FPIC, international law, social space, and indigenous territories in FPIC during extractive projects in Latin America. A romantic or tragic story?

CLPI, derecho internacional, espacio social y territorios indígenas en CLPI durante proyectos extractivos en América Latina. ¿Una historia romántica o trágica?

CLPI, mamallaktapura kamachinakuymi kan. Imasha CLPI kashka runallakta ukupi, shinallatak, runa kawsaykunapa kuskakunapi, allpata utuhunkapak hatun ruraykuna Abya Yalaman yaykumushkakpi. ¿Kushilla wiñaykawsaychu kanka mana kashpaka llakillachu kanka?

Michel André Lapierre Robles
miclapierre@gmail.com
ORCID: 0000-0002-8621-0310
Investigador programa bosques y cambio climático, COMFOR-SUDOE;
Universidad de Valladolid (Valladolid-España)

Aguasantas Macías Marín
aguasantasm@gmail.com
ORCID: 0000-0003-1281-6333
Investigadora en COCEMFE Servicios Centrales (Madrid-España)

Cita recomendada:

Macías Marín A. y Lapierre Robles M.A. (2021), CLPI, derecho internacional, espacio social y territorios indígenas en CLPI durante proyectos extractivos en América Latina. ¿Una historia romántica o trágica?. Revista Sarance, (48), 33-51 https://doi.org/10.51306/ioasarance.048.02

Abstract

The development and implementation of the free, prior, and informed consent (FPIC) can be understood both as a "romantic" and "tragic" story, using a sharp reflection made by Susan Marks (2012) regarding Human Rights. Following this idea, this essay intends to analyse the main developments of FPIC international human rights in the last three decades (the successful story) and the clear and strong limitations of

Revista Sarance, ISSN: 1390-9207; ISSNE: e-2661-6718
Fecha de recepción: 08/03/2022; fecha de aceptación: 30/05/2022

its use in Latin America (the tragic side to it).

Despite the fact that the romantic narrative tells us about a progressive recognition and protection of indigenous rights in international law, especially with instruments such as the ILO Convention 169 (ILO-C169) and the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), these advances have been and are currently deactivated.

Through the revision of postcolonial literature and an analysis of relevant research in Latin America, this essay explains how the supposed progress is clearly limited by imbalances in the history of international law itself and in the territorial governance system that is configured in large-scale extractive projects, where FPIC is applied or not. In this manner, despite apparently overcoming colonial times against indigenous peoples, the permanent structure of neo-colonization of indigenous territory prevails for an ever-growing global market.

Keywords: FPIC; ethnic-environmental conflicts; extractivism; Human Rights.

Resumen

El desarrollo e implementación del consentimiento libre, previo e informado (CLPI) puede entenderse tanto como una historia "romántica" como "trágica", utilizando una aguda reflexión realizada por Susan Marks (2012) en materia de Derechos Humanos. Siguiendo esta idea, este ensayo pretende analizar los principales desarrollos del CLPI en derechos humanos internacionales en las últimas tres décadas (la historia exitosa) y las claras y fuertes limitaciones de su uso en América Latina (su lado trágico).

A pesar de que la narrativa romántica nos habla de un progresivo reconocimiento y protección de los derechos indígenas en el derecho internacional, especialmente con instrumentos como el Convenio 169 de la OIT (OIT-C169) y la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas (DNUDPI), estos avances han sido y son actualmente desactivados.

A través de la revisión de la literatura postcolonial y del análisis de investigaciones relevantes en América Latina, este ensayo explica cómo los supuestos avances se ven claramente limitados por desequilibrios en la historia del propio derecho internacional y en el sistema de gobernanza territorial que se configura en los proyectos extractivos a gran escala, donde se aplica o no el CLPI. De esta manera, a pesar de la aparente superación de los tiempos coloniales contra los pueblos indígenas, prevalece la estructura permanente de neocolonización sobre el territorio indígena para un mercado global cada vez mayor.

Palabras clave: *CLPI; conflictos étnico-ambientales; extractivismo; Derechos Humanos.*

Tukuyshuk

Consentimiento Libre, Previo e Informado nishpami mishu shimipika riksirin CLPI shimitaka. Kayka "kushiyachishkatapash" yarinalla ninmi, shinallatak "llakiyachishkatapash" yarinalla ninmi, chaymi allikuta pacha yuyarishpa kay killkayka willachikrin. Chaypami Runakunapak Kamachinakuykunata imasha Susan Marks (2012) maskak warmipa yachaykunawan alli yuyarikrin. Shinallatak kay killkayka imasha CLPI ñukanchik Runakunapa Kamachinakuykunapi kay kimsa chunka watakunapi wiñarishkatami (alli wiñaykawsayta) rikukrinchik, shinallatak imasha kay kamachinakuykunallata sinchilla kashka Abya Yalapi ukupi tarpuchinkapakka (llakilla wiñaykawsay).

Wakin mishkilla yuyaykunaka ninmi kay CLPI ashtakata ñukanchik runakunta alliman rikushpa, alliman mamallaktapura kamachinakuykunatapash wiñachishka nin, shinallatak chay alli ruraymantapash kay 169 OITpa convenio nishka kamachinakuykunapash wiñarishka nin shinallatak Naciones Unidaspa Runa Llaktakunapa (DNUDPI), hatun yachaykunapash rurarishka nin, shinapash kay kamachinakuykunaka mana ruraypipa kunankaman rikurishkachu kan.

Colonia kipa killkashkakunapi maskashpa, shinallatak Abya Yalamanta ashtawan hatunlla maskaykunata tarishpami kay killkaypika kashna ninchik; kay alli rurarihun nishpa riksishka kamachinakuykunaka mana yanapashka kanchu, ashtawankarin ashtaka llakikunatami puntamanta wiñaykawsaypi maskakpika rikurin. Kay llakikunaka ashatawan pacha ñukanchik runakunapa mamallaktapura kanchinakuykunapimi na alliman apashka rikurishka shinallatak imasha mamallaktata apakkuna paykunapa allpata kamanakunapika ashtakata allpata utuhunatalla ari nishka kashka. Chaymantaka paykunaka ñawsamanmi rikushka CLPI kamachinakuykunataka. Shinami kunanpika yankallami punta colonia kawsaykunata washaman sakishpa rinahunchik ninchik, ashtawankarin neocolonización nishka mushuk yuyay runakunata saruna unkuykunami wiñarimuhunlla, shinashpa ñukanchik runakunapa allpakunataka ashatawan hatuna ukuman shina tikrarichunmi apanahun.

Sinchilla shimikuna: *CLPI; runakunapa allpata kamanamanta llakikuna; allpata utuhuna; Runakunapa Kamachinakuy.*

Introduction

The free, prior and informed consent of indigenous communities appeared to be one of the most important advances to ensure their decision-making capacity regarding what happens in their own territory. At present, the first bidding instrument that establishes this right, ILO-C169, has been ratified by 15 Latin American countries. However, conflicts around environment and its resources are extended and many times violent: the murders of indigenous people associated with environmental conflicts are twice as great as those of non-indigenous people, and countries such as Colombia, Mexico, Brazil and Honduras are the most dangerous in the world for indigenous environmentalists.

As active co-producing agents of biodiversity-rich ecosystems over centuries and even millennia, indigenous peoples live in territories highly coveted by companies and the State. In this sense, environmental conflicts tend to involve them disproportionately. According to Scheidel et al (2020), although indigenous peoples constitute only 5% of the global population, they are involved in 41% of environmental conflicts registered in the world.

To understand this conflictive dynamic, despite advances in national and international jurisprudence, we will first analyse the content of FPIC and then understand its limitations in international law itself as well as its application in the territories.

1. FPIC in international human rights law. The romantic view.

Free, prior, and informed consent (FPIC) has been an outcome of human rights development related to indigenous people over the last 35 years (Barelli, 2012; Ward, 2011; Aylwin, 2020). This development has been deeply rooted in the right to self-determination and the right to own ancestral lands, which are acknowledged in diverse foundational aspects of contemporaneous international law such as the Charter of United Nations, and which include the principle of equal rights and the right to self-determination (Barelli, 2012; de Moerloose, 2020). An essential argument is that, considering the unique connections that indigenous peoples have with their territories, their very existence depends on the attachment to their lands.

Although International Environmental Law and the United Nations Human Rights Treaty Bodies (UNHRTBs) do not explicitly mention FPIC, they have a special interest. Environmental law acknowledges, particularly, the spiritual relationship between indigenous people and their lands. In addition,

it emphasizes the notable contribution of indigenous people in sustainable development, therefore, highlighting the need to protect indigenous cultures and lifestyles. In this sense, the UNHRTBs have been relevant as a means to develop the links between civil, political, social, economic and cultural rights and FPIC, based on identifying some threshold for requiring consent, the geographical scope of FPIC and the adoption of domestic legislation (Barelli, 2012). In addition, the UNHRTB also ties into FPIC in terms of the right to self-determination (de Moerloose, 2020).

The most crucial instruments in the definition of FPIC are the International Labour Organization (ILO) Convention N. 169 (1989) and the United Nations Declaration on the Rights of Indigenous People (UNDRIP, 2007). Even though the former has been ratified by only 24 countries in the world, it is binding and particularly significant in Latin America, where 15 countries have recognised it. The UNDRIP has been subscribed by 164 countries, however, it does not have a binding character, although it is a permanent reference in national and international jurisprudence due to its wide and far-reaching development of FPIC principles.

Both ILO-C169 and UNDRIP fully acknowledge the special relationship between indigenous people and their lands and reaffirm their right to own their lands and control their economic, social, and cultural development. UNDRIP, especially, emphasizes the right to self-determination as the right to freely define their political status and development (Art. 3). From this perspective, FPIC must be understood as an exercise of self-determination. However, ILO-C169 admits that States may retain ownership of sub-surface minerals (ILO-C169, Art. 15) and, consequently, UNDRIP establishes that States, "shall consult [...] in order to obtain FPIC" (Art. 32), introducing a nuance in the right to consent (Engle, 2011; Barelli, 2012).

According to these instruments, free, prior, and informed consent is a process that must have certain characteristics, as discussed below. "Free" means that the entire process should develop without the arbitrary use of power, namely without coercion, manipulation, or intimidation. "Prior" means that the consent process must be deployed appropriately before any official permission is granted or project activities begin, guaranteeing sufficient time considering customary forms of decision-making. The adjective "informed" underlines that indigenous communities must obtain all the substantial project information from companies and States. Furthermore, information must be accessible to them in their own languages and adapted to cultural forms of indigenous understanding. And, in general, the whole process must be adapted

to traditional and customary forms of political organization and representation. International bodies accentuate the balance in power relationship, emphasizing the equal access to different sorts of resources required to carry out an FPIC process (Ward, 2011; Barelli, 2012).

As a right firmly grounded in the right to self-determination, FPIC is seen by these instruments as a realization of this right. That means that it is the indigenous comunities themselves that should undertake FPIC from within their own socio-political structures and symbolic systems of understanding (de Moerloose, 2020; Barelli, 2012; Ward, 2011). The "good faith" character of the entire process also implies that governments and third parties should adapt to indigenous decision-making methods.

However, the romantic account of progressive crystallization of indigenous self-determination finds one of its greatest limitations in the results of FPIC. Instruments and courts do not require governments to obtain the consent of communities, mainly, arguing that this depends on the specific circumstance. A flexible stance predominates. As a result, this opens the door to neo-colonial interpretations. Nearly all countries assert that FPIC does not imply an obligation since they have the right to control their resources in the collective interest of all their citizens (Barelli, 2012; Bayot, 2019; Chaturvedi, 2014; Ward, 2011). Indigenous peoples cannot hold the right to block development projects because they might prevent the defeat of poverty within the nation (Colchester, 2010). Nevertheless, and at the same time, the very existence of indigenous peoples depends on their lands and territories; accordingly, a project that jeopardizes their living conditions can threaten their lives.

In the Latin American case, the jurisprudence of the Inter-American Court of Human Rights has defined a criterion of consent or consultation through specific judicial cases. As Barelli (2012) points out, the Court has generally been inclined to interpret FPIC as a consultation process that, in certain cases, such as Saramaka v. Suriname, must be via mandatory consent. Here, the Court interprets that the large-scale investment plans:

> would have a major impact within the Saramaka territory, [thus] the State has the duty, not only to consult with the Saramaka, but also to obtain their free, informed and prior consent of these, according to their customs and traditions. (cited from Orellana, 2008, p. 845)

Yet, in this interpretation, a question rises about what may be considered as a "greater impact" and if this means that a lesser impact does not need consent (Herrera, 2019).

The "consent v. consultation" controversy (Barelli, 2012; Colchester, 2010) has expressed the incompatibilities of state sovereignty and the right of indigenous peoples to self-determination. The romantic vision of "flexibility" that courts have adopted (Barelli, 2012; Herrera, 2019) offers ample room for maneuver for more powerful actors such as the State and capital. From this controversy it is possible to understand the structural limitations of FPIC, that is, the long-term dynamics in international law and the world-system and its territorial expressions in the social space. Those structural limitations make consent, and more broadly, the right to decide the indigenous peoples' own ways of life, unfeasible. This tragic account of FPIC will be analysed in the following sections.

2. Western Capitalism, IHRL and limitations of FPIC. A tragic narrative worldwide.

As different postcolonial and critical schools of thinking have remarked, modern eurocentric capitalism, active since the emergence of colonialism in the 16th century, has produced a global distribution of capital, labour, and resources. This distribution follows the patterns of center-periphery dynamics, which, in turn, produce geographies of accumulation, extraction, and dispossession (Luxemburg, 1951; Prebisch, 2012; Frank, 1966; Amin, 1976; Quijano, 2000; Harvey, 2004; Composto et al., 2014; Svampa, 2019). Despite the process of decolonization, this world-system currently remains in its general patterns of accumulation/dispossession between the Global North (center) and the Global South (periphery), but with different political, economic, and territorial adjustments. Within this long-term structural dynamic, indigenous peoples have occupied a position of exploitation, discrimination, extermination, and deterritorialization since the first western colonies. Even though the level of formal discrimination of colonization no longer exists, the rate and scales of dispossession are much higher today (Dorninger et al., 2021).

As Doyle mentions (2014), in addition to occupation and wars, the law was a key factor in the colonial project. Colonialist and indigenous people signed many treaties and agreements, and consent was at the core of negotiations. The infamous *Requerimiento* of Spanish colonization, a statement (read in Spanish to the indigenous people of the Americas) demanding acceptance of Spanish rule under threats of exterminations was aimed at the dispossession of wealth and land. Although there were different and sometimes successful resistance movements, the agreement conditions for indigenous people were increasingly unfavourable. Colonial law attempted to justify, regulate and legalise forms of dispossession directly through the explicit discrimination of colonised people. The colonial state and international law were designed to

facilitate the colonial expansion of the modern world-system.

Despite granting sovereignty to the nascent states, the postcolonial state of the Global South was built upon the foundations of the colonial state and its territorial jurisdiction (*utis possidetis*), maintaining, or even strengthening economic dependence and geo-political dominance (Anghie, 2005; Chimni, 2017). In this sense, decolonization in the international law was also an imperial restructuring of the center-periphery relationship of capitalism. It produced, in the Global South, a neo-colonial (Quijano, 2000; Young, 1994), authoritarian (Cardoso et al, 2002; O'Donnell, 1982) and/or developmental (Eslava, 2019; Eslava & Pahuja, 2020) State under the specific conditions of "self-determination" that colonial powers permitted (Barsalau, 2019). After the decolonising processes (in Latin America at the beginning of the 19th century and Africa and Asia more than one century later) and under these postcolonial states, war, occupation, discrimination, assimilation, and unequal law continued as central features in the relationship between States and indigenous people.

The postcolonial state in the Global South can be called a "developmental state" due to its functionality within the new postcolonial world-system (Eslava, 2019). It means, briefly, a peripheral situation where the influence of transnational capital and the Global North's policy imposes clear margins of action on the states and societies of the Global South; a Eurocentric imaginary and practice of transformation oriented towards social and economic modernization ("progress" and "development"), and the reproduction of a neo-colonial domination system within the territorial jurisdictions of the state (also called "internal colonialism" by the Mexican academy in the 60's) (González-Casanova, 2006; Stavenhagen, 1965; Kay, 1991).

Although between the 1950s and 1970s, the "Third world" attempted to dispute the development discourse, linking it with "self-determination", economic independence, regulation of transnational capital, fair trade and debt (Bandung conference, UNGA Resolution 1960 and the attempts to regulate international trade through UNCTAD), this was strongly contested, limited and finally defeated by the Global North (Pahuja & Saunders, 2019). Rostow's ideas that development is rather connected to the efforts and capacities of the "underdeveloped countries" themselves rather than to the international asymmetries (Pahuja & Saunders, 2019; Chaturvedy, 2014; Whyte, 2018; Rist, 2008) started to be hegemonic. During the beginning of the neoliberal project, the "Third-Worldist" ideas (including dependency theory) were politically buried, and the world-system and international law managed to adjust even

more the developmental state (Pahuja & Saunders, 2019).

Under neoliberalism, the developmental state of the Global South has affirmed its links of dependency (and its loss of power in the face of transnational capital, states and multilateral organizations of the Global North) (Kay, 1996), but, at the same time, it has incremented its internal "violence monopoly" through the control of natural resources and social diversity. In this period, features such as the "structural adjustment" (state reduction, tax breaks and free movement of capitals), public-private alliances, decentralization, and the ideology of "individual agency" (that places the management of risks arising from the contradictions of the model on the individual) were new elements of the development state (Eslava & Pahuja, 2020).

Against this backdrop of power, the Latin American indigenous peoples have been situated in a quite feeble position. As in the colonial past, the decolonization period does not represent a change of position, but rather their continued subjugation under the sovereignty of the developmental state and global capital (Bengoa, 2000). In Latin America, between 1860 and 1880, Argentina and Chile undertook a military campaign against the Mapuche "Wallmapu" (Bengoa, 1996). In the Argentinian case, one of the most important causes was the payment of the British debt contracted by the government in the Independence War. Similarly, the Mexican government fought and reduced the Yaquis on its northern border and in the "Mayab" territory on the Yucatan peninsula (Reed, 2007). The extermination of indigenous peoples during the rubber boom and the beginnings of oil exploitation in the Amazon (Bunker, 1984; Franco, 2013), the Guatemalan genocide of Mayans between the 1960s and 1980s (Roht-Arriaza, 2006; Sanford, 2004) or the current systematic murder of indigenous and Afro-descendant leaders during the Colombian conflict (Ávila, 2020), are also extreme, but not rare, examples of this regime against indigenous people. The growing wave of criminalization of indigenous organizations and leaders resisting extractive projects follows the same foundation (Svampa, 2019; Raftopoulos, 2017). Therefore, despite the "romantic" development of indigenous rights in international law, the developmental state that emerged from the postcolonial World-System (and its international law), has ruthlessly exercised its full right to take control of "its" territory at any cost.

A key concept to build the primacy of the state in the international and national law is sovereignty (Parfith, 2017; Bayot, 2019). According to Anghie (2005), sovereignty emerged from the exclusionary perspective of modern imperialism, where only "civilized" (European) societies could hold

sovereignty. The sovereignty doctrine provides "certain cultures with all the powers of sovereignty while excluding others" as the Weberian concept of "monopoly on violence" describes. In the postcolonial stage, the developmental state reproduces this "dynamic of difference" internally: the "savage" needs to be tutored and incorporated in a rational political order. The neglecting of self-determination was called "Fourth World" by the Shuswap Chief George Manuel: "The Fourth World perspective reveals how the state sovereignty doctrine […] has created a power imbalance between states and indigenous peoples" (Bayot, 2019, p. 283). In the consent v. consultation controversy, states widely interpret the right of self-determination of indigenous people as subordinated to state sovereignty. This is one of the most powerful legal instruments that allow the World-System and the development state to avoid the right to FPIC.

Another important legal element of this type of "symbolic power" (Bourdieu, 1991) to limit FPIC has been the "right to development" (Chaturvedy, 2014). Due to its original content being disputed and then deactivated in its most critical forms[1], the right to development is multiple, ambiguous, and abstract, embracing different aspects, which can be contradictory among them (Ibid). The right to development has different rightsholders (State, individuals and collectives), and their different qualities and relationships are not clear. In addition, FPIC has been seen as an element of participation within the right to development (African Commission) and OIT C-169 puts the two rights at par and complementary. The World Bank has expressly argued that the "self-determination" interpretation of FPIC contravenes the right to development (Chaturvedy, 2014). This multiplicity opens the door for the global capital and the developmental states to emphasize the interpretations most favourable to their interests, that is, prioritizing the sovereign content of the right to development and imposing it on others. According to this, indigenous self-determination cannot impose obligations on the state, "derogate" its sovereignty and prevent the development of all the citizenry. This hierarchy seriously limits the principle of self-determination of indigenous peoples.

There are many examples where, for "national interest", "development", and in use of its legitimate sovereignty, the State ends up imposing extractive projects despite local resistance and self-determination (Anderson, 2012; Chaturvedy, 2014; Bayot, 2019; Svampa, 2019). Furthermore, according to Baker (2012) and de Moerloose (2020), this degradation in the indigenous

[1] Peter Uvin describes the history of the right to development as follows: "It was the kind of rhetorical victory that diplomats cherish: the Third World got its Right to Development, while the First World ensured that the right could never be interpreted as more of a priority than civil and political rights, that it was totally non-binding, and that it carried no resource transfer obligations" (cited by Chaturvedy, 2014: 41-2).

self-determination principle in FPIC is related to the proliferation of a "negotiated approach" of FPIC, typical of the language of Corporate Social Responsibility (CSR). This narrative, adopted by the World Bank Group and other stakeholders of international development (Equator principles), see FPIC as a process of negotiation and necessary agreement, mutually built and based on principles of participation and representation agreed upon by borrowers (States and companies) and indigenous peoples. Therefore, there is not a simple consent because the principles of development must be agreed between all participants under the right to participation within the development framework.

As can be seen, both the historical power relations reflected in the postcolonial global legal order, and the emerging principles of sovereignty and development have managed to deactivate the principle of self-determination, slowing down the emancipatory potential of FPIC. Therefore, can FPIC be considered as an emancipatory element (romantic narrative) or simple lure (tragic narrative) of a more restrictive international order? Considering the advocacy work of international indigenous organizations, which viewed human rights with suspicion since the 60s, the evolution of FPIC is an emancipatory element within the relative autonomy of the field of power of international law, although rapidly countered by that same field of power and the influence of actors committed to global capitalist development. However, it is necessary to understand some elements about how FPIC is implemented in the territories to understand, ultimately, its more crucial function.

3. FPIC and indigenous communities in the social space. A tragic territorial account.

In the reign of the territorial realpolitik, any vestige of FPIC self-determination disappears. The position of FPIC and the indigenous people within the World-System, in a Global South that has dramatically multiplied the extraction of materials and energy in the last decades (Martínez-Allier et al., 2010; Dorninger et al., 2021), is highly fragile. Using a Bourdieusien expression (Bourdieu, 1998), Rodríguez-Garavito (2011) situates FPIC in a "social space" and a "field of power", highlighting the extreme imbalance of power between extractive projects and indigenous communities. Considering the centre-periphery relationship which structurates an extractive economy in the Global South, the capacity of the developmental state to deterrence international standards of FPIC and to use the "monopoly on violence" to impose extractive projects, the extraordinary amount of economic and political capital of companies and international financing organizations, the private violence of organised crime (Lapierre & Macías, 2018; Rodríguez et al., 2017),

and the extreme poverty and low mobilization capacity of many indigenous communities, among other factors, it is possible to understand the difficulties to impose a meaning of self-determination in the territorial FPIC "minefield" (Rodríguez-Garavito, 2011).

In this regard, it is interesting to analyse the findings of Torres-Wong, 2018 and Zaremberg & Wong, 2018 in Latin America, who have made an evaluation of the FPIC processes registered until 2017[2], making a typology of scenarios and action patterns of indigenous communities. This sheds light to understand, in a more complex way, the position of indigenous communities in the social space.

The first type of scenario is a "medium public order, no extraction, and no pecuniary benefits for indigenous people", characterised by highly mobilized "anti-extractive communities" (Zaremberg & Wong, 2018, p. 36), which oppose extractive projects. In this scenario, there are sporadic episodes of violence from the communities and State, but the latter steps back and the project is cancelled. There are two additional characteristics of this type: there are very few cases and communities achieve to be united under the same political decision. Furthermore, in this scenario, FPIC was not used, demonstrating that FPIC is not the most effective tool to crystallize a possible right to veto.

The second scenario describes a "low public order, no extraction and no pecuniary benefits for indigenous people" (Ibid., p. 36). In this case, there are strongly mobilized indigenous communities in favour of extraction, but state denial of FPIC and both the community and the State are unable to negotiate. States tend to repress and criminalize social mobilization; the conflict scales and the project is suspended after deaths and multiple riots.

The third, more common scenario, depicts a "high public order, extraction, and no pecuniary benefits for Indigenous People" (Ibid., p. 37) and typically occurs when indigenous groups are demobilised. Communities have weak skills to negotiate better conditions and end up taking the fixed formulas of consultation and environmental management that States and companies propose. This has occurred mainly in the Amazon basin where the isolation of small communities, the material poverty, the lack of links with national organizations, and skills not adapted to coping with extractive disruptions, put them in an extremely marginalised and weak position to negotiate. A self-determination process is unthinkable.

[2] The analysis includes 177 cases in three countries such as Bolivia, Mexico, and Peru where FPIC was implemented or not, although Bolivia is overrepresented with 87% of the total cases.

In the fourth scenario, indigenous communities have a better position, high mobilization, and the possibility of reaching more positive benefits. There is a "Medium public order, extraction and pecuniary benefits for indigenous people" (Ibid., p. 39). Here, local organizations constantly pressure the State and conflict does not scale in violence. The difference with the previous scenario can be found in the existence of strong organizations, with expert leaders – which makes them improve their position in the field of power – solid alliances, and sufficient resources to ensure a certain autonomy of mobilization.

Finally, the worse scenario is when the State does not implement FPIC, there is a medium-level mobilization capacity, but internal divisions are significant, and violence increases while the project continues. This case is characterised by a "low public order, extraction and no pecuniary benefits for Indigenous People" (Ibid., p. 40). In some cases, violence includes systematic private violence (Lapierre & Macías, 2018).

As we can see, although the position of indigenous people is overall diverse, it is extremely fragile. Some strong communities can challenge the dominant position of extractive projects or negotiate historically denied pecuniary benefits, but such scenarios are not the general norm. The weak position does not mean an a priori "anti-extractive" position. Rather, many times, the difficult economic situation, the deterioration of the territory (previous processes of peasant and capital colonization, deforestation, and other disruptions), pressures, and a very marginal position (such as the dispersed Amazonian indigenous communities) push them to support and not to oppose to extractive projects, even knowing the potential impacts. A legitimate attachment to the development speech may also exist. In the social space, FPIC has not worked as a consent tool or as an expression of self-determination. FPIC has been deployed only in the third and the fourth type of conflict, oscillating between a checklist (as in the case of demobilized communities) and a negotiation process (as in communities which achieve pecuniary benefits). According to Zaremberg & Wong, (2018) FPIC has never implied a right to veto in the analysed cases, not even in the Bolivian case where national norms formally allow it. On the contrary, communities that achieve the halt of a project never used FPIC. Although some scholars have found cases in Latin America where FPIC has been a dynamizing factor of mobilization (Walter & Urkidi, 2017), and even a most effective way to delay projects than environmental law (Vela et al., 2020), others emphasize the depoliticizing component of FPIC (Urteaga, 2018; Dunlap, 2018; Ramírez, 2019).

Conclusions

Despite the advances of international human rights law on indigenous rights such as self-determination and FPIC, this achievement (highlighted by the romantic narrative) has been tragically deactivated by the international law and the social space. On the one hand, the postcolonial order, the developmental state, the sovereignty principle, and the right to development have visibly subordinated FPIC under their logics. On the other, FPIC has served to "rationalize" negotiations on compensations and to bureaucratically ritualize an FPIC simulacrum through checklist processes. In this manner, the permanent structure of neo-colonization over indigenous territory for an ever-growing global market prevails. In the long term, what is the role of international human rights law? Looking at current outcomes of FPIC in the field, without doubt FPIC has facilitated and institutionalised the negotiation process to assure the juridical security for the extractive investment, although, many times the authoritarian temptations of the development state seek a quick, violent, and low-cost imposition.

Considering the day-to-day social struggle, and some rare positive experience with FPIC in indigenous communities who seek to cancel extractive projects (Walter & Urkidi, 2017), the strengthening of territorial movements is more important than FPIC policy in itself, but, of course, it can entail the tactic use of FPIC in a specific case. In this sense, international human rights law (and FPIC) has a precise potential for resistance (Marks, 2012) that, however, should not be understood as an objective of emancipation in itself. Using the words of Knox "in a short-term, conjunctural, tactical sense it is necessary to work within it" (2016, p. 325).

Bibliographical references

Acosta, A. (2013). Extractivism and neoextractism: Two sides of the same curse. In M. Lang and D. Mokrani (Eds.), *Beyond development: Alternative visions from Latin America* (pp. 61-86). Rosa Luxemburg Foundation and Transnational Institute.

Amin, S. (1976). *Unequal development. An essay on the social formations of peripheral capitalism*. Montly Review Press.

Anderson, P. (2012). Free, Prior, and Informed Consent? Indigenous Peoples and the Palm Oil Boom in Indonesia. In ISEAS–YUSOF ISHAK INSTITUTE. (Ed.), *The Palm Oil Controversy in Southeast Asia: A Transnational Perspective. pp.* 244-258.

Anghie, A. (2005). *Imperialism, Sovereignty, and the Making of International Law.* Cambridge University Press.

Ávila, A., (2020). *¿Por qué los matan?* Planeta.

Aylwin, J, Policzer, P. (2020). No Going Back: The Impact of ILO Convention 169 on Latin America in Comparative Perspective. *The School of Public Policy Publications, 13*(8), p. 1.

Baker, S. (2012). Why the IFC's Free, Prior, and Informed Consent Policy Doesn't Matter (Yet) to Indigenous Communities Affected by Development Projects. *Wisconsin International Law Journal, 30*(3), pp. 668-705.

Barelli, M. (2012). Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead. *International Journal of Human Rights,16*(1), p. 1.

Barsalou, O. (2019). The Failed Battle for Self-Determination. The United States and the Post-War Illusion of Enlightened Colonialism, 1945–1975. In: J. Von Bernstorff and P. Dann (Eds), *The Battle for International Law: South-North Perspectives on the Decolonization Era*. Oxford University Press.

Bayot, ABE. (2019). Free, Prior, and Informed Consent in the Philippines: A Fourth World Critique. In: I. Feichtner, M. Krajewski and R. Roesch (Eds), *Human Rights in the Extractive Industries: Transparency, Participation, Resistance*. Springer International Publishing, pp. 281-309.

Bengoa, J. (2000). *La emergencia indígena en América Latina*. Fondo de Cultura Económica.

Bengoa, J. (1996). *Historia del Pueblo Mapuche*. Ediciones Sur.

Bourdieu, P. (1998). *Practical Reason: On the Theory of Action*. Stanford University Press.

Bourdieu, P. (1991). *Language and Symbolic Power*. Cambridge Polity Press.

Bourdieu, P. and Terdman, R. (1987). The Force of Law: Toward a Sociology of the Juridical Field. *Hastings Law Journal,* 38, p. 814.

Bunker, S.G. (1984). Modes of Extraction, Unequal Exchange, and the Progressive Underdevelopment of an Extreme Periphery: The Brazilian Amazon, 1600-1980. *American Journal of Sociology, 89*(5), pp. 1017-1064.

Cardoso, F. and Faletto, E. (2002). *Dependencia y desarrollo en América Latina: ensayo de interpretación sociológica*. Siglo XXI Editores.

Chaturvedi, I. (2014). Critical study of free, prior and informed consent in the context of the right to development can consent be withheld. *Journal of Indian Law and Society, 5*(1), pp. 37-60.

Chimni, B.S. (2017), *International Law and World Order: A Critique of Contemporary Approaches*. Cambridge University Press.

Colchester, M. (2010). *Free, Prior and Informed Consent. Making FPIC work for forests and peoples*. The Forest Dialogue.

Composto, C. and Navarro, M. (2014). Claves de lectura para comprender el despojo y las luchas por los bienes comunes naturales en América Latina. In: C. Composto and M. Navarro (Eds), *Territorios en disputa. Despojo capitalista, luchas en defensa de los bienes comunes naturales y alternativas emancipatorias para América Latina*. Bajo Tierra Ediciones, pp. 33-75.

Dorninger, C, Hornborg, A, Abson, DJ, Von Wehrden, H, Schaffarzik, A, Giljum, S, Engler, J, Feller, RL, Hubacek, K and Wieland, H. (2021). Global patterns of ecologically unequal exchange: Implications for sustainability in the 21st century. *Ecological Economics,* (179), pp. 106-124.

Doyle, CM. (2014). *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent*. Routledge.

Dunlap, A. (2018). "A Bureaucratic Trap:" Free, Prior and Informed Consent (FPIC) and Wind Energy Development in Juchitán, Mexico. *Capitalism Nature Socialism 29*(4), pp. 88-108.

Engle, K. (2011). On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights. *European Journal of International Law, 22*(1), pp. 141-163.

Escobar, A. (2017). *Designs for the Pluriverse; Radical Interdependence, Autonomy, and the Making of Worlds*. Duke University Press.

Eslava, L. (2019). *The Developmental State: Independence, Dependency and the History of the South*. In: J. Bernstorff and P. Dann (Eds.) *The Battle for International Law: South-North Perspectives on the Decolonization Era. The history and theory of international law.* Oxford University Press.

Eslava, L. and Pahuja, S. (2020). The State and International Law: A Reading from the Global South. *Humanity: An International Journal of Human Rights, Humanitarianism, and Development, 11*(1), pp. 118-138.

Franco, J. (2013). Territorio waorani: problemática y proceso extractivo en el Yasuní. In: I. Narvaez, M. De Marchi and S. Pappalardo (Eds), *Yasuní, zona de sacrificio: análisis de la Iniciativa ITT y de los derechos colectivos indígenas*. FLACSO.

Frank, A.G. (1966). The Development of Underdevelopment. *Monthly Review, 18*(4), pp. 37-51.

Gonzalez, P. (2006). El colonialismo interno: una redefinición. In: A. Boron, J. Amadeo and S. González (Eds). *La teoría marxista hoy: problemas y perspectivas*. Consejo Latinoamericano de Ciencias Sociales, pp. 409-434.

Gudynas, E. (2013). Debates on development and its alternatives in Latin America. A brief heterodox guide. In: M. Lang and D. Mokrani (Eds), *Beyond Development Alternative Visions from Latin America*. Fundación Rosa Luxemburg, pp. 15-40.

Harvey, D., 2004. The "New Imperialism": Accumulation by Dispossession. *Social Register,* (40), pp. 63-87.

Herrera, J. (2019). Free, prior and informed consent (FPIC) in Mexico: elements for its construction and challenges. *The Age of Human Rights Journal*.

Howard, P, Puri, R, Smith, L. and Altieri, M. (2008). *GIAHS - Globally Important Agricultural Heritage Systems: A Scientific Conceptual Framework and Strategic Principles for the Food and Agriculture Organization of the United Nations*.

Kay, C. (1991). Reflections on the Latin American Contribution to Development Theory. *Development and Change, 22*(1), pp. 31-68.

Knox, R. (2016). Marxist Approaches to International Law. In: A. Orford and F. Hoffmann (Eds), *The Oxford Handbook of the Theory of International Law.* Oxford University Press.

Lapierre, M. and Macias, A. (2018). *Extractivismo, (neo)colonialismo y crimen organizado en el norte de Esmeraldas*. Abya Yala.

Luxemburg, R. (1951). *The accumulation of capital*. Routledge and Kegan Paul LTD.

Marks, S. (2012). Human rights in disastrous times. In: J. Crawford and M. Koskenniemi (Eds), *The Cambridge Companion to International Law. Cambridge companions to law.* Cambridge University Press, pp. 309-326.

Martinez-Alier, J, Kallis, G, Veuthey, S, Walter, M and Temper, L. (2010). Social metabolism, ecological distribution conflicts, and valuation languages. Ecol. Econ. 70. *Ecological Economics,* (70), pp. 153-158.

Moerloose, S.D., 2020. Indigenous Peoples' Free, Prior and Informed Consent (FPIC) and the World Bank Safeguards: Between Norm Emergence and Concept Appropriation. *VRÜ Verfassung und Recht in Übersee, 53*(3), pp. 223-244.

O'donell, G. 1982. *El Estado Burocrático Autoritario*. Editorial de Belgrano.

Orellana, M.A. (2008). Saramaka People V. Suriname. Judgment (Preliminary Objections, Merits, Reparations, and Costs). *American Journal of International Law, 102*(4), pp. 841-847.

Ornelas-Bernal, R, Bartra, A, Ceceña, A, Esteva, G and Holloway, J. (2013). *Crisis civilizatoria y superación del capitalismo*. Universidad Nacional Autónoma de México - Instituto de Investigaciones Económicas.

Pahuja, S and Saunders, A. (2019). *Rival Worlds and the Place of the Corporation in International Law.* Oxford University Press.

Parfitt, R. (2017). The Anti-Neutral Suit: international legal futurists, 1914–2017. *London Review of International Law, 5*(1), pp. 87-123.

Prebisch, R. (2012). El desarrollo económico de la América Latina y algunos de sus principales problemas. CEPAL.

Quijano, A, (2000). Coloniality of Power, Eurocentrism, and Latin America. *Nepantla: Views from South, 1*(3), pp. 533-580.

Raftopoulos, M. (2017). Contemporary debates on social-environmental conflicts, extractivism and human rights in Latin America. *The international journal of Human Rights*, *21*(4), pp. 387-404.

Ramirez, J. (2019). Impacts of neoliberal wind energy investments on environmental justice and human rights in Mexico. In: P. Lund-Thomsen, M. Wendelboe-Hansen and A. Lindgreen (Eds), *Business and Development Studies: Issues and Perspectives*. Routhledge, pp. 353-377.

Reed, N. (2007). *La Guerra de castas de Yucatán*. Ediciones Era.

Rist, G. (2008). *The History of Development: From Western Origins to Global Faith*. Zed Books.

Rodríguez, D, Mol, H, Brisman, A and South, N (Eds). (2017). *Environmental crime in Latin America. The theft of nature and the poisoning of the land*. Palgrave Macmillan.

Rodríguez-Garavito, C. (2011). Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields. *Indiana Journal of Global Legal Studies,* (18), pp. 263 - 305.

Roht-Arriaza, N. (2006). Guatemala Genocide Case. Judgment no. STC 237/2005. *The American Journal of International Law, 100*(1), pp. 207-213.

Sanford, V. (2004). *Buried Secrets: Truth and Human Rights in Guatemala*. Palgrave MacMillan.

Santos, B. (2009). *Una epistemología del sur*. Siglo XXI - CLACSO.

Scheidel, A., Del Bene, D., Liu, J., Navas, G., Mingorria, S., Demaria, F., Ávila, S., Roy, B., Ertor, I., Temper, L. and Martínez-Alier, J., 2020. Environmental conflicts and defenders: A global overview. *Global Environmental Change,* (63), pp. 1-12.

Stavenhagen, R. (1965). Classes, Colonialism, and Acculturation: A System of Inter-Ethnic Relations in Mesoamerica. *Studies in Comparative International Development, 1*(6), pp. 53-78.

Svampa, M. (2013). El consenso de los commodities y lenguajes de valoración en América Latina. *Revista Nueva Sociedad*, (244), pp. 30-46.

Svampa, M., 2019. *Neo-extractivism in Latin America*. Cambridge University Press.

Torres-Wong, M. (2018). *Natural Resources, Extraction and Indigenous Rights in Latin America: Exploring the Boundaries of Environmental and State-Corporate Crime in Bolivia, Peru and Mexico*. Routledge.

Urteaga-Crovetto, P. (2018). Implementation of the right to prior consultation in the Andean countries. *A comparative perspective. 50*(1), pp. 7-30.

Vandervort, B. (2006). *Indian wars of Mexico, Canada and the United States, 1812-1900*. Routledge.

Vela-Almeida, D. and Torres, N. (2021). Consultation in Ecuador: Institutional Fragility and Participation in National Extractive Policy. *Latin American Perspectives*.

Wallerstein, I. (2004). *World-Systems Analysis: An Introduction*. Duke University Press.

Walter, M. and Urkikdi, L. (2017). Community mining consultations in Latin America (2002–2012): The contested emergence of a hybrid institution for participation. *Geoforum,* (84), pp. 265-279.

Ward, T. (2011). The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law'. *Northwestern Journal of International Human Rights,* (10), pp. 54-84.

Whyte, J. (2018). Powerless companions or fellow travellers?: human rights and the neoliberal assault on post-colonial economic justice. *Radical Philosophy,* (2), pp. 13-29.

Young, C. (1994). *The African Colonial State in Comparative Perspective*. Yale University Press.

Zaremberg, G. and Wong, M.T. (2018). Participation on the Edge: Prior Consultation and Extractivism in Latin America. *Journal of Politics in Latin America, 10*(3), pp. 29-58.