

## Free Prior and Informed Consent in Africa: Challenges and Opportunities

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Free, Prior, Informed Consent refers both to a substantive **right** under international-, statute- and customary law as well as a **process** designed to ensure satisfactory development outcomes. The right to FPIC places the development decision in the hands of the community. To realise this right, the community's decision should be made **free** from any obligation, duty, force or coercion. Ideally, alternative development options should also be available to the community to ensure that the decision is based on real choice. Secondly, the community has the right to make the development choice **prior** to any similar decisions made by government, finance institutions or investors. In other words, the community's right to FPIC is not realised if they are presented with a project as a *fait accompli*. Thirdly, the community must be able to make an informed decision. That means that they should be provided sufficient information to understand the nature and scope of the project, including its projected environmental, social, cultural and economic impacts. Such information should be objective and based on a principle of full disclosure. The community should be afforded enough time to digest and debate the information. Finally, **consent** means that the community's decision may be to reject the proposed development. They can say no.

FPIC is then also described as a **process** precisely because the right to say no places the community in a position to negotiate. In other words, FPIC is not designed only to stop undesirable projects, but also to provide communities with better bargaining positions when they do consider allowing proposed developments on their land or resources.

The last decade first saw the demand for minerals and metals globally rise to the highest levels yet and a concurrent peak in prices before the extractive industries experienced a remarkable fall from grace over the last 18 months. For the rural African communities who have increasingly played host to these industries over the last thirty years, the development bubble had burst much earlier. As the International Study Group on Africa's Mineral Regimes of the Economic Commission for Africa and the African Union noted in as early as 2011, the record levels of extractive-fuelled economic growth on the African continent before the onset of the 2008 economic crisis failed to meaningfully contribute to the social and economic development objectives of the continent.<sup>i</sup> Benefits were not trickling down.

It is within this context that affected local communities in Africa, with the aid of civil society, began to demand a greater say in development decisions when these directly affected them. As such, these communities joined the already very successful movement of indigenous peoples and communities across the world. These groups had been campaigning at the international level for legal mechanisms to protect their territories and culture from resource extraction since at least the early 1980s and had already achieved major milestones such as the 1989 ILO Convention 169 and the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). While these

instruments were limited to the obligations of states towards indigenous communities, frameworks and guidelines relevant to company conduct have in the last decade increasingly taken the protections of indigenous communities on board.<sup>ii</sup> Legally, this protection is captured in the principle of Free, Prior and Informed Consent (FPIC). While debates continue to rage as to the precise content and appropriate application of FPIC, the legal force of this right for indigenous peoples faced with a development project on their territories, has been almost universally confirmed (if often not properly implemented).<sup>iii</sup>

There can be no doubt that the local communities in Africa affected by the extractive industries have been able to benefit greatly from the gains made in international law by the indigenous peoples' movement. However, it has also created challenges that are particularly difficult to navigate for local communities on the continent. For one, the notion of "indigenous peoples" as generally recognised in international law<sup>iv</sup> developed mainly in Latin America. The historical context on that continent within which the concept gained traction is very different to the African history of warfare, displacement and migration and the subsequent imposition of colonial boundaries. As a result, the legal definitions that have developed to capture in large part the Latin American phenomenon and that sometimes emphasises historical and unbroken attachment to land, for example, excludes many African rural communities. Politically, African leaders have rejected the notion of "indigeneity" in the African context and only a last minute legal opinion by the African Commission on Human and Peoples' Rights (ACHPR) on the applicability of the concept in the African context convinced the African block not to reject UNDRIP.<sup>v</sup> Only one African country, the Central African Republic, has ratified ILO Convention 169 – with little hope of that figure improving.

But the modern-day African reality is that, on the back of the colonial rejection of indigenous law and property regimes, customary ownership and rights to land and resources remain almost entirely unrecognised. As a result, the rural communities of Africa who occupy more than two thirds of the continent's surface are as vulnerable and marginalised through the historical discrimination against their systems of law and governance as indigenous communities in other parts of the world. Often falling short of the international law definition of "indigenous" in the eyes of their governments and the extractive industries, these communities are unable to insist on the protections afforded to indigenous peoples by UNDRIP. The same is true of current industry standards and best practices: important industry groups such as the International Petroleum Industry Environmental Conservation Association and the International Council on Mining and Metals have policy documents on FPIC and indigenous peoples only, while international development agencies, notably the Organisation for Economic Cooperation and Development, and financing institutions continue to require consent exclusively from indigenous peoples.<sup>vi</sup> Contrary to these developments, the World Bank caused consternation with the release of a draft revision of its Social and Environmental Policy and Standards in 2014, proposing an "opt-out" clause for governments who prefer to deal with the issue of indigenous peoples in an "alternative" way. Many believed that the recommendation was particularly aimed at appeasing African states. In response, the African Commission in early 2015 adopted a resolution on the draft Policy and Standards reasserting its commitment to indigenous peoples on the continent.<sup>vii</sup>

In fact, the African regional and sub-regional human rights institutions have consistently shown significant sensitivity for their particular context and for the vulnerability of all local African communities threatened by large scale development projects.<sup>viii</sup> Therein lie some of the greatest

protections for African communities under threat. The African Commission, the institution tasked with giving content to the African Charter on Human and Peoples' Rights, has not only understood the vulnerability of local African communities faced by the extractive industries, but has explicitly linked their protection to FPIC and to the recognition of their ownership to their land and resources. In a Resolution on a Human Rights-Based approach to Natural Resource Governance of 2012, the ACHPR said:

*Mindful of the disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary rights to access and control of various resources, including land, minerals, forestry and fishing...calls upon State Parties to....confirm that all necessary measures must be taken by the State to ensure participation, including the free, prior and informed consent of communities, in decision-making related to natural resource governance; ....and to promote natural resource legislation that respect human rights of all and require, transparent, maximum and effective community participation in a) decision-making about, b) prioritisation and scale of, and c) benefit from any development on their land or other resources, or that affects them in any substantial way.*

This resolution followed the Commission's landmark FPIC decision in the *Endorois*<sup>ix</sup> case of 2010. The case concerned a Kenyan community that was removed from its ancestral lands and resources in 1973 by the then government. The community argued successfully that the removal violated their rights to property, development, culture and to freely dispose of their natural resources. While the Commission decided that the *Endorois* community indeed constituted an indigenous community, it remained ambiguous as to the significance of that finding for its further findings on the community's right to property, development, natural resources and culture. In other words, did the *Endorois* community have the right to FPIC because they were indigenous or simply because they were an affected local community? Read with its earlier decisions (and the 2012 resolution cited above) it appears clear that the African Commission regards local communities as "peoples" for the purposes of the Charter – and for attracting FPIC. In *Kevin Mgwanga Gumne et al v. Cameroon* the Commission decided that a group of people will be considered a "people" if it manifests all or any of the following attributes, namely: common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, ethno- anthropological attributes, or a common economic life. Additionally, the African Commission further held that a group also might identify itself as a "people" with a separate and distinct identity.<sup>x</sup> Finally, in the *Endorois* decision itself, the Commission emphasised that<sup>xi</sup>

*(...) the term "indigenous" is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities... In the context of the African Charter, the Working Group notes that the notion of "peoples" is closely related to collective rights.*

Given the continued injustice and inequality suffered by all the bearers of customary rights to land and resources, the *Endorois* protections must be understood to extend to distinct local communities under threat of the extractive industries. So what are these protections? The Commission not only clarified that the right to development included FPIC to be sought in terms of the particular community's customary law,<sup>xii</sup> but gave content to this right. The community's right to development under the Charter includes procedural and substantive elements, it held, in particular,<sup>xiii</sup>

*requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development. [...] Freedom of choice must be present as a part of the right to development.*

The Endorois community's right to development was violated because

*community members were informed of the impending project as a fait accompli, and not given an opportunity to shape the policies or their role. Furthermore, the community representatives were in an unequal bargaining position, [...] being both illiterate and having a far different understanding of property use and ownership than that of the Kenyan Authorities. The African Commission agrees that it was incumbent upon the Respondent State to conduct the consultation process in such a manner that allowed the representatives to be fully informed of the agreement, and participate in developing parts crucial to the life of the community.*

The connection established by the Commission between the right and implementation of FPIC and the customary law of the community concerned is of crucial importance in the African context. For one, it has the potential of grounding FPIC in customary law and customary ownership rights as an alternative legal basis to the international law discourse on indigenous peoples rights.<sup>xiv</sup> Moreover, it highlights the historical and present-day injustice of the continued non-recognition of customary tenure as equal to common law forms of tenure based simply on racist colonial prejudices. As the victims of such continued discrimination, local communities whose customary land and resources are threatened deserve the right to FPIC not only because their own customary law requires it, but because the African Charter's vision of overturning colonial oppression in every form, demands it.

In fact, at a regional and an international level, the linkages between customary tenure and FPIC have emerged as central to the elevation of the protection of local communities. The African Commission has stated unequivocally that the right to property in the Charter includes the protection of "rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership".<sup>xv</sup> In the same vein, the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the context of the National Food Security of 2012 of the Food and Agriculture Organisation of the United Nations feature multiple protections of customary tenure, including a call on states to "protect communities with customary tenure systems against the unauthorised use of their land, fisheries and forests by others". The guidelines explicitly link customary rights to resources to the need to "obtain the [customary community's] free, prior and informed consent".

Finally, the Economic Community of West African States (ECOWAS), in its 2009 Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector" explicitly state that "companies shall obtain the free, prior and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations".

At the national level, however, examples of the requirement for consent from affected communities are few and far between and even where these exist, are hardly operational. While the Botswana Mines and Minerals Act require the written consent of an owner or lawful occupier before a mining right is granted, for example, the well-publicised fate of particularly the San communities' diamond rich land indicate that this is far from the reality.<sup>xvi</sup> In countries such as Zambia and South Africa where a reading together of mining-, land- and customary laws ostensibly provides the right to

consent for affected communities, the practice of singling out traditional leaders, whether legitimate community representatives or not, fatally weakens the bargaining position of the community. Attempts at ensuring that extractive industries contribute tangibly to socio-economic transformation, for example through the Social and Labour Plans in South Africa or the Indigenisation Policy in Zimbabwe, are at best top-down and inappropriate development that happens to communities rather than with them. These approaches do not afford communities choice.

Despite the difficulties at the domestic and international levels, however, the opportunities created by the African regional institutions and instruments as well as the increasing recognition of customary law and ownership on the continent should mean that all is not lost for Africa's customary, local communities. In fact, if FPIC can regionally be acknowledged as a principle of customary law – the law that lives and develops in the practice and histories of communities – it has the potential to move beyond a narrow legal principle to become a community agency organising approach to localised development in Africa.

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<sup>i</sup> At p 1. Available at <http://www.uneca.org/publications/minerals-and-africas-development>.

<sup>ii</sup> For a detailed discussion of these standards globally, see Voss, Marianne and Greenspan, Emily 2014 *Community Consent Index: Oil, Gas and Mining Company Public Positions on Free, Prior, and Informed Consent (FPIC)* Oxfam America.

<sup>iii</sup> The International Finance Corporation (IFC) has stated, for example, that “there is emerging consensus among development institutions that adopting the term [FPIC] is necessary. Increasingly, other IFIs...industry associations...and roundtables have adopted or are considering adopting FPIC”.(IFC 2010 in Oxfam p 14).

<sup>iv</sup> It remains a concept that is difficult to define precisely: UNDRIP includes no specific definition.

<sup>v</sup> Since UNDRIP provided no specific definition of indigenous peoples, the African Commission released an Advisory Opinion laying down broad rules to make such a determination, namely (a) self-identification as indigenous; (b) attachment to traditional land; and (c) a state of subjugation and marginalization.

<sup>vi</sup> In other sectors, tentative steps towards the broadening of the application of FPIC have been taken. For more, see Voss and Greenspan 2014, p 15.

<sup>vii</sup> 301: Resolution on the World Bank's draft Environmental and Social Policy (ESP) and associated Environmental and Social Standard (ESS) - ACHPR/Res.301 (EXT.OS/XVII) 20 available at <http://www.achpr.org/sessions/17th-eg/resolutions/301/>.

<sup>viii</sup> For example, in an earlier decision (*Antonie Bissangou v. Congo*, Case 253/02, African Comm'n H.R. (2006), §81) the Commission said the following about Article 21 of the African Charter: *The origin of this provision may be traced to colonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the [African] Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.*

<sup>ix</sup> 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*.

<sup>x</sup> 266/2003 KEVIN MGWANGA GUMNE ET AL/CAMEROON, available at <https://docs.google.com/file/d/0B0uuvXdgDlroNmExNDdINzUtMmEyZi00NTIILTgxOGMtYjE4OTRiODRjNDFm/e dit?pli=1&hl=en#>.

<sup>xi</sup> At para 149.

<sup>xii</sup> “[T]he African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions”.

<sup>xiii</sup> At Paras 277-282.

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<sup>xiv</sup> The case of *Alexor Ltd v. The Richtersveld Community*, 14 October 2003, CCT 19/03, cited in *Endorois*, saw the South African Constitutional Court emphasise the right to consent as a central aspect of customary or aboriginal ownership and title.

<sup>xv</sup> The African Commission's Guidelines and Principles on the Implementation of the Socio-Economic Rights contained in the African Charter. 2011.

<sup>xvi</sup> The San people have over the last twenty years systematically been removed from their ancestral lands in the Central Kalahari Game Reserve. Despite the protestations by government that these forced removals were not linked with diamond mining, the opening of a multi-billion dollar mine in 2014 in the CKGR placed the issue beyond doubt.