 1 of the ICCPR and ICESCR, which declares that 'all peoples have the right to self-determination', is the inherent source of tension and contradiction for Indigenous peoples and states due to its systematically undermined status in practice (UN, 1966a; UN, 1966b). This tension originates from the conflict between the rhetorical affirmation of Indigenous self-determination in international law, while states actively work to retain ultimate control over territory and decision making (Engle, 2011, cited in Rösch, 2023: 161). This involves limiting the application of 'peoples' from Article 1, yet where it is applied in practice, it is reduced to 'cultural accommodation', only including the 'internal dimension' rights without further implications, hindering challenges to state sovereignty over land and resources (Xanthaki, 2005: 17-18).

As scholars like Rösch (2023: 43) and Xanthaki (2005: 17-18) examine, a significant barrier is the widespread reluctance of states to recognise Indigenous groups as 'peoples' under international law. This reflects a long-standing strategic exclusion, rooted in a state-centric interpretation of self-

determination that explicitly forecloses claims by internal ethnic groups in favour of preserving territorial integrity (Thornberry, 2002: 93).

The strategy is clearly illustrated by France's historical classification of the Indigenous Kanak peoples of New Caledonia as 'minorities' (Kochenov, 2010: 317), a move that effectively denies them the path to self-determination articulated in Article 1 of the ICCPR and ICESCR (UN, 1966a; UN, 1966b), relegating them to the weaker protections afforded to minorities under Article 27 of the ICCPR (UN, 1966a: Art. 27). This transforms FPIC from a sovereignty-based norm into a procedural formality on a flexible basis, a phenomenon epitomised by Article 34 of ILO 169 (ILO, 1989).

Case Studies of FPIC Evasion

The theoretical contradictions within the FPIC framework are manifested in a range of evasion tactics by state and corporate actors, as evidenced by the following cases.

It is valuable to review Philippine legislation and consider the structures involved with the concept of FPIC. On the surface, the Indigenous Peoples' Rights Act (1997) (IPRA) in the Philippines appears to guarantee the recognition of cultural communities in their ancestral domains, including the option to decide priorities for their own developments (UN DESA and FAO, 2016: 35). Its ratification led to the creation of the National Commission for Indigenous Peoples (NCIP); an agency attached to the Office of the President which claims to provide frontline services for Indigenous peoples. Although IPRA recognition of the right of Indigenous people to self-determination, of which FPIC is an expression, should be celebrated, reality is removed. The IPRA requires extractive industry companies to obtain FPIC before beginning operations in areas inhabited by Indigenous peoples. However, the NCIP has the ultimate authority and responsibility to issue certificates stating compliance with FPIC (Minter et al., 2012: 1241-1242). Therefore, the structural process has reduced FPIC to a 'tick-box' formality exercise to achieve certification (Kanosue, 2015: 663). This demonstrates government and corporate co-operation to circumvent FPIC commitments, including the consultation of Indigenous peoples, while retaining moral legitimacy on the surface.

The lack of consultation spreads to Myanmar and Thailand in South-East Asia, yet is paired with violence against Indigenous peoples and their criminalisation. Their case studies demonstrate the absence of 'free' or 'informed' consultation by the respective states. In Myanmar, FPIC is informally enshrined through the 'UN-REDD+' programme, which provides information on FPIC (UN-REDD Programme, 2020). Villagers in 7 geographic research areas conducted by the Karen Human Rights Group reported that investors and authorities are engaged in natural resource extraction and implementing development projects, without engaging or informing local people (Karen Human Rights Group, 2013, cited in Kanosue, 2015: 663). Protesters to such conduct in one incident were dispersed with grenades by government forces, and those participating in the opposition of land deals risk arrest or detention (Kanosue, 2015: 663-664). In Thailand, the Karen people were forcibly evicted from Kaeng Krachen and continue to face abuse for asserting their land rights, including extrajudicial killings, harassment, and criminalisation, under the guise of attempting to include the Kaeng Krachen land onto the World Heritage List as a national park (UN, 2022: 13). The lack of FPIC engagement and violence surrounding it sets a dangerous precedent for Indigenous communities that are less likely to engage in protecting their lands and resources and reduces their likelihood of effectively engaging in consultation with the government due to their risks of criminalisation (Kanosue, 2015: 664).

As briefly explored in the Philippine example, corporations frequently circumvent FPIC obligations by exploiting weak certification systems and by manipulating legal definitions of Indigeneity, often with state complicity. In doing so, FPIC is rendered ineffective while maintaining a facade of compliance with international standards. This is demonstrated through the actions of the company Golden Veroleum Palm Oil Plantation Liberia (GVL) in Liberia and the not-for-profit certification

board, Roundtable on Sustainable Palm Oil (RSPO), of which GVL is a member (RSPO, n. d.). RSPO has developed an environmental and social criterion, which includes the implementation of FPIC for projects affecting Indigenous peoples and local communities (UN DESA and FAO, 2016: 37). When a company complies with their criteria, it is granted a certification for sustainably produced palm oil. Despite this certification, anti-GVL expansion protests in Liberia were deemed "unpatriotic and non-nationalistic" and sovereignty was framed as a way to achieve government economic interests (Rösch, 2023: 184). This reflects a weakness within the concept of FPIC: while Indigenous consent can be withdrawn, there is a lack of an enforcement mechanism for those who violate FPIC (UN DESA and FAO, 2016: 13). In the case of GVL, the requirement of FPIC from communities was removed from discussions of extending the GVL's contract to its 350,000 hectares (Rösch, 2023: 247). This shows how corporations, acting on behalf of government economic interests, can ignore FPIC, especially in the cases of resource extraction – a key factor in UNDRIP attempt to protect resource rights for Indigenous peoples. Global, multi-stakeholder organisations such as RSPO, which claims to involve all 7 sectors of palm oil production, including NGOs, continue to grant GVL a RSPO certification, where the state and the company retain moral legitimacy and are seen as 'more reliable' by demonstrating 'good conduct' (UN DESA and FAO, 2016: 37). This case exemplifies a difficult outcome of international norm-building, where the more elaborate a legal framework for protection becomes, the more incentive and ingenuity states and corporations display in circumventing them, ultimately leveraging the rhetoric of rights to legitimise their evasion (Etchart, 2022: 149).

Systemic Barriers: State and Corporate Resistance

Despite FPIC's recognition in international law, it is frequently undermined by states through bureaucratic procedures, repression, and legal evasion, particularly in resource-rich regions. Similarly, it is evident that these violent responses from states present a case where states see Indigenous people's efforts to self-determination as a direct threat to their sovereignty, despite UNDRIP's Article 46 that protects state sovereignty rights (UN, 2007: Art. 46(1)). The lack of a universal internationally agreed definition of FPIC creates several exploitable legal loopholes. Corporations will often exploit FPIC's norm fragmentation across different fields of law to work around certain definitions of FPIC in varying contexts. This ambiguity extends to the very nature of corporate responsibility itself. As Pulver (2021) notes, while the expectation for corporations to respect FPIC are growing, it is still 'rather unclear what the corporate responsibility to respect indigenous peoples' rights and FPIC entails from a legal perspective,' a lack of clarity that surveys show leaves corporations 'struggling to grasp the meaning and implementation' of the principle (2021: 19).

The field of general human rights law still lacks a consistent understanding of FPIC (Barelli, 2018, as cited in Rösch, 2023: 77). However, FPIC's appropriation in other fields, such as developmental and environmental law, leaves several versions of FPIC coexisting, understood by different social actors in different spaces (Rösch, 2023: 143-146). This fragmentation can be understood through the lens of 'vernacularization,' a process in which transnational concepts are adapted and reconfigured within local institutional and legal contexts, often translated and reworked in ways that alter their original intention (Merry, 2006: 39). Rösch argues that while this can benefit Indigenous peoples by 'obtaining more spaces for self-determination', geopolitical interests often limit their freedom of choice in reality (Merino, 2018, as cited in Rösch, 2023: 145). Rösch offers an example of this legal plurality of FPIC:

'If conservation NGOs or donors decide to designate a protected area, they become an Indigenous people and local community under environmental law. If the government or companies have economic interests in the area, then the legal identities of developmental law will be imposed on them, which does not allow for their self-identification.' (Rösch 2023: 146).

This loophole can be seen in practice in many African states, where weaker versions of FPIC are required through interpretations from non-human rights-based legislation (Legal Resources Centre, Oxfam, 2018: 10). In Kenya, the Community Land Act (2016) forgoes mentioning FPIC directly, or 'indigenous', instead opting for a majority vote from 'community' members (Kenya, 2016: para. 2). This redefinition avoids the stronger collective rights associated with FPIC. The harmful nature of the diffusion of the FPIC norm and the lack of universal definition are ultimately a distinguishable counter to conventions such as ILO 169 which champion the standards of flexibility in the implementation of FPIC (ILO, 1989: Art. 34).

The Niyamgiri Paradox: Exceptionalism and Selective Enforcement

The deliberate ambiguity adopted by some states towards FPIC mirrors India's selective enforcement of FPIC, particularly in the traditionally lauded case of the Niyamgiri Hills. The 2013 decision is often celebrated as a landmark victory for Indigenous rights, but it stands as the exception rather than the rule. Although the case intrinsically demonstrates the potential of FPIC, it also reveals how India, and other states, can manipulate selective enforcement of Indigenous rights to legitimise systemic exploitation elsewhere, particularly in regions such as Assam, where Indigenous voices are suppressed and ignored.

Niyamgiri as a case study is used to present FPIC as a tool to 'ensure that [Indigenous] priorities are taken into account', Indigenous peoples being kept informed, in control and managing their lands and territories, with their cultural identity and right to self-determination respected (UN DESA and FAO, 2016: 18). The case saw the Supreme Court of India uphold the rights of indigenous peoples under the Forest Rights Act of 2006 and emphasised their authority to reject or accept projects through traditional decision-making bodies, such as the Gramme Sabha (UN DESA and FAO, 2016: 18). The ruling was in response to a proposed bauxite mining project in the Niyamgiri hills, a rich, biodiverse, and sacred region for certain Indigenous peoples (UN DESA and FAO, 2016: 18). FPIC was implemented through: (1) participation in local language during village meetings, (2) governments helping to organise Gramme Sabha's during monsoon season, and (3) the Supreme Court prohibiting the mining company from influencing the meeting (UN DESA and FAO, 2016: 18). It led to the rejection of the mining project that cited threats to Indigenous cultural, spiritual and livelihood rights (UN DESA and FAO, 2016: 18). On the surface, the case provides a perfect case of FPIC being implemented and should be respected through case precedence elsewhere.

However, the case should be presented as an exception. The international spotlight on the region pressured the Indian state to act, with NGOs such as Amnesty pressuring the mining company (Vendata) and its stakeholders threatening to withdraw funding over the treatment of Indigenous peoples (Wachman, 2010). Despite the ruling, Vendata still seeks to expand operations on the hills and continues to lobby for the rights to mine there (Wachman, 2010). Importantly, the Niyamgiri precedent risks being exploited as a selective legitimisation tool. By pointing to this singular victory, state actors can claim a record of respecting Indigenous rights while simultaneously violating FPIC in other regions, such as Assam and Nagaland, where oversight is weaker and international attention is limited. The Assam region contains multiple Indigenous groups with tribal structures. Despite its tribal identity, national, colonial legislation such as the Assam Land and Revenue Regulation (1886) continues to allow the state the power to 'make rules for allotments of lands' for tribes (Government of Assam, 1886: para. 14). In particular, the amendments have not incorporated FPIC provisions, which could threaten the traditional tribal council structure of decision-making on local issues on land and resources and allow forced acquisitions. Elsewhere, in Nagaland, Indigenous communities have raised concerns about military presence through the Armed Forces Special Powers Act 1958 (AFSPA) and resource extraction without FPIC (Baria, 2013; Asian Centre for Human Rights (ACHR), 2022: 4-7).¹ The '2021 Nagaland killings' saw 14 civilians killed protesting AFSPA, demonstrating the violent erasure of dissent elsewhere to Niyamgiri hills (Baria, 2013; ACHR, 2022: 2). The Niyam-

giri case ultimately demonstrates the weaponisation of FPIC - by choosing symbolic compliance in certain contexts, compared to greenwashing violations elsewhere, such as in Assam and Nagaland. This selective enforcement risks creating a divide-and-rule dynamic, potentially pitting Indigenous groups against each other by implying that some are more deserving of rights than others. However, ultimately, legal victories such as Nyamgiri are meaningless without systemic change. Without systemic reform, Niyamgiri remains celebrated in rhetoric but systematically weaponised in practice. It is a symbolic victory that fails to establish a meaningful precedent.

From Fiction to Enforcement: Proposals for Reform

FPIC is a concept that requires serious development to become effective in international law. To transform FPIC from rhetoric to reality, several reforms are critical. Firstly, soft-law instruments such as UNDRIP crucially lack enforcement. Precedents such as the implementation of Canada's UNDRIP Act (2021) show promise that requires the alignment of FPIC in domestic law and are being implemented with the consultation of Indigenous peoples (Government of Canada, 2021). The lack of independent enforcement is also key to the current failures of FPIC. In this paper, I reflect the recommendations of Special Rapporteur Jose Francisco Cali Tzay (2022) according to the Human Rights Council, for a third-party grievance body to investigate violations, but operationalised through hybrid tribunals combining Indigenous customary law and international standards, respecting Article 5 of the UN (UN, 2022: 19; UN, 2007: Art. 5). In addition, including Indigenous-led review panels, rather than state-appointed committees, would allow for grassroots auditing while still deferring to state sovereignty and respecting UNDRIP Article 5 (Lenzerini, 2006: 189; UN, 2007). The weakness of FPIC when considered from a pluralistic legal perspective is demonstrated when, for example, environmental law and human rights law conflict. Although difficult, the international community, along with Indigenous peoples, should seek to reconsider the flexibility clause of ILO 169 in Article 34 and achieve a more universal definition of FPIC to prevent loopholes and exploits. If this is unattainable, a cross-sector review board should be considered, which could include, for example, imports of palm oils which violate FPIC being banned in trade policy. In this way, FPIC becomes more institutionalised.

Conclusion: The Persistent Fiction of FPIC

FPIC remains a fractured concept, celebrated in rhetoric, but structurally undermined in practice. The case studies of the Maasai in Tanzania, the Karen in Thailand, and selective enforcement in India's Niyamgiri demonstrate that these failures are not incidental but foundational. Defining otherwise would be to mistake the current form of FPIC for its completion.

The consistent and multifaceted undermining of FPIC, as demonstrated in the cases of Tanzania, Thailand, and India, reveals its functions as a legitimising fiction, masking dispossession under the guise of participation. The case studies, such as Tanzania's Maasai evictions, and India's selective enforcement in Niyamgiri, present a consistent pattern of FPIC being operationalised as a legitimising fiction which masks violence against Indigenous peoples under the guise of participation. The tension between UNDRP's recognition of Indigenous self-determination and its protection of state sovereignty (UN, 2007: Art. 3, Art. 46) presents a system designed to preserve the ultimate decision-making power with states and capital. The consequences of such a system continue to see Indigenous peoples criminalised and erased despite current FPIC legal frameworks that claim to prevent these outcomes. The international order remains hostile to Indigenous sovereignty, reflecting a dire need for procedural reform and enforcement mechanisms to build on the key principles of the FPIC.

For FPIC to transcend its status as a legal fiction, enforcement must focus on moving from symbolic gestures to actionable mechanisms, whether in the form of hybrid tribunals, trade sanctions, or Indigenous-led oversight. Although these may contain political challenges and logistical hurdles, these mechanisms would finally give the FPIC the substance it needs to be seriously considered in

international law. Until this point, international law will remain complicit in the dispossession it claims to condemn.

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