

# FREE PRIOR INFORMED CONSENT: AN OBLIGATION UNDER INTERNATIONAL LAW REGARDING NATURAL RESOURCES

ZEESHAN ALI KHAN | [zeeshaneshan13@gmail.com](mailto:zeeshaneshan13@gmail.com)

*Zeeshan Ali Khan* is a final-year law student at Bahria University, serving as the President of the Bahria University Law Moot Society (BULMS). He has represented and coached teams in numerous national and international moot court competitions, including the Jean-Pictet, Philip C. Jessup, and Foreign Direct Investment International Arbitration Moot. His interests include Public International Law, Constitutional Law, International Humanitarian Law.

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## ABSTRACT

This article examines the normative status of Free, Prior, and Informed Consent (FPIC) as a mandatory obligation under international human rights law regarding natural resource extraction. Moving beyond procedural formalities, it establishes FPIC as a substantive right anchored in customary international law and the jus cogens principle of self-determination. Through a doctrinal analysis of UNDRIP, ILO Convention No. 169, and landmark jurisprudence from regional tribunals, such as *Saramaka v. Suriname* and *Sarayaku v. Ecuador*, the study demonstrates that state sovereignty over subsurface minerals is strictly qualified by the duty to secure valid indigenous consent. The article deconstructs the legal thresholds of FPIC: "free" from coercion, strictly "prior" to project authorization, comprehensively "informed" through culturally appropriate data, and culminating in "consent" as a collective decision. Ultimately, the paper argues that FPIC requires good faith mechanisms that unequivocally recognize indigenous communities' absolute right to grant or withhold agreement.

**Keywords:** Indigenous Peoples' Rights, Mineral Resource Extraction, Customary International Law, Natural Resource Governance, Prior Consultation, State Sovereignty, Good Faith Negotiations.

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## 1. INTRODUCTION

The right of Indigenous people to obtain free, prior and informed consent (FPIC) has been recognized by a number of intergovernmental organizations, international bodies, conventions and international human rights law<sup>1</sup> and has also become an international obligation under Customary international law due to its applicability and acceptance. This right is to be particularly taken into account while making a decision regarding natural resources on the lands of indigenous people. In this regard, Article 28 of the UN Declaration on the Rights of Indigenous Peoples obligated FPIC, and restitution of their resources in case an action is done

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<sup>1</sup> Forest Peoples Programme, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review* (Briefing Paper, FPP 2004) 5.

without obtaining Free Prior Informed Consent.<sup>2</sup> Therefore, the governing standard establishes that FPIC is a necessary requirement in decisions affecting indigenous lands and resources.

## 2. OBLIGATION IN CONTEXT OF NATURAL RESOURCES

Multiple States have deemed their Mineral and Natural Resources as State's official property. However, indigenous peoples cannot be alienated in matters touching on their lands. States still are to consult under Article 15 of ILO Convention 169 even when there exists a sovereign right of the State over the natural resources.<sup>3</sup> However, the word used in ILO Convention is to consult, which can translate differently than obtaining consent.<sup>4</sup> In this regard, Article 6 of the same Convention can be used as a tool for interpretation, as Article 6 requires the consultations to be done with an object to achieve consent. Thus, even where States assert ownership over natural resources, such authority remains qualified by the obligation to carry out consultations aimed at securing consent.

Secondly, the right to self-determination which is a fundamental principle of human right entails the individual and collective right of a people to freely determine and pursue their political, economic, social, and cultural development and status.<sup>5</sup> The International Court of Justice (ICJ) has held that this is a right held by the people rather than the government alone and that it is a norm of *jus cogens* which is the highest rule of international law and must be obeyed at all times.<sup>6</sup> The interpretation by *Lampung Journal of International Law* of ILO convention extend it to indigenous people's right to participate in the use, management, and conservation of natural resources on their lands.<sup>7</sup> Additionally, the court held in *Saramaka People v. Suriname* that requirement is not merely of consultations but to obtain FPIC of the indigenous people.<sup>8</sup> Similarly, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, it was held that "in terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded;"<sup>9</sup> and that any development or investment projects that would have a major impact within the Endorois territory impose a duty on the State not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions. Therefore, the combined effect of self-

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<sup>2</sup> United Nations Declaration on the Rights of Indigenous Peoples (adopted 13 September 2007) UNGA Res 61/295, art 28.

<sup>3</sup> Indigenous and Tribal Peoples Convention 1989 (ILO Convention No 169) art 15.

<sup>4</sup> *Ibid*, art 6.

<sup>5</sup> Nadesan Satyendra, 'Self Determination: Principle and the Law' (Tamilnation) <http://www.tamilnation.org/selfdetermination/> accessed 22 April 2026.

<sup>6</sup> *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90; Matthew Saul, 'The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?' (2011) 11(4) *Human Rights Law Review* 609–10.

<sup>7</sup> 'Indigenous Peoples' Rights over Natural Resources: An Analysis of Host Communities Rights in Nigeria' (2021) 3(2) 121–136.

<sup>8</sup> *Saramaka People v Suriname (Judgment) Inter-American Court of Human Rights Series C No 172 (28 November 2007)*.

<sup>9</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (African Commission on Human and Peoples' Rights, Comm No 276/2003, February 2010) paras 226 and 291.

determination and jurisprudence affirms that FPIC is not merely procedural but a substantive requirement.

### **3. LEGAL THRESHOLD OF VALID FREE, PRIOR, AND INFORMED CONSENT (FPIC):**

According to United Development Programme (UNDP)'s report there is no internationally agreed definition or understanding of the principle or mechanism for implementation of Free Prior Informed Consent. Although some UN agencies have, to some extent, implemented FPIC on an ad hoc basis in line with their general guidelines or legal instruments and principles to enhance their partnership with Indigenous Peoples (IPs).<sup>10</sup> The same has been discussed and interpreted by courts in various cases.

#### **3.1. Free:**

Free means a consent given voluntarily and absent of “coercion, intimidation or manipulation.”<sup>11</sup> This standard is common among different jurisprudences however, no set threshold has been given under any jurisprudence. In the case of *Saramaka People v. Suriname* it was stated that for the consent to be free it must be obtained from the entire community in a method which is appropriate for such consent according to their customs.<sup>12</sup> This requires States to not rely on methods convenient for the State but the methods which are culturally and contextually convenient for the indigenous people involved in the consultation process. In addition, the Human Rights Committee in *Angela Poma Poma v. Peru* held that measures taken to obtain consent must respect the principle of proportionality so as not to endanger the very survival of the community and its members.<sup>13</sup>

UNDRIP's Articles 19 read with Article 32 obligate the states to obtain the said consent in good faith particularly when it is regarding adopting measures or approving projects affecting their lands, territories, or resources, especially “development, utilization or exploitation of mineral, water or other resources. This has been translated to being the criteria for consent being free in the case of *Kichwa Indigenous People of Sarayaku v. Ecuador* and such was rendered incompatible with attempts to undermine the social cohesion of the affected communities, either by bribing community leaders or by establishing parallel leaders, or by negotiating with individual members<sup>14</sup> of the community instead with community as a whole. Similar has been upheld in *Maya Q’eqchi’ Agua Caliente Indigenous Community v. Guatemala* that the good faith consultations are incompatible with practices such as attempts to disintegrate the social cohesion of communities affected, either through the corruption of community leaders or the

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<sup>10</sup> United Nations Development Programme (UNDP), ‘Inter-Agency Support Group on Indigenous Issues on FPIC’ (Report presented at the Permanent Forum, May 2004) UN Doc E/C.19/2004/11.

<sup>11</sup> UN Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent* (2005) UN Doc E/C.19/2005/3.

<sup>12</sup> *Saramaka People v Suriname* (n 17).

<sup>13</sup> *Angela Poma Poma v Peru* (2009) UN Doc CCPR/C/95/D/1457/2006, para 7.6.

<sup>14</sup> *ibid* para 87.

establishment of parallel leaderships. This threshold of "Free" also obligates the states to ensure that indigenous peoples are able to exercise their right to free, prior and informed consent.<sup>15</sup>

Philippines Indigenous Peoples' Rights Act gives the standard as to be "free from any external manipulation, interference and coercion"<sup>16</sup> Canadian law obligates the duty to consult in a manner consistent with voluntary and non-coercive participation.<sup>17</sup>

In conclusion, the concept of Free Consent it must be done in good faith without any coercion, intimidation, and manipulation.<sup>18</sup> The State must respect Indigenous people's self-governance and decision-making systems.<sup>19</sup> During the process state is to ensure there is no undue influence or pressure in respect to urgency of time or the place of consultations.<sup>20</sup> The indigenous people finally should at all times have the freedom to choose their own representatives through their own culturally appropriate mechanisms.<sup>21</sup>

### 3.2. Prior:

Consent is to be obtained prior to the project about which the consent is required. However, a question regarding the nature and the standard of prior consent arises, which is; whether prior consent requires consent to be taken before even the decision making or whether this consent is a part of the implementation process and is to be obtain before the project starts which in our case is mining of the natural resources. ICJ in its **Pulp Mills case** has held that even the preparatory steps taken before the required consultations violate the obligations of the state. Similarly, Food and agriculture Organization requires consent to be sought sufficiently in advance of any authorization or commencement of activities.<sup>22</sup> UNDRIP and ILO Convention 169 requires consent to be obtained before approval, undertaking or permitting any such project that affects the lands and territories of indigenous people.

In another view, *Kichwa Indigenous People of Sarayaku v. Ecuador* and *Saramaka People v. Suriname* has loosened the criteria of consent either being obtained before or at the first

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<sup>15</sup> Human Rights Committee, 'Concluding Observations on Togo' (18 April 2011) UN Doc CCPR/C/TGO/CO/4, para 21.

<sup>16</sup> Indigenous Peoples' Rights Act 1997 (Philippines Republic Act No 8371) s 3(g).

<sup>17</sup> Impact Assessment Act 2019 (Canada).

<sup>18</sup> Retno Kusniati, 'Free, Prior, and Informed Consent Principles as Indigenous Peoples' Right: Soft Law or Hard Law?' (2024) 7(1) *Jambe Law Journal*.

<sup>19</sup> aurence Klein, M Muñoz-Torres and MA Fernández-Izquierdo, 'A Comparative Account of Indigenous Participation in Extractive Projects: The Challenge of Achieving Free, Prior and Informed Consent' (2023) *The Extractive Industries and Society*.

<sup>20</sup> Mauro Barelli, 'Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead' (2012) 16 *International Journal of Human Rights* 1–24.

<sup>21</sup> Aguasantas Macias Marín and Michelle André Lapierre Robles, 'FPIC, International Law, Social Space, and Indigenous Territories in FPIC during Extractive Projects in Latin America: A Romantic or Tragic Story?' (2022) *Revista Sarance*.

<sup>22</sup> Food and Agriculture Organization, 'Free, Prior and Informed Consent' (FAO) <https://www.fao.org/indigenous-peoples/pillars-of-work/free--prior-and-informed-consent/en> accessed 11 May 2026.

stages of development and planning.<sup>23</sup> However, it is important to note down that the development at first stages should be completely reversible in case consent is not given.

Before the final consent is required the Indigenous People are to be given sufficient advance time for customary processes and internal deliberation leading to decision-making subject to Indigenous norms to provide an appropriate answer to the State without their being any time pressure which renders the obtained consent not Free.

National Jurisprudences also give out a threshold of what constitutes prior consent. Norway integrates Sámi consultations *before governmental decisions are made* on land and mineral use.<sup>24</sup> Similarly, in Bolivia prior consultation with Indigenous communities before granting mining rights is mandatory.<sup>25</sup>

In conclusion consent must be prior, giving the opportunity to the indigenous people to provide an answer after discussing it among themselves and then with the State.

### 3.3. Informed:

Informed Consent requires that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples.<sup>26</sup> **UN Human Rights Committee** includes translation into Indigenous languages and full disclosure of expected consequences in this duty.<sup>27</sup>

There are two aspects of consent being informed. First that the indigenous population has been provided all the required information and second that all of the indigenous people or their duly appointed representatives have been informed about such information and are participating in the consultations. In the *Maya Q'eqchi' Agua Caliente Indigenous Community v. Guatemala*<sup>28</sup> court held consent to be not informed based on the fact that 10 families had not participated and were not informed of the project. *Kichwa Indigenous People of Sarayaku v. Ecuador* and *Saramaka People v. Suriname* state that in the context of the consultation process, the State should always provide clear and sufficient information on the nature and impact of the activities to be carried out so that such information allows the community to assess with full awareness, the advantages and disadvantages of the project.<sup>29</sup> The same has been

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<sup>23</sup> *Saramaka People v Suriname* (n 17)

<sup>24</sup> Planning and Building Act 2008 (Norway).

<sup>25</sup> Law 535 on Mining and Metallurgy 2014 (Bolivia).

<sup>26</sup> UN-REDD Programme, *Legal Companion to the UN-REDD Programme Guidelines on Free, Prior and Informed Consent (FPIC)* <https://www.un-redd.org/sites/default/files/2021-09/Legal%20Companion%20to%20the%20UN-REDD%20Programme%20Guidelines%20on%20FPIC.pdf> accessed 11 May 2026.

<sup>27</sup> Human Rights Committee, 'Concluding Observations on Canada' UN Doc CCPR/C/CAN/CO/5; Human Rights Committee, 'Concluding Observations on Kenya' UN Doc CCPR/C/KEN/CO/3

<sup>28</sup> *Maya Q'eqchi' Agua Caliente Indigenous Community v Guatemala (Judgment) Inter-American Court of Human Rights Series C No 488 (16 May 2023).*

<sup>29</sup> *Saramaka People v Suriname* (n 17)

mandated across numerous jurisprudences including Peru<sup>30</sup> and Australia<sup>31</sup> in their laws disclosure of all relevant information in accessible formats and Indigenous languages.

In conclusion for consent to be informed it must be clear, transparent, comprehensive, accurate information on nature, size, pace, reversibility, duration, and economic, social, cultural, environmental impacts; alternatives and risk–benefit; in accessible form and language through culturally appropriate mechanisms.<sup>32</sup>

#### 4. CONSENT:

Consent refers to a collective decision made by the right holders and reached through customary decision-making processes of the communities. Consent is meaningless without its cumulative elements, as held in *Kichwa Indigenous People of Sarayaku v. Ecuador*, that where prior and informed consultation has not been conducted, it is unnecessary to proceed to the question of consent. In its Concluding Observations on Guatemala, the Human Rights Committee emphasized that States must not only conduct consultations but also recognize and give due weight to the decisions taken by indigenous peoples within such processes.<sup>33</sup> Similarly, in its observations on Colombia, the Committee expressed concern over large-scale infrastructure and mining projects undertaken without obtaining FPIC, particularly where consultations were deficient, lacked participation of legitimate representatives, and failed to provide accurate and complete information regarding the scope and impact of such projects.<sup>34</sup>

A comparable concern was raised in relation to Argentina (E/C.12/ARG/CO/3, 2011), where inadequate consultation processes resulted in the exploitation of natural resources on indigenous lands without FPIC and without the provision of just and fair compensation, in violation of both constitutional guarantees and international obligations, including ILO Convention No. 169.

A question is raised whether consent is compulsory or if the consultations are sufficient regardless of the decision. The Inter-American system has drawn a distinction between consultation and consent. As stated by InterAmerican court in *Saramaka People v. Suriname* and in the report of Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, while all consultation processes must aim at achieving consent, certain circumstances impose a stricter obligation.<sup>35</sup> Specifically, in cases involving large-scale development or investment projects with a significant impact on indigenous lands, territories,

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<sup>30</sup> Prior Consultation Law 2011 (Peru Ley No 29785)

<sup>31</sup> Native Title Act 1993 (Australia).

<sup>32</sup> S Sadiq and A Sinclair, 'Understanding Free, Prior, and Informed Consent (FPIC) in the Context of Mining in Canada' (2020).

<sup>33</sup> Human Rights Committee, 'Concluding Observations on Guatemala' (19 April 2012) UN Doc CCPR/C/GTM/CO/3, para 27.

<sup>34</sup> Committee on Economic, Social and Cultural Rights, 'Concluding Observations on Colombia' (21 May 2010) UN Doc E/C.12/COL/CO/5, para 9.

<sup>35</sup> *Saramaka People v Suriname* (n 17).

or natural resources, States are under a legal duty not only to consult but to obtain the free, prior and informed consent of the affected communities.<sup>36</sup>

## 5. CONCLUSION

In conclusion the standard of FPIC is applied with remarkable consistency across different legal systems is coherent, the only difference that exists is in the intricacies of the standard, while at the same time maintaining the same objective. Even though, no single international treaty that sets a global standard, the various legal interpretations remain anchored in the same foundational principles; as put by Expert Mechanism on the Rights of Indigenous Peoples "*the element of "free" implies no coercion, intimidation or manipulation; "prior" implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow indigenous peoples to undertake their own decision-making processes; "informed" implies that indigenous peoples have been provided all information relating to the activity and that that information is objective, accurate and presented in a manner and form understandable to indigenous peoples; "consent" implies that indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.*"<sup>37</sup>

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<sup>36</sup> Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources* (30 December 2009) OEA/Ser.L/V/II Doc 56/09, paras 329–334.

<sup>37</sup> Expert Mechanism on the Rights of Indigenous Peoples, *Final Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making* (17 August 2011) UN Doc A/HRC/18/42, paras 3, 20–25.