

# FREE PRIOR AND INFORMED CONSENT, DEVELOPMENT AND MINING ON BOUGAINVILLE: CHOICE AND THE PURSUIT OF SELF-DETERMINED DEVELOPMENT

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## Introduction

The principle of free prior informed consent (FPIC), as framed in international human rights law (IHRL), is grounded in indigenous peoples' right to self-determination and is fundamental to its exercise. By virtue of their right to self-determination indigenous peoples freely determine their own economic, social and cultural development, freely dispose of their natural wealth and resources, and may not to be deprived of their own means of subsistence.<sup>1</sup> The requirement to obtain indigenous peoples' FPIC arises whenever the measures or activities proposed by external entities, be they State or corporate actors, could potentially place limitations on, or

result in infringements of, the enjoyment of this right. The rights to give or withhold FPIC required that consent must be obtained in a manner that: is free from coercion or manipulation; is prior to the authorisation and commencement of activities; and ensures the concerns peoples are fully informed as to the potential impacts on their rights as well as potential benefits. The concerns people must be free to provide or withhold their collective FPIC through their own representatives in accordance with their own processes, laws and decision-making practices and their traditional knowledge and worldviews must be respected.

The concept of obtaining indigenous peoples' consent is not new. As far back as the 16th century, the founding fathers of the law of nations recognised that respect for natural law principles required that indigenous peoples' be able to exercise their "free and

1. Common Article 1 International Covenant on Civil and Political Rights and International Covenant on Economic Social and Cultural Rights. Articles 3, 26 and 32 UN Declaration on the Rights of Indigenous Peoples.

voluntary choice” when deciding whether or not to subjugate themselves to colonial rule.<sup>2</sup> However, as power imbalances between indigenous peoples and states amplified throughout the colonial and post-colonial eras, the use of force and coercion facilitated the widespread non-consensual exploitation of indigenous lands and resources, with pre-existing agreements frequently reneged upon. By the late 19th century when Bougainville was first colonised, a positivist version of international law, premised purely on the consent of “civilized” nations as opposed to previous natural law informed conceptions, had essentially deemed native consent superfluous. Only in recent decades, with the emergence of the self-determination based requirement for FPIC under IHRL, has this situation gradually begun to change.

The paper provides a discussion on the self-determination based requirement for FPIC and its relationship with indigenous peoples’ right to development under IHRL. The paper then examines the extent to which FPIC is reflected in the 2015 Bougainville Mining Act, building on the analysis already done by Jubilee.<sup>3</sup> It closes with a discussion on the contemporary context within which reopening of the Panguna mine is being promoted and argues for a participatory analysis of all potential developmental options as a pre-requisite for genuine FPIC and self-determined development.

## Indigenous peoples’ right to self-determination and a new relationship

The dawn of the contemporary human rights era, following the adoption of the Universal Declaration of Human Rights, promised equal

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2. Doyle C *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (London: Routledge, 2015).

3. See ‘The Devil in the Detail Analysis of the Bougainville Mining Act 2015’ (NSW: Jubilee Australia Research Centre, 2015).

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rights to all peoples. This included the right to self-determination by virtue of which all peoples are free to determine their own social, economic, political and cultural development. While there has been much debate to the content and the subjects of the right self-determination, its embodiment of the notion of choice is consistently recognised as one of its core features and is also intrinsic to the notion of self-determination that emerges from the UN Declaration on the Rights of Indigenous Peoples (henceforth the Declaration).

The contemporary international law concept of indigenous peoples’ right to self-determination is broader than the concept of self-determination which emerged during the decolonisation process. While, independence from Papua New Guinea (PNG) remains a potentially legitimate self-determination option in colonial-like contexts such as Bougainville, self-determination is not limited to this. In other words the exercise of this option does not exhaust the exercise of indigenous peoples’ right to self-determination. Instead, indigenous peoples’ self-determination, as recognised in the Declaration and IHRL jurisprudence more broadly, is an on-going right that is a flexible and dynamic concept aimed at addressing their diverse realities, worldviews, needs and future aspirations. One the clearest barometers of the exercise of the on-going aspect of this right to self-determination is the extent to which indigenous peoples, as opposed to outsiders, maintain control over the land and resource base underpinning their subsistence, way of life and development. This social, cultural and economic development dimension of



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self-determination is referred to by indigenous peoples as their right to self-determined development. In other words, their right to govern their lands and territories and make informed developmental choices in the certainty that they will be free to pursue those choices without outside interference. Viewed from this perspective, the opportunity to make an informed choice between the reopening of the Panguna mine (or indeed the opening other mines on the island) and potential alternative developmental options is just as much an exercise of their right to self-determination as is participation in the anticipated independence referendum currently scheduled for 2019.

By affirming indigenous peoples' right to self-determination the UN General Assembly has, in adopting the Declaration, called on all states to build new consensual relationships with indigenous peoples based on equality, and which recognise and seek to strengthen them as empowered decisions-makers and masters of their own destiny. To realise this,

indigenous people must not only be free to give or withhold FPIC to particular projects but must also be empowered to participate in the identification and assessment of, and exercise choice between, the range of alternative developmental options possibly open to them. It is only within such a framework that notion of FPIC becomes meaningful and fulfils its purpose as a safeguard and enabler for the self-determination right to determine social, cultural and economic development. Applying this logic to the Bougainville context would imply the conduct of a transparent critique of and nation-wide debate about the premise that independence is not financially feasible without large scale mining.

## The nexus of fpic, self-determined development and the right to choose

Self-determination, the right to development

and the right to give or withhold FPIC are at their core collective decision-making rights in relation to internally or externally triggered choices. These choices generally pertain to the use of lands and resources and related cultural, economic, spiritual and social matters. Fundamental to realising indigenous peoples' right to self-determination is their ability to give or withhold FPIC to proposals by state or corporate actors that may impact on their lands, territories and resources. The exercise of the right to self-determined development and the requirement to obtain indigenous peoples' FPIC are inextricably interlinked. The former facilitates the exercise of choice in relation to the determination of development plans, priorities and pathways while the latter offers certainty in relation to the realisation of those developmental plans and strategies by preventing the subordination of indigenous peoples' choices to the plans and priorities of external parties. If disconnected from self-determined development, FPIC loses its integrity and risks being transformed into a disempowering concept.

The Declaration, as a synthesis of IHRL as it pertains to indigenous peoples, provides a clear articulation of this relationship between the requirement for FPIC and self-determined development.<sup>4</sup> Article 32 succinctly captures its essence. The first provision, article 32(1), affirms indigenous peoples' right "to determine and develop priorities and strategies for the development or use of their lands or territories and other resources". This right is

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4. This emerges from the UN Declaration on the Rights of Indigenous Peoples Articles 3, 5, 11, 18, 19, 20, 23, 32 and 34. It is also reflected in the concluding observations of human rights treaty bodies which affirm the requirement to obtain FPIC in light of common article 1 of the ICCPR and ICESCR. For a discussion on this point see Doyle C (2015) *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (London: Routledge); Doyle, C., & Gilbert, J., (2009) *Indigenous Peoples and Globalization: From "Development Aggression" to "Self-Determined Development"*, in *European Yearbook of Minority Issues Volume 8*. Leiden: Martinus Nijhoff Publishers, 219-262; Tauli-Corpuz, V., (2008), 'The Concept of Indigenous Peoples' Self-Determined Development or Development with Identity and Culture,' Baguio: Tebtebba Foundation UN Doc. CLT/CPD/CPO/2008/IPS/02.

***The option to consider and evaluate alternative culturally appropriate development options, prior to having to make decisions with regard to proposed developments, is essential to making a free and fully informed choice.***

recognised as constituting an aspect of the right to self-determination affirmed in article 3.<sup>5</sup> The requirement for FPIC affirmed in article 32(2) is effectively a derivative of this right to development, and by extension of the rights to self-determination and to lands, territories and resources. Article 32(2) outlines the mechanism of good faith consultation with the purpose of obtaining consent as the means to guarantee the realisation of the rights affirmed in article 32(1).

Read in light of the right to development affirmed in article 32(1), the FPIC requirement in article 32(2) therefore affirms a right of choice. The indivisibility of FPIC and self-determined development arises because they are in fact two sides of this same coin. On one side of the coin, self-determined development embodies an indigenous peoples' right to decide its own development priorities. FPIC protects this choice in the face of projects, policies or legislation that could run counter to these priorities or render them unachievable. On the other side of the coin, genuine FPIC is only possible if the community has been afforded the possibility of choosing its development priorities in advance. The option to consider and evaluate alternative culturally appropriate development options, prior to having to make decisions with regard to proposed developments, is essential to making a free and fully informed choice.

## Fpic and the 2015 Bougainville mining act

Unsurprisingly, there are opposing views among landowners in relation to the pursuit of large scale mining on Bougainville as a basis for economic development. The Autonomous



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Bougainville Government's (ABG) expressed preference has been to reopen the Panguna mine, although in January this year it did impose an indefinite moratorium on mining at Panguna. Conscious of the potential for mining related tensions to erupt, and potentially for history to repeat itself, the ABG, while framing mining as a necessary enabler for financial autonomy and independence, has consistently stressed that landowners would have a veto over mining projects in their lands and that projects would not be enforced on them.

This philosophy underpinned the enactment of the 2015 Mining Act which transfers control of mining from PNG to the ABG. On the surface, the Act contains provisions which mirror FPIC. The Act requires "landowner permission" prior to entering land that is the subject of reconnaissance licences,<sup>6</sup> or prior to entering or disturbing land that is subject of

exploration licences,<sup>7</sup> and as part of making applications for a mining lease.<sup>8</sup> In the case of the latter, where the permission is not forthcoming, the Act states that mining leases will not be granted.<sup>9</sup> Written evidence of landowner permission is also required for the expansion of mining lease areas<sup>10</sup> and for mining easements.<sup>11</sup>

The notion of landowner permission, while it appears synonymous with FPIC, deviates from FPIC in some important regards.<sup>12</sup> Unlike FPIC, it does not explicitly include the

5. UN Doc. E/CN.4/2003/92 paras 19, 20 & 44; see also UN Doc. A/61/PV.107 at 25.

6. Bougainville Mining Act 2015 Section 91(1).

7. Bougainville Mining Act 2015 Section 105(1).

8. Bougainville Mining Act 2015 Sections 119(1,b,x), 120 (1,b,iv).

9. Bougainville Mining Act 2015 Section 126 (2,c).

10. Bougainville Mining Act 2015 Section 134 (1,b,vii), 135 (3,c).

11. Bougainville Mining Act 2015 Section 189 (b, viii), 191 (2,b).

12. For a more in-depth analysis of various problematic aspects the Mining Act see 'The Devil in the Detail Analysis of the Bougainville Mining Act 2015' (NSW: Jubilee Australia Research Centre, 2015).

requirements for those who are potentially impacted to be adequately and independently informed and for their consent to be freely obtained prior to the authorisation or initiation of any activities impacting on their rights. Under human rights law jurisprudence this requirement arises prior to the issuance of exploration licences, while under the Mining Act the requirement to obtain landowner permission only arises after exploration licences are issued. Furthermore, the post exploration licence landowner permission seeking process consists of an unregulated engagement between companies and landowners, with no clarity provided on what should happen if this permission is not forthcoming. In addition, the provisions that render access to land contingent on landowner permission can be overruled, or do not apply, in a number of scenarios.<sup>13</sup>

The law is again ambiguous and somewhat contradictory in relation to mining leases. While it unambiguously states in section 126 that mining leases will not be granted if landowner permission is not forthcoming, it appears to retreat from this in subsequent provisions. Section 142 establishes that a mandatory process of mediation can be initiated in “an attempt to obtain the outstanding landowner permission”.<sup>14</sup> If this mediation fails, the Bougainville Executive Council (BEC) is required to “consult with approved landowner organisations, the applicant and other stakeholders; and reach a mutually acceptable decision”.<sup>15</sup> As part of this consultation, the BEC is to take into account “whether the mining development is necessary for the rehabilitation of Bougainville and its people from the destruction, injuries, trauma and dislocation suffered during the Bougainville Conflict” and “the importance of the mining development to

Bougainville achieving autonomy and fiscal self-reliance”.<sup>16</sup> Apart from requiring consideration of “measures that will be taken to prevent or minimise damage and destruction to land, sea, air and water resources”, all of the other criteria that are to be considered relate exclusively to the benefits rather than potential impacts or opportunity costs arising from mining.<sup>17</sup>

In order to satisfy the necessity requirement, an exhaustive, transparent and participatory assessment of potential alternatives to mining that could contribute to fiscal self-reliance and rehabilitation of Bougainville and its people would be required.<sup>18</sup> However, there is no reference to such an assessment in the Act. In addition, and critically from a human rights perspective, there is no reference to respect for the principle of proportionality in relation to the potential impacts on indigenous

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16. Bougainville Mining Act 2015 Section 143(3).

17. Bougainville Mining Act 2015 Section 143(3).

18. While there is growing recognition of the need to ensure effective participation of indigenous peoples in the planning of development options at a regional or national level, there is limited practice to date of this. The experience of First Nations in Canada with land use planning could provide valuable lessons see for example “BC First Nations Land Use Planning: Effective Practices A guide prepared for the New Relationship Trust” (EcoTrust Canada 2009). Other models, such as Indigenous Peoples’ Ancestral Domain Sustainable Development and Protection Plans, which were intended to feed into an Indigenous Peoples’ Master Plan in accordance with the 1997 Indigenous Peoples Rights Act, also provide some principles (though practice has failed to live up to them to date) that could inform participatory formulation and assessment of developmental options, see “Guidelines on the Formulation of the Ancestral Domain Sustainable Development and Protection Plan (ADSDPP)” National Commission on Indigenous Peoples Administrative Order No. 1, Series of 2004 available at <https://bit.ly/2LdHgJC>. Proactive measures taken by indigenous peoples, such as the development of the Autonomous Government of the Wampis in Peru offer some of the most promising developments in relation to peoples’ control over, and participation in, land use planning and proactive determination of development strategies see Gobierno Territorial Autonomo De La Nacion Wampis-GTANW Resumen Ejecutivo Recuperando La Autonomia Socio Historica: Construccion Del Futuro Comun Territorios Integrales Para Tarimat Pujut available at <https://bit.ly/2N7ZoXr>.

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13. The requirement can be overruled by the Secretary of the Mining Department when conducting surveys. Likewise, it does not apply to authorized officials who are enforcing the Act, including when taking soil samples or when tenements are being marked out. Bougainville Mining Act 2015 Sections 329, 331 & 238.

14. Bougainville Mining Act 2015 Section 142.

15. Bougainville Mining Act 2015 Section 143(2) a, b.

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peoples' human rights and the benefits to be realised by the Bougainvillean society at large.

potential weakness in the notion of “landowner permission” in the Act is the extent to which it ensures respect for and protects communities' own forms of decision-making. The Act states that “permission must be obtained in the manner that is customary for decision-making for the group or groups comprising the landowners of that land”.<sup>19</sup> This is consistent with IHRL's recognition of indigenous peoples' right to maintain and develop their own institutions and to be consulted through representatives of their own choosing. However, this is undermined in the context of mediation processes envisaged under the Act where landowner permission is not forthcoming, as individuals may be required to provide a “written statement” their reasons for refusing permission<sup>20</sup> – a practice that may not be acceptable under many collective customary decision-making processes. Likewise, it is unclear how obtaining landowner permission through a Mineral Resources Forum could be consistent with customary decision-making processes.<sup>21</sup> The BEC's role in the establishment and approval of landowner organisations, its determination of who should mediate where consent is not forthcoming, and its unstated role in the

determination of what constitutes a “mutually acceptable decision” where consent is not forthcoming, is also potentially problematic from the perspective of ensuring permission is freely given.

Other concerns in relation to “landowner permission” vis-à-vis FPIC are the apparent one-off nature of the requirement in the Act and the potential for criminalisation of any subsequent dissent to mining projects.<sup>22</sup> The Act's inclusion of a compulsory acquisition clause, allowing property to be taken for “a public purpose, namely mining, exploration for minerals, and other activities ancillary to mining”,<sup>23</sup> also has the potential to undermine any protections offered under the landowner permission clauses.

Two of the core safeguards under IHRL that operate in conjunction with consultations to obtain FPIC are impact assessments (including in relation to social, economic, environmental and human rights impacts), and benefit sharing agreements. The Act refers to the need to “avoid or minimize the deleterious, environmental, social and cultural impacts” of mining projects. However, from an IHRL perspective, there is insufficient clarity of the relationship between impact assessments and the process for obtaining landowner permission. As a result, it is unclear how consent sought can be adequately informed. Nor is there any guarantee of independent technical advice regarding potential impacts. A similar issue arises in relation to ensuring fair compensation. While the Act addresses the need for compensation and community development agreements, it does not provide the necessary safeguards and mechanisms to ensure that fair and equitable compensation and benefits are guaranteed in line with IHRL standards.

In conclusion, while the law is innovative and progressive in a number of important areas, and offers the promise of landowner permission being sought, the limitations and ambiguity in certain provisions provide leeway for its implementation in a manner that deviates

19. Bougainville Mining Act 2015 Section 32(2)

20. Bougainville Mining Act 2015 Section 142(2)3b “may request from the relevant persons a written statement of their concerns that have resulted in the decision to withhold permission”.

21. Bougainville Mining Act 2015 Section 140(5).

significantly from the principles of FPIC and IHRL standards. The extent to which it will protect landowner rights in practice therefore remains a function of the political environment in which it will be implemented.

## Bougainville today - a new opportunity for self-determined development?

When addressing the requirement for FPIC, UN and regional human rights monitoring bodies have pointed to the importance of striving for mutual agreement between indigenous peoples and the state. However, in so doing they have stressed that indigenous peoples' rights must be respected and that their FPIC is to be obtained as part of this process, in particular in the case of large scale mining. This requirement for FPIC has consistently been framed within the framework of self-determination for indigenous peoples. Mining is one potential path that indigenous peoples may follow in the pursuit of their self-determination objectives. However, it is not, and should not be, presented as the only development option available to them. Experience throughout the world has demonstrated that indigenous peoples are frequently worse off as a result of mining projects in their lands, unless pre-conditions including empowerment of their indigenous governance structures, respect for their human rights, in particular land and resource rights, and obtaining their FPIC are first guaranteed.

What emerges from the Bougainville Mining Act, and the political context in which it was adopted, is the perspective that large-scale mining offers the only feasible developmental path for Bougainville, and that significant efforts will be made to convince communities that this is the case. Despite political

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22. 'The Devil in the Detail Analysis of the Bougainville Mining Act 2015' (NSW: Jubilee Australia Research Centre, 2015).

23. Bougainville Mining Act 2015 Section 2(2).

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pronouncements to the contrary, the Act suggests that mining could ultimately proceed irrespective of landowner views and without necessarily conducting the type of independent broad-based participatory impact assessments and obtaining FPIC as required under international standards.<sup>24</sup> The political consensus in relation to the necessity of mining has led to a scenario in which there appears to have been insufficient in-depth analysis of potential alternative development options. In such a context, those whose permission is being requested are deprived of the opportunity to make a fully informed choice with regard to their own preferred form of development that is consistent with their future aspirations as peoples. The publication this paper appears in may well support such an analysis and deliberation of other potential development options.

The struggle for independence in Bougainville has been inextricably linked with the right to decide if or how mineral resources should be exploited. Given this past, it would appear self-evident that the success of Bougainville's future independence or autonomy rests on

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24. See for example Saramaka v Suriname Inter-American Court on Human Rights (2007) and UN Special Rapporteur on the rights of indigenous peoples reference to the "Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities."

the freedom of its peoples to make informed choices about their development path. Mining may or may not ultimately form part of their chosen developmental options, but the process for determining this must respect the inherent rights of its peoples and withstand the scrutiny of the current and future generations of Bougainvilleans, in particular those who stand to be most impacted. The trauma of imposed environmental, socially and culturally destructive mining in Bougainville reinforces the imperative to obtain FPIC and to empower its peoples to realise self-determined development. FPIC and self-determined development in such contexts embody a strong remedial and redress dimension, and would provide a strong foundation for long-term peace, prosperity, equality and sustainable development, whatever the outcome of the independence referendum.