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I. INTRODUCTION

Global development diminishes the voices of indigenous populations around the world. Resource extraction and commercial use threaten even the most isolated groups.[1] In an effort to develop enforceable rights for indigenous peoples, the United Nations Declaration of the Rights of Indigenous Peoples sought to protect indigenous peoples through the principle of the Free, Prior, and Informed Consent ("FPIC"). This paper focuses on why the FPIC is struggling to take hold in the international community.

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1. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 4 (1996).

To effectively execute the FPIC, this principle should become hard law because countries view hard law as binding. Because most nations in the international community view the FPIC as soft law,[2] this principle has failed to adequately protect indigenous peoples' rights.

The international community and the United Nations ("UN") have long recognized general human rights as an obligation of each nation state. Finally, in 2007, the UN articulated additional rights specifically for indigenous peoples through the FPIC.[3] The UN developed the FPIC by using key terms and theories from the 1989 International Labour Convention No. 169 ("ILO 169"), known as the Indigenous and Tribal Peoples Convention.[4] The ILO 169's members sought to protect two main groups of people:

> (1) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; and (2) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[5]

While each of the 20 countries that ratified the ILO define "indigenous" differently,[6] the ILO 169 sought to unite the countries' governments to implement a common goal: "To ensure indigenous people's fundamental rights and work together with indigenous communities to end discrimination both as it relates to inequalities in *outcomes* – differences

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2. TSEMING YANG ET AL., COMPARATIVE AND GLOBAL ENVIRONMENTAL LAW AND POLICY ch. 2, 60 (2019) (explaining soft law is a norm that is not "quite law," while hard law is generally accepted as law).

3. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, at 1, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

4. INTERNATIONAL LABOUR ORGANIZATION, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169, 5 (2009).

5. *Id.* at 9.

6. *Id.* at 10–23.

in health, education, employment, etc. – and as it relates to inequalities in the *processes* of governance – participation and involvement of indigenous peoples in decision-making, government institutions and programs."[7] In 2007, the United Nations Declaration of the Rights of Indigenous Peoples ("UNDRIP") acknowledged the importance of ILO 169, and articulated the need for appropriate implementation mechanisms.[8] UNDRIP's members drafted a series of articles, which now form the FPIC.[9]

UNDRIP, unlike the ILO 169, is not a legally binding document but rather a stated commitment to certain values that may become law.[10] The FPIC's articulation contained within UNDRIP "is still in a phase of dynamic development and the scope of the standard is not yet fully clarified."[11] Indigenous populations have experienced more than just shortfalls in the effectiveness of this principle. Across the globe, countries that have signed onto this principle have continued to commit atrocities against indigenous populations, especially when it comes to natural resource development.

For example, 2009 marked a violent time for Peru's indigenous peoples.[12] In response to their political activism, the Peruvian government classified indigenous peoples in the country as "extremists."[13] The biggest driver of the FPIC's ineffectiveness is national governments teaming up with global corporations, as seen in Peru, because of the belief that corporations are not bound to the FPIC, and therefore, countries do not enforce FPIC requirements.[14] If the international community viewed the

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7. *Id.* at 29. (*emphasis in the original).*

8. *Id.* at 30.

9. UNDRIP, *supra* note 3, at arts. 10, 11, 19, 28, 39. (referencing art. 10 which states Indigenous peoples shall not be forced from their homes; (2) art. 11 § 2 which states nations will provide restitution if property is taken without FPIC; (3) art. 19 which states nations will consult and cooperate in good faith with Indigenous peoples; (4) art. 28 which states indigenous peoples have the right to redress, by means that can include restitution or equitable compensation for land or resources the government took without FPIC; and (5) art. 29 § 2 which states nations cannot store hazardous chemicals on Indigenous lands without FPIC).

10. Ipshita Chaturvedi, *A Critical Study of Free, Prior and Informed Consent in the Context of the Right to Development — Can "Consent" be Withheld?*, 5 J. INDIAN L. & SOC'Y 37, 40 (2014).

11. S.J. OMBOUTS, HAVING A SAY: INDIGENOUS PEOPLES, INTERNATIONAL LAW AND FREE, PRIOR AND INFORMED CONSENT, 20 (2014).

12. Elizabeth Salmón G., *The Struggle for Laws of Free, Prior, and Informed Consultation in Peru: Lessons and Ambiguities in the Recognition of Indigenous Peoples*, 22 P. RIM L. & POL'Y J. 353 (2013).

13. *Id.* at 355.

14. *Id.*

FPIC like the duty to not harm or right to home and property, principles now considered hard law, other nation states could pressure breaching countries to follow the FPIC.

In Part I, this paper will illustrate the background of the FPIC and the rights of indigenous populations globally. Part II will address the pitfalls of the FPIC and give examples of states' domestic laws failing to enforce the FPIC. Part III will provide how international law can move toward adopting the FPIC as "hard law" by analyzing the history of the "duty not to harm" and "right to home and property," which are hard laws. Finally, Part IV will explore how the FPIC may already be embedded in customary hard law through cultural heritage protections.

II. EVOLUTION OF THE FREE, PRIOR, AND INFORMED CONSENT PRINCIPLE

Although the United Nations did not introduce the FPIC to international actors until 2007,[15] the global community began discussing indigenous rights in the 1970s.[16] "Generic protection" of indigenous groups is explained in Article 27 of the International Covenant on Civil and Political Rights[17] and asserts, "In those [s]tates in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."[18] As concerns around indigenous rights grew, the International Labour Organisation, a specialized branch of the UN that focuses on workers' rights, became involved.[19]

In 1957, the first legal document, the International Labour Organisation's Convention No. 107 ("ILO 107"), was specifically created around indigenous rights.[20] ILO 107 focused on governmental responsibility in integrating indigenous populations into the majority populations.[21] Indigenous communities criticized ILO 107 as

15. UNDRIP, *supra* note 3.

16. ANAYA, *supra* note 1, at 50.

17. ROMBOUTS, *supra* note 10, at 12.

18. International Covenant on Civil and Political Rights, General Assembly, Mar. 23, 1976, Art. 49 I.L.M 2200A (XXI).

19. BEN SAUL, INDIGENOUS PEOPLES AND HUMAN RIGHTS 27 (2016); United Nations Department of Economic and Social Affairs, *State of the World's Indigenous Peoples* (UN, 2009), 2.

20. ROMBOUTS, *supra* note 10, at 13.

21. ROMBOUTS, *supra* note 10, at 13; Convention on International Labour Organisation, Jun. 26, 1957, 107 ILO.

"paternalistic" and "promoting assimilation."[22] As views and politics shifted, influenced by the Human Rights Conventions of 1966 and indigenous voices, the ILO began re-evaluating its integration policy under ILO 107.[23] The International Labour Organisation reconvened in 1989 and passed ILO 169.[24] ILO 169 implemented tribal consultation, implied semi-autonomous societies, and allowed self-identification of status or relation to an indigenous population.[25] Despite colonization having a deep and lasting impact on many countries, only 11 percent signed ILO 169, a decrease from ILO 107, which had less stringent restrictions.[26] Of the countries that signed, the majority were from Latin America, with four in Europe, one in Africa, one in Asia, and one from the Pacific.[27]

Recognizing the need to protect indigenous rights, the United Nations struggled to adopt its own declaration that paralleled the achievements of ILO 169.[28] In 1982, the United Nations formed the Working Group on the Rights of Indigenous Peoples ("WGIP") to prepare a draft declaration.[29] In 1985, the WGIP created a declaration that included indigenous voices as well as research to "deepen the understanding of the issues involved."[30] The WGIP completed a draft declaration in August 1993 and gave it to the Commission on Human Rights seeking support.[31] While a working group within the Commission on Human Rights planned on meeting every year for over ten years, the declaration failed to gain support from countries.[32] The Commission on Human Rights failed to adopt the declaration from 1994 to 2006, but in June of 2006, the Human Rights Council ("HRC") adopted the declaration and sought support from

22. SAUL, *supra* note 19, at 28.
23. ROMBOUTS, *supra* note 10, at 13–14.
24. *Id.* at 13.
25. SAUL, *supra* note 19, at 28–29.
26. *Id.* at 30.
27. *Id*.
28. Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in The Context of Human Rights*, 22 EUR. J. INT. L. 141, 143 (2011).
29. *Id.*
30. ASBJØRN EIDE, *The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples*, in ASBJØRN EIDE ET AL., MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 32, 37 (Claire Chartres & Rodolfo Stavenhagen eds., 2009) [hereinafter Making the Declaration Work].
31. *Id.* at 38. The Commission on Human Rights sets standards to govern human rights issues.
32. *Id*.

the UN General Assembly.[33] Despite ample support in the HRC, five major member countries of the UN General Assembly opposed the declaration's adoption: Canada, Australia, New Zealand, United States, and Russia.[34]

One of the main criticisms was Article 19, which stated indigenous groups must consent to projects.[35] These five opponents influenced a majority of African countries to vote against the declaration, which failed in the UN General Assembly in November 2006.[36] Yet, after further negotiations led to nine small changes in the HRC's draft, the African countries that had previously opposed the draft shifted to supporting the declaration.[37] In September 2007, the UN General Assembly passed the UN Declaration on the Rights of Indigenous People, creating the FPIC.[38]

Executing the FPIC has been "slow and uneven by countries, private sector corporations, non-governmental organizations, international financial institutions, and the United Nations agencies."[39] With difficulties facing the FPIC's effectiveness, the UN Food and Agriculture ("FAO") branch created a six-step process to implement the FPIC for companies looking to develop in known indigenous areas.[40]

(1) *Identify the indigenous groups and their representatives.*[41] Information on indigenous peoples may be accessed through resources such as non-profit

33. *Id.* at 38 (showing that the United States, Canada, New Zealand, and Australia were not signatories during this vote. Later, all four countries voiced support for UNDRIP, including the United States in 2010.); *see also* United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, at 1, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

34. Making the Declaration Work, *supra* note 30, at 39.

35. *Id.* at 40.

36. *Id.* at 38–39.

37. *Id.* at 42 (stating most of these changes were "small and inconsequential[;]" however, in one larger change, the drafters changed the right to self-determination to include "respect for political unity of the state." The implication of this is still not known, but this change was one of the reasons for the reluctant African countries to sign on.).

38. *Id.* at 41–42.

39. *Free Prior and Informed Consent: An Indigenous peoples' right and a good practice for local communities*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, 19−30 (2016), http://www.fao.org/3/a-i6190e.pdf [hereinafter FAO].

40. *Id.* at 19.

41. *Id.* at 20.

organizations, official national censuses and community-based organizations.[42] Step one also encourages entities to identify any mobile communities, research any local laws pertaining to the FPIC, and approach any indigenous community through their self-governance structure.[43]

(2) *Identify the geography and demographic information of the proposed development area*.[44] Identification happens through "participatory mapping," which means involving indigenous community members to better "understand connections between people, places and organizations over space and/or time."[45] This step encourages participation through all affected communities as well as placing responsibility on the project owners to determine who owns the proposed land and if there is non-negotiable land.[46]

(3) *Design a communication plan to disseminate project information in a transparent way.*[47] Project developers are encouraged to perform this step through meeting with indigenous peoples when and where they want to, conveying their right to say no, and documenting proceedings by providing copies to all parties.[48]

(4) *Gain consent.*[49] All parties must reach an agreement, have documents involved in the process readily available in the appropriate languages, identify any possible risks, indicate which parts of the agreement

42. *Id.*
43. *Id.* at 20–21.
44. *Id.* at 21.
45. *Id.* 19−30 (quoting National Co-ordinating Centre for Public Engagement, *How to Perform Participatory Mapping* (2017), https://www.publicengagement.ac.uk/sites/default/files/publication/how_to_perform_participatory_mapping.pdf).
46. *Id*. at 22–23 (explaining non-negotiable land includes sacred sites, burial areas, etc.).
47. *Id*. at 23.
48. *Id.* at 23–24.
49. *Id*. at 25.

the indigenous peoples have not consented to, and establish conditions on what may lead to their consent.[50] An agreement should include parties, summary of project, substantive evidence of consent, feedback and complaints mechanism, monitoring plan, and terms for withdrawal of consent.[51]

(5) *Monitor and evaluate aspects of the agreement.*[52] This step works to ensure participation from the impacted community and gives indigenous groups the ability to raise concerns.[53]

(6) *Document the lessons learned to help with future development goals.*[54]

These six steps outline one method to FAO's approach on the FPIC, however, the FAO's approach still has shortcomings.[55] The FPIC's duties involve duty to consult, participation, and consent have continued to be a significant problem due to diminished support, through lack of implementation and resources, from local or national governments.[56] Additionally, the FAO guidelines do not address appropriate action if an indigenous community does not consent to a project. In contrast, the International Council on Mining and Metals ("ICMM") has a policy that "requires members to seek consent, but does not require members to gain consent," similar to the United States' and Canada's rules, before initiating a project.[57] Finally, companies may also fail to gain consent, and governments can step in and approve development regardless.[58] In order to effectuate the FPIC, the participating nations need to address these failures.

50. *Id.*
51. *Id.* at 26.
52. *Id.* at 29.
53. *Id.*
54. *Id.* at 30.
55. *Id.* at 19−30.
56. ROMBOUTS, *supra* note 10, at 94.
57. ANGELA ANTAKLY ET AL., INDIGENOUS RIGHTS IN SOUTH AMERICA 15−16 (Juan Sonoda ed., 2016).
58. *Id.* at 16.

III. THE FPIC AND ITS FAILURE TO HELP INDIGENOUS POPULATIONS

Despite the FPIC going into effect over ten years ago, companies and nations still commit atrocities against indigenous populations.[59] In 2018, there were 164 documented killings of individuals trying to protect their land.[60] Latin America has the highest rate of violence against activists, with little government protection, as well as suffering from international companies extracting resources on indigenous land.[61] This data leads to some key concerns about the FPIC among the international community, including implementation and lack of enforcement.

A. Lack of Clarity in Implementation

Fundamental issues remain with implementing the FPIC including isolation, internal participation, and overlap.[62] Isolation is detrimental to the FPIC's goals because some indigenous populations desire to live secluded.[63] Because of their isolation, public participation and consultation are difficult.[64] Scholars argue the "desire to be left alone" shows they do not give consent to projects because of their intention to secure their land from the outside communities.[65]

This reluctance and mistrust lend itself to difficulties when implementing the FPIC. Another issue with the FPIC implementation is internal participation.[66] Some indigenous groups contain marginalized populations like women and children, but do not allow all community members to participate—a concept the FPIC requires.[67] For example, in some indigenous groups, women and children are not consulted on issues that affect the internal community.[68] Because overall participation by

59. *Enemies of the State? How governments and businesses silence land and environmental defenders*, GLOBAL WITNESS 8 (July 2019), https://www.globalwitness.org/en/campaigns/environmental-activists/enemies-state/ [hereinafter Global Witness].

60. *Id.*

61. *Id.* at 9.

62. ROMBOUTS, *supra* note 10, at 173−83.

63. *Id.* at 174.

64. *Id.* at 175.

65. *Id.* at 174.

66. *Id.* at 177.

67. *Id.* at 179.

68. *Id.* at 177−78 (explaining the Western world's ideas behind effective participation must be handled delicately with indigenous populations that have a different framework of society).

affected indigenous groups is a key part of the FPIC implementation, participation from "illiberal" communities is challenging.[69]

A third major issue with implementation is overlap between other indigenous communities or entities.[70] A "dichotomized" view of indigenous groups leads to "arbitrarily fixating indigenous peoples' consensus, while disregarding the multiple and fragmented nature of the member subject positions."[71] By recognizing the cultural overlaps and differing interests among groups, developers face challenges to achieve one common plan and gain all groups' consent.[72]

Another key issue involves private actors like the World Bank and extractive resource industries' interpretation of the FPIC.[73] Because UNDRIP applies to governments and not private companies,[74] the World Bank has implemented less stringent guidelines called Free, Prior, and Informed Consultation, except for in special circumstances where it advises use of the FPIC.[75] As noted, the ICMM has an even lesser standard, which directs that development programs should engage and consult with indigenous peoples in a "fair, timely and culturally appropriate way throughout the project cycle."[76] This standard could "lead to breaches of international human rights standards, as companies might only do the minimum necessary to meet the requirements of local legislation, potentially failing to recognize the right to the FPIC, and thus infringing [on] the Indigenous right to self-determination."[77] While the ICMM is

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69. *Id*. at 177−79 (defining illiberal as "communities that internally do not adhere to internationally established human rights norms in relation to participation of marginalized groups living in these communities").

70. *Id.* at 179–83.

71. *Id*. at 181 (citing *Right Based Approach to Development: Exploring the Potential and Pitfalls*, 71 (Sam Hickey & Diana Mitlin eds., 2009)).

72. *Id*. at 182–83.

73. Philippe Hanna & Frank Vanclay, *Human rights, Indigenous peoples and the concept of Free, Prior and Informed Consent*, *Impact Assessment and Project Appraisal*, 31 HUMAN RIGHTS AND IMPACT ASSESSMENT 146, 151 (2013).

74. ANTAKLY, *supra* note 57, at 11.

75. HANNA, *supra* note 73, at 151 (stating special circumstances include "Impacts on Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use," "Relocation of Indigenous Peoples from Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use" and for projects that impact "Critical Cultural Heritage").

76. *Id.*

77. *Id*. (citing Bethany Haalboom, *The Intersection of Corporate Social Responsibility Guidelines and Indigenous Rights: Examining Neoliberal Governance of a Proposed Mining Project in Suriname* 43, GEOFORUM 2012, at 969–79, https://doi.org/10.1016/j.geoforum.2012.06.003); *see also* Environmental Assessment: Dakota Access Pipeline Project 2 (2016) (stating the Standing Rock

taking steps to follow the FPIC, ultimately, it can still decide to move forward with projects, even if there is opposition or a lack of consensus.[78]

Finally, it remains unclear if the "consent" part of the FPIC includes veto power.[79] Without veto power, the FPIC loses strength because projects can continue to move forward. As of now, the international community recognizes tribal consultation as the customary norm.[80] For instance, the United States has a "long-standing executive branch policy to incorporate special [tribal] status into regulatory processes," but it does not include tribal veto power on projects.[81] Similarly, Canada has a duty to consult with indigenous communities during the Environmental Impact Assessment phase which includes "good-faith consultation" and willingness to make changes based on information obtained during assessments.[82] Canada's policy, however, does not include tribal consultation as determinative of whether the project moves forward, even if indigenous communities are opposed.[83] Unfortunately, as shown in Canada's and the United States' policies, the question of whether nation states need to obtain consent from indigenous communities is usually answered in the negative because governments can weigh economic benefit to regulate resources for all citizens, not just its indigenous groups.[84]

B. Lack of Enforcement

Along with implementation issues, the FPIC faces a lack of enforcement in countries that have adopted it, which non-compliant countries would have to resolve if the FPIC was considered hard law. Some of the biggest breaches of the FPIC stem primarily from Latin American countries,[85] even though Latin American countries comprise the

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Sioux Tribe opposed a pipeline development from crossing a waterbody upstream from their water takes, and the Tribe argued they were not adequately consulted on the project despite the project moving forward).

78. ANTAKLY, *supra* note 57, at 16.

79. CHATURVEDI, *supra* note 11, at 52.

80. YANG, *supra* note 2, at 571.

81. *Id.*

82. *Id.* at 573.

83. *Id.*

84. CHATURVEDI, *supra* note 11, at 53; *see also* Mauro Barelli, *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead*, 16 INT'L J. HUM. RTS. 1, 5 (2012).

85. Global Witness, *supra* note 59, at 9.

majority of countries that signed ILO 169.[86] This issue is referred to as the "governance gap," which means a nation state fails to protect populations because of lack of mechanisms to ensure compliance.[87] Additionally, there is no legal entity or instrument to enforce compliance because UNDRIP is nonbinding unless it is carried out in domestic law.[88]

Further, a government's right to develop and the FPIC often conflict, particularly in developing countries.[89] State versus tribal sovereignty and ownership of national resources are often still debated.[90] Because nation states argue these resources "are the benefit for all," courts often side with nations on ownership issues.[91]

Issues over rights to develop and resource ownership are further conflated due to large inconsistencies between an international, national, and domestic regulation, known as the "implementation gap."[92] The Philippines exemplifies the implementation gap in a conflict with Dole Asia, one of the largest producers of bananas, which is backed by companies like JP Morgan Chase.[93] The Philippines is a signatory to UNDRIP,[94] and it also holds its own national policies surrounding indigenous rights such as the Indigenous Peoples' Rights Act.[95] Despite the international and national policies, the Philippines has inconsistently implemented indigenous protection policies. For example, in the Bukidon region, the indigenous KADIMADC community stated a wealthy landowner, who owns the largest gun-making factory in the country, was illegally sub-leasing indigenous land for a Dole plantation without their

86. SAUL, *supra* note 19, at 30.
87. HANNA, *supra* note 73, at 149.
88. *Id*.
89. CHATURVEDI, *supra* note 11, at 54−55.
90. *Id*. at 52−53.
91. Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Separate Opinion of Judge Weeramantry 647, https://www.icj-cij.org/public/files/case-related/91/091-19960711-JUD-01-05EN.pdf (last visited Apr. 27, 2021); CHATURVEDI, *supra* note 11, at 53−54.
92. CHATURVEDI, *supra* note 11, at 53.
93. Global Witness, *supra* note 59, at 20.
94. UNDRIP, *supra* note 3.
95. Indigenous Peoples' Rights Act (2017); *see also* Lynette Torres, *Indigenous Peoples in the Philippines: Perspective on Inclusion*, Global Observatory for Inclusion (June 15, 2016), http://www.globi-observatory.org/indigenous-peoples-in-the-philippines-perspectives-on-inclusion/ (stating the Indigenous Peoples' Rights Act "affirms Indigenous Peoples' rights to ancestral domains, self-governance and empowerment, social justice and human rights, and rights to cultural identity); *see generally* UNDRIP, *supra* note 3.

consent.[96] Dole failed to take steps in reviewing this land lease to determine if the land was disputed and if the FPIC was granted.[97] Because of Dole's lack of due diligence, the community's indigenous peoples turned to local government to investigate allegations.[98] Reportedly, instead of investigating, government officials tried to bribe indigenous members to sign consent forms.[99] The KADIMADC people remained on their land, but the wealthy landowner's security personnel in the area have threatened the community with loss of homes and life.[100] The Philippines government is failing to implement the FPIC on a national and local level, and it has failed to implement the UNDRIP policies it agreed to at an international level.

The Ixquisis peoples' struggles in Guatemala show another example of indigenous groups fighting to overcome their country's conflicting regulations and right to develop.[101] After the end of the Guatemalan Civil War in 1996, the country opened itself to foreign development to boost its economy.[102] As a result, many projects began developing, including the San Andrés and Pojom II dams.[103] A large funder of these dam projects is the Inter-American Development Bank, which has received international criticism for investing in the project.[104] The Ixquisis community alleges the dam projects have contaminated their rivers, affecting their ability to fish, farm, and maintain cultural traditions.[105] An activist group, including indigenous leaders, criticized the dam project due to the company's failure to consult the indigenous community.[106] Despite Guatemala adopting UNDRIP, the government allowed development without indigenous consultation.[107] Due to lack of consultation, multiple members of the indigenous activist movement, "the Peaceful Resistance of the Ixquisis," protested the hydroelectric dam project on their land.[108]

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96. Global Witness, *supra* note 59, at 20.
97. *Id.* at 21.
98. *Id.* at 20.
99. *Id*.
100. *Id*.
101. *Id.* at 23.
102. *Id.*
103. *Id.*
104. Anastasia Moloney, *Inter-American Development Bank Should Withdraw Guatemala Dam Funding: Rights Groups*, REUTERS (Aug. 7, 2018), https://www.reuters.com/article/us-guatemala-dam-rights-idUSKBN1KS0NI.
105. *Id*.
106. *Id.*
107. Global Witness, *supra* note 59, at 25.
108. *Id*. at 23.

This hydroelectric dam project—owned and operated by one of the wealthiest families in Guatemala—has caused "a wave of forced and violent evictions" of the Ixquisis people.[109] Recently, Guatemalan police have targeted the Peaceful Resistance of the Ixquisis because of their work defending land rights.[110] Sadly, the protests have led to even more Ixquisis being injured and murdered.[111] Because the political and economic clout of the family who owns the dam project, the protesters are unable to seek police help or support from their government.[112] The government has cancelled talks with indigenous leaders, which would have been led by Guatemala's human rights ombudsman.[113] Case studies such as this, where a country fails to enforce the FPIC at national and international levels, appear all over the world.[114] In order to improve implementation and compliance, the international community must see the FPIC as binding law.

IV. THE FPIC AND THE PUSH TOWARD HARD LAW

International law evolves from a variety of places, such as treaties, customary law, judicial decisions, or universal norms.[115] First, this section will address how laws become customary ("hard law"), while highlighting that the FPIC is still only soft law. Second, this section will analyze how a customary law is developed by tracing the steps of the hard law principles "duty not to harm" and "right to home and property." Third, it will address what steps the UN and nation states can take to develop the FPIC into new hard law. Finally, this paper will explore the FPIC's incorporation into already existing hard law, the international obligation to preserve cultural resources.

A. Hard Law v. Soft Law

Customary law is defined as "the set of rules of state practice that are consistently and uniformly followed by states based on a sense of legal obligation."[116] Customary international law has three elements: (1) "state

109. *Id.*

110. Genevieve Belmaker, *Latin America Saw Most Murdered Environmental Defenders in 2018*, MONGA BAY NEWS (Aug. 24, 2019), https://news.mongabay.com/2019/08/latin-america-saw-most-murdered-environmental-defenders-in-2018/.

111. *Id.*

112. Global Witness, *supra* note 59, at 23.

113. *Id.*

114. *Id.* at 8.

115. YANG, *supra* note 2, at 49−66.

116. *Id.* at 57.

practice must be widespread and virtually uniform in conformance with the rule;" (2) belief that the practice is "legally compelled" (*opinio juris*); and (3) the act is taken by a significant number of states and not rejected by a significant number of states.[117] On the other hand, soft law is often considered "not yet law."[118] Soft law may not be seen by nations as law because it is not legally binding, it is not intended to be law, or it is unenforceable law.[119] Soft law may become customary international law through a process called crystallization.[120] Crystallization occurs through judicial precedent frequently citing the principle, treaties, or voluntary commitments, or a majority of nations making their actions toward a new norm.[121]

The first element in forming customary international law is nations' widespread conformity to the practice.[122] For example, ILO 169 is an international binding document on indigenous rights; however, only 20 countries have signed on.[123] Clearly, only 20 signatories indicates a lack of conformity to the principle. While a majority of countries have signed onto UNDRIP,[124] the state practice of implementing the principle is not uniform. For instance, interpreting whether indigenous groups have veto power creates significant ambiguity in the international community, and it leads to inconsistencies with implementation.[125] Even courts' judicial frameworks have been inconsistent, which creates issues with nations uniformly executing the FPIC.[126]

The second element is a belief that the practice is legally compelled.[127] UNDRIP is a non-binding but "morally obligatory" declaration of indigenous rights.[128] In fact, experts argue the reason so many nations signed on to UNDRIP was due to the nonbinding legal

117. *Id.*

118. *Id.* at 62.

119. *Id.* at 62−63.

120. *Id.*

121. *Id.; see, e.g.*, Case Concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*) (Order on the Request for the Indication of Provision Measures [2006] ICJ Rep 135 (2006), at para. 204 (holding that environmental impact assessments are considered a customary international obligation because of a consensus held among States that it is the new norm).

122. *Id.* at 57.

123. Hanna, *supra* note 73, at 147.

124. UNDRIP, *supra* note 3.

125. *See supra* Part III. A.

126. *See, e.g.*, I/A Court H.R., *Saramaka People v. Suriname*, Judgement of Nov. 28, 2007, Series C, No. 4 No. 172.; I/A Court H.R., *Kichwa Indigenous People of Sarayuku v. Equador*, Judgement of June 27, 2012, Series C, No. 245.

127. YANG, *supra* note 2, at 57.

128. Making the Declaration Work, *supra* note 30, at 111.

status, whereas only 20 nations signed onto ILO 169 because it is legally binding.[129] Both Canada and the United States, initially refusing to sign UNDRIP, finally signed between 2009 and 2010—stating the declaration does not reflect customary international law and does not change their national laws.[130] New Zealand expressed similar notions when it signed in 2010, stating UNDRIP "expresses new, and non-binding, aspirations."[131] Additionally, there is not enough legal compulsion through judicial precedent to cause the FPIC to bind participating nations. Because the FPIC is a relatively new concept, there are only a handful of relevant cases.

Saramaka People v. Suriname[132] is important because it is the first case that explored the FPIC and it revealed a number of issues that need to be resolved in order for countries to effectively implement the FPIC.[133] The Inter-American Court of Human Rights, an autonomous tribunal overseeing human rights' violations in Central and South American countries, ruled that indigenous tribes must be able to give consent to safeguard their lands.[134] The court referenced sections from UNDRIP, particularly Article 32, stating "the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions."[135] The court, however, declined to elaborate on whether consultation with the goals of the FPIC in mind were enough, or if the FPIC created a stronger duty to obtain consent.[136] Unfortunately, even four years after the judgment, Suriname still had not met the court's order to demarcate the Saramaka's land.[137]

In another landmark case, *Kichwa Indigenous People of Sarayuku v. Equador*,[138] the court upheld the need for participation rights, established in *Suriname*, and further elaborated that there is a duty to consult based on the FPIC as well as a duty of consent for large scale projects.[139] In 2008, the African Commission on Human and People's Rights issued a court decision that cited principles from the Inter-American Court on Human Rights stating "[f]ailure to . . . consult or to seek consent . . . results in a violation."[140] Despite the recognition toward

129. HANNA, *supra* note 73, at 151.
130. Engle, *supra* note 28, at 145 n.9.
131. *Id.*
132. IACtHR. (ser. C) No.172 (2007).
133. ROMBOUTS, *supra* note 10, at 220.
134. *Id.* at 263.
135. *Id.* at 265 (internal citations omitted).
136. *Id.* at 265.
137. *Id.* at 274.
138. IACtHR (ser. C) No. 245 (2012).
139. *Id.* at 287.
140. *Id.* at 305.

other judicial precedent, the UN Special Rapporteur still "contended that the form of [FPIC] implementation is context dependent and that there is no 'single formula.'"[141] Many courts, such as the European Court of Human Rights, which oversees numerous indigenous populations, still have no jurisprudence on the FPIC.[142] This indicates a significant number of courts are not citing to the FPIC judicial precedent, which makes the FPIC legally ineffective in most nations.

Finally, the third element of customary law requires that a significant number of nations execute and not reject the FPIC, and that the FPIC is not rejected by a significant number of nations.[143] Here, a majority of nations have adopted this principle with 144 original signatories in 2007—the United States, Canada, Australia and New Zealand later voicing support.[144] At least on paper, a significant portion of states support the FPIC. However, signatory countries like the Philippines and Guatemala are still failing to execute the principle successfully.[145] While the FPIC may satisfy the third element, there is no indication of widespread conformance or belief that the FPIC is legally binding. Because the FPIC is still soft law, it is important to compare with hard law principles like the duty to not harm and right to home and property in order to analyze how it can become customary law.

B. Hard Law Principles: Duty Not to Harm and Right to Home and Property

The international community now see duty not to harm and right to home and property as widespread, legally compelled, and adopted by almost all nations. This indicates that nations view these two concepts as hard law and binding.

Duty not to harm "recognize[s] state responsibility for transboundary air pollution," and created a duty on the polluting nation to pay for any damages caused by their transboundary harm.[146] In 1941, during arbitration between the United States and Canada, a tribunal decided *Trail Smelter*, a major case, which established the now customary international law: the duty not to harm.[147]

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141. *Id.* at 318 (internal citations omitted).
142. *Id.* at 219.
143. YANG, *supra* note 2, at 57.
144. UNDRIP, *supra* note 3.
145. *See supra* Part II. B.
146. YANG, *supra* note 2, at 58.
147. *Id.* at 611.

In *Trail Smelter*, a private Canadian company's smelter site emitted sulphur dioxide into the atmosphere causing damage to United States farms and citizens.[148] The two countries brought the dispute to the International Joint Commission, which awarded the United States $350,000 in damages.[149] The United States, unsatisfied, proposed arbitration and Canada agreed.[150] The Tribunal used the "'general principles of international law on State liability for cross-border damages'" to establish the now recognized duty not to harm.[151] Because of this decision, the *Trail Smelter* case has become a norm in international law with a case in the International Court of Justice, the *Pulp Mills* case, continuing to recognize the transboundary harm rule put forth in *Trail Smelter*.[152]

Additionally, the duty not to harm is memorialized in treaties and other international instruments. For example, the Stockholm Declaration expressed the duty not to harm in its Principle 21, which states that "sovereign states may not allow their territory to be used to cause harm to the environment of other states or the global commons."[153] The duty not to harm developed quickly, but customary international law has been judged as a "more or less subjective weighing of the evidence."[154] Nations follow the duty not to harm rule because of its presence in international judicial precedent, memorialization in treaties, and its general acceptance among nation states.

Another example of a hard law principle is the right to home and property. The United Nations initiated the right to home and property principle under the Universal Declaration of Human Rights (UDHR). The UDHR—created to prevent future atrocities seen during World War II—states "[e]veryone has the right to own property."[155] While the UDHR is not a binding document, "it is considered a codification of the underlying

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.* (internal citations omitted).

152. *See, e.g.*, Case Concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*) (Order on the Request for the Indication of Provision Measures [2006] ICJ Rep 135 (2006), at para. 204 (explaining the transboundary harm rule applied when Argentina objected to Uruguay allowing development of two pulp mills on their shared Uruguay River border because the court stated Argentina has an obligation to respect other States' environments)).

153. YANG, *supra* note 2, at 58.

154. *Id.* at 59 (internal citations omitted).

155. Universal Declaration of Human Rights (10 Dec. 1948), U.N.G.A. Res. 217 A (III), Art. 17(1) (1948).

substantive customary international law norms."[156] Agreements like the American Convention on Human Rights further codify the right to property and home through Article 21, which lays out a fundamental right to property.[157]

Judicial proceedings also solidify the right to home and property concept, such as in the European Court of Human Rights' ("ECHR") *Lopez Ostra v. Spain* holding.[158] This case set precedent when the ECHR held severe environmental pollution constitutes a violation of right to home and property, and therefore, a state violates the right to home if it does not strike a fair balance between the severe pollution that caused the harm and the economic interests.[159] The international community recognizes and extends the right to home and property through a number of treaties and cases like *Lopez Ostra.* The international unity and support behind this human rights' principle indicates that the FPIC, focusing on indigenous human rights, will be more successful once it is codified.

C. Making the FPIC Emerging Customary International Law

Ultimately, customary law "is an evolutionary process where there is likely to be disagreement about its status . . . during the process of its creation."[160] The mere fact that scholars still debate whether the FPIC is customary international law shows that it is not yet hard law. The FPIC is slowly becoming crystallized into hard law, yet, there is still ambiguity about executing the principle among countries that have signed UNDRIP. The FPIC may become customary international law by solidifying the first two of the three customary law elements: (1) widespread conformity and (2) belief the principle is legally binding.[161]

To establish widespread uniform practices, nations must address issues with implementation. If states are not uniformly executing the FPIC, then the first element of creating international customary law cannot be satisfied.[162] For instance, the governance gap, as previously mentioned, could be resolved through looking at writings and suggestions from

156. YANG, *supra* note 2, at 364.

157. American Convention on Human Rights (San Jose, Costa Rica, 22 Nov. 1969), 9 I.L.M. 673, Art. 21 (1970), entered into force 18 July 1978 (stating "everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.").

158. *Lopez Ostra v. Spain*, judgement of 9 December 1994, series A no. 303 para. 51.

159. YANG, *supra* note 2, at 381−83.

160. *Id.* at 60.

161. *See supra* Part III. A.

162. *See supra* Part IV. A.

scholarly articles. The UN Food and Agriculture Organization has produced guidelines on how to implement the FPIC.[163] Also, the UN Human Rights Office of the High Commissioner published a guide on implementing frameworks involving human rights.[164] The guidelines suggest states should promote respect for human rights among their commercial transactions.[165] Additionally, the right to home and property rule could be used as a building block to extend into indigenous rights.

Another important guideline to conformity is ensuring governmental departments and agencies are providing support and information to local branches of government.[166] Adopting these principles could allow countries to apply pressure on ICMM to change its guidelines, and if not, force companies in their own countries to comply with more stringent consent standards. By continuing to publish frameworks for the FPIC, nations and leading scholars can begin to use these frameworks to eventually satisfy the widespread conformity element in customary law.

The second element, belief the practice is legally binding,[167] can be satisfied through consistent legally-binding judicial decisions. By issuing judicial decisions like the holding in *Saramaka People v. Suriname*, the court "appeared to interpret elements of the UN Declaration as having gained the status of international custom."[168] Additionally, the court created a legal framework of five elements to implement valid consultation: (1) consultation must be sufficient and prior to the development plan; (2) the consultation goal must be to reach an agreement in good faith; (3) consultation must be adequate and accessible in line with the indigenous peoples' decision-making models; (4) an environmental impact assessment must be conducted adequately with participation of the community; and (5) the consultation process must meet informational requirements, which include constant communication.[169] As the international community has begun to see, court systems outside the Inter-American Court on Human Rights have used this key framework. One example is the African Commission on Human and People's Rights.[170]

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163. FAO, *supra* note 39.

164. *Guiding Principles on Business and Human Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf (last visited Apr. 27, 2021).

165. *Id*. at 8.

166. *Id*. at 10.

167. YANG, *supra* note 2, at 57.

168. ROMBOUTS, s*upra* note 10, at 298.

169. *Id.* at 291−93.

170. *See supra* Part III. A.

Ideally this will lead to consistent and set rules that nations, along with international court systems, will look to as legally binding.

Educating signatory nation states on some of these suggestions may help with developing national constitutions, and the UN can begin promoting consistent key frameworks that legally bind nations. Ultimately, the frameworks for the FPIC implementation will come through other courts adopting the holdings from previous cases, as shown in *Trail Smelter*. Potentially, the best way to speed the process of adopting frameworks would be through a decision by the International Justice Court—which is legally binding on all UN signatories[171]—that enshrines the concepts the Inter-American Court on Human Rights laid out in *Saramaka*. Another way to speed the process would be to recognize the FPIC as an already established concept.

D. The FPIC Inclusion in Existing International Laws Surrounding Cultural Resource Protection

United Nation's Educational, Scientific and Cultural Organization ("UNESCO"), a specialized United Nation's Agency, had five conventions focusing on preserving cultural heritage.[172] These five conventions included: (1) the 1954 Hague Convention and its two protocols; (2) the 1970 Convention on the Means of Prohibiting and Preventing the Illegal Import, Export and Transfer of Ownership with Cultural Property; (3) the World Heritage Convention; (4) Underwater Cultural Heritage Convention; and (5) Intangible Cultural Heritage Convention.[173] The FPIC has the potential of becoming hard law through incorporation into these already existing conventions protecting cultural resources. In particular, two main conventions that form the customary principle surrounding cultural resource protections could apply: (1) The Hague Convention and (2) the World Heritage Convention.

In response to the "cultural atrocities perpetuated by Nazi Germany during World War II," a number of European countries proposed protections through the Hague Convention, the first and oldest international treaty protecting cultural resources.[174] The 1954 Hague

171. *How the Court Works*, INT'L CT. OF J. (May 7, 2020), https://www.icj-cij.org/en/how-the-court-works.

172. CRAIG FOREST, INTERNATIONAL LAW AND PROTECTION OF CULTURAL HERITAGE 33 (2010).

173. *Id.*

174. U.S. Committee of the Blue Shield, U.S. Ratifies Treaty to Protect Cultural Property in Time of War (Sept. 30, 2008), https://uscbs.org/news/us-ratifies-treaty-to-protect-cultural-property-in-time-of-war/; *see also* Armed Conflict and

Convention laid out measures to prevent destruction of cultural heritage sites specifically during armed conflicts; however, the United States did not ratify the Hague Convention until 2008.[175] The Hague Convention allows criminal prosecution for those who threaten cultural sites, including "theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention."[176]

World leaders recently recognized the significance of the Hague Convention when former President Donald Trump threatened to bomb Iranian cultural sites and was met with intense backlash from the international community.[177] United States Senator Tim Kaine stated, "The pledge to attack cultural sites, likely, is a violation of international law," while the Metropolitan Museum of Art emphasized there is global importance in protecting cultural resources that connect people with their communities.[178] The Hague Convention is legally binding on the 121 countries that have ratified it.[179]

Similarly, nations came together to protect natural heritage sites through the World Heritage Convention.[180] While the Hague Convention covers cultural heritage in times of war, the World Heritage Convention sought to address impacts such as industrialism, economic upheaval, and climate change on heritage sites.[181] The World Heritage Convention was as much about protecting culture as it was about protecting the environment.[182] The World Heritage Convention has contributed to the development of international customs, particularly in relation to *ergo*

Heritage: *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, United Nations Educational, Scientific, and Cultural Organization, http://www.unesco.org/new/en/culture/themes/armed-conflict-and-heritage/convention-and-protocols/1954-hague-convention/ (last visited Apr. 27, 2021).

175. U.S. Committee of the Blue Shield, *supra* note 174 (Due to the Cold War the United States was reluctant to sign onto the 1954 Hague Convention first protocol.).

176. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict [Second Protocol], Art. 15 *entered into force* 26 March 1999.

177. Lolita Baldor, *Pentagon Rejects Trump's Threat to Hit Iranian Cultural Sites*, ABC NEWS (Jan. 6, 2020), https://abcnews.go.com/Politics/wireStory/pentagon-rejects-trump-threat-hit-iranian-cultural-sites-68106602.

178. *Id.*

179. U.S. Committee of the Blue Shield, *U.S. Ratifies Treaty to Protect Cultural Property in Time of War* (Sept. 30, 2008), https://uscbs.org/news/us-ratifies-treaty-to-protect-cultural-property-in-time-of-war/.

180. World Heritage Convention [UNESCO] (Paris, 16 Nov. 1973) 3 U.N.T.S 4 *entered into force* 17 Dec. 1975.

181. FOREST, *supra* note 172, at 224.

182. *Id.*

omnes, a concept that is considered an international law norm.[183] *Ergo Omnes* means "toward everyone."[184] The World Heritage Convention captures the *ergo omnes* concept in its preamble, which recognizes the duty of the international community to preserve heritage sites for the benefit of all people.[185]

The Convention is also binding on its 186 signatories,[186] but it contains no legal consequences for destruction of listed sites.[187] Instead, signatories can benefit from grant funding, heritage site listings, and assisting signatories with sites that are considered high risk for degradation.[188] Although the World Heritage Convention does not have any specific language on settling disputes for breaching parties, a breach of a customary concept, such as *ergo omnes,* could amount to an "internationally wrongful act," which could pressure nations toward international enforcement.[189]

Because protecting cultural resources is tantamount to the FPIC's goals, the FPIC could easily be incorporated into established cultural heritage protections that international law already recognizes as binding. The World Heritage Convention's Preamble aligns with the FPIC's vision. It states that "existing international conventions, recommendations and resolutions concerning cultural and natural property demonstrate the importance, for all the peoples of the world, of safeguarding this unique and irreplaceable property, to whatever people it may belong."[190] Indigenous communities seek to protect lands that are considered unique and irreplaceable property. For instance, indigenous lands are used for religious and traditional practices such as prayer, rituals, festivals, and other cultural ceremonies.[191] Extending cultural heritage to include indigenous lands is a natural progression.

Once the international community uniformly recognizes the FPIC as part of this customary law, the UN and other non-breaching countries can begin demanding that other countries follow the FPIC through cessation, assurances, guarantees, and reparations.[192] There may even be

183. *Id.* at 277.
184. YANG, *supra* note 2, at 58.
185. FOREST, *supra* note 172, at 277.
186. *Id.* at 228.
187. *Id.* at 278.
188. *Id.* at 267, 278.
189. *Id.* at 400–01. (For example, international enforcement could include cessation or sanctions.).
190. World Heritage Convention, *supra* note 180, at Preamble.
191. SAUL, *supra* note 19, at 166.
192. *See* Responsibility of States for Internationally Wrongful Acts, GAOR, 56th Session No. 10 U.N. Doc. A/56/10, Arts. 30–31(2001).

potential for criminal charges against companies who "theft, pillage or misappropriate" cultural resources or those that cause "extensive destruction or appropriation of cultural property" protected under the Hague Convention.[193]

V. CONCLUSION

While UNDRIP and the FPIC's adoption is a big step in internationally recognizing indigenous rights, it is still far from effective. The FPIC's historical development may help to strengthen the intentions behind UNDRIP. The FPIC's intentions will be further solidified if the international community recognizes it as hard law, whether through a newly recognized concept or one that is already established in customary law. By recognizing the FPIC as binding hard law on the international world, the issues such as lack of clarity in implementation and lack of enforcement would be resolved because clearer frameworks would be developed. The FPIC can only be effective if nations consider it binding hard law.

193. HAGUE CONVENTION, *supra* note 176.