

Discussion paper on
Free, Prior and Informed Consent
in Africa

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COALITION FOR CORPORATE ACCOUNTABILITY

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1. Introduction

While the history of informed consent resonates in the field of medicine, the notion of free, prior and informed consent (FPIC) dates to medieval history¹ and the practice of 'indigenous consent' during this period.² For indigenous peoples, the notion of FPIC is at the heart of their cultural survival and existence given their distinct attachment to the land and territories they occupy. In addition, it is with respect to this population that the language of FPIC has significantly evolved. By definition, FPIC is a legal right for indigenous peoples in terms of international law, based on the principle of self-determination and it is also the collective right of indigenous peoples to negotiate the terms of externally imposed policies, programs, and projects that directly affect their livelihoods and well-being. In addition, FPIC is generally used as a standard or sometimes principle in soft law instruments, safeguards and other voluntary guidelines setting out best practices for companies. However, most recently, jurisprudence, domestic and international law instruments have started recognising FPIC as a legal right of customary communities not identified as indigenous. As such, FPIC is a consent that is given freely, by people fully informed of the consequences, prior to any decision being made, and according to their own decision-making processes.

It is important to point out that the definition of 'indigenous peoples' is contested and, therefore, exhaustive definitions are avoided by most human rights documents. However, a narrow definition suggests that the concept of indigenous peoples has assumed a different context in international human rights law and practice and it is now being used with reference to peoples who possess a cultural attachment to their lands and territories with distinct cultural, social and political traditions from the rest of mainstream society who historically were original inhabitants of territories, but due to repressions, have been significantly marginalised.³ Self-identification is key to the narrative on indigenous peoples.⁴

However, the discourse around land grabs and displacement of local non-indigenous populations and the socio-economic deprivations that often resonate from these processes have, in recent years, led to an increase in recognition of FPIC beyond indigenous peoples' land rights. Social justice activists and human rights defenders have begun to articulate this imperative given the massive protests against development projects in many parts of the world. While international human rights law has begun to respond to this imperative, the practice of FPIC in relation to non-indigenous communities is in a state of infancy. This is predicated on three factors: firstly, there is limited understanding on FPIC as a tool of advocacy in the context of projects likely to affect communities. Secondly, closely linked to this factor is a dearth of information on FPIC practices that can be extrapolated from one case to the other and juxtaposed between jurisdictions. Thirdly, there is scant reference to FPIC specifically in international human rights instruments that are binding on states, making it difficult for advocates to contrive the realisation of FPIC in national jurisdictions. It is against the backdrop of these three factors from which the essence of this discussion paper emerges.

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1. Cathal Doyle Indigenous peoples, title to territory, rights and resources: the transformative role of free prior and informed consent (2015) 18; R Roesch 'The story of a legal transplant: the right to free, prior and informed consent in sub-Saharan Africa' (2016) 16 *African Human Rights Law Journal* 505-531.
 2. CM Doyle (n 1 above) p505-531.
 3. For a discourse on indigenous peoples in international law, see SJ Anaya *Indigenous peoples in international law* (2004); J Gilbert *Indigenous Peoples' land rights under international law: from victims to actors* (2006); AK Barume *Land rights of indigenous peoples in Africa* (2014).
 4. ILO Convention 107: The Indigenous and Tribal Populations Convention, adopted by the General Conference of the International Labour Organisation (5 June 1957).

This paper begins with a discourse on the legal context and content of FPIC. As the discourse on FPIC has mostly been developed with respect to indigenous peoples, the concept of FPIC is clarified from this position and distinguished from other similar concepts. This paper further highlights the necessity of applying FPIC to non-indigenous communities drawing on norms, actor-oriented approaches in Africa and considering comparative jurisdictions. Afterwards, this paper considers the challenges to realising FPIC in Africa, and strategies for addressing these challenges in view of existing practices both within the continent and beyond.

2. Pertinent Standards on FPIC

The pertinent legal framework of FPIC consists of a number of legal international instruments including: the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Labour Organization Convention 169 (ILO 169),⁵ and the Convention on Biological Diversity (CBD), as well as domestic laws. It is worth noting that the international legal regime on FPIC has significantly been developed with respect to indigenous peoples.⁶ At the core of this is the UN Declaration on the Rights of Indigenous Peoples, which recognises FPIC as central to the protection of indigenous peoples' land rights. In six instances,⁷ the UN Declaration on the Rights of Indigenous Peoples articulates FPIC. Of specific importance is the provision of article 10, which posits:⁸

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

The emphasis of this provision is that displacement outside the will of indigenous peoples must not occur. States often contrive this emphasis as implying the right of indigenous peoples to veto planned activities. Given the existence of legislations that emphasise eminent domain and constitutional clauses that legitimise expropriation, the concept of FPIC is often regarded with resistance. While this is true and hampers the implementation of FPIC, it is worth noting that where FPIC is an enforceable right, states do not have the option of resisting it, even though they do so in practice. However, in the last three decades, the global indigenous peoples' rights movement has significantly countered this resistance by means of the enactment of legislation, litigation, advocacy, and public litigation though there have been challenges with implementation. The result of this movement has been legislative significantly in Latin American countries and the Philippines.⁹ In Peru, for instance, there is a Law of the Right to Prior Consultation for Indigenous Peoples, which was passed by Congress in 2011. In 2007, the Philippines enacted a law recognising FPIC for indigenous peoples.¹⁰

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5. Article 15, 16 and 6 of the International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries 1989 (adopted by the General Conference of the International Labour Organisation, Geneva, June 29, 1989; entered into force, Sept. 5, 1991) [hereinafter ILO 169].
 6. ILO Convention 107: The Indigenous and Tribal Populations Convention, adopted by the General Conference of the International Labour Organisation (5 June 1957); ILO Convention 169: Indigenous and Tribal Peoples Convention, adopted by the General Conference of the International Labour Organisation (27 June 1989); United Nations Convention on Biological Diversity (1992); UN Committee on the Elimination of Racial Discrimination 'General recommendation 23: rights of indigenous peoples' UN Doc A/52/18 annex V (1997); United Nations Declaration on the Rights of Indigenous Peoples, UN Doc A/RES/61/295 (13 September 2007); UN collaborative initiative on Reducing Emissions from Deforestation and forest Degradation Programme *Guidelines on Free, Prior and Informed Consent* (2013).
 7. UN Declaration on the Rights of Indigenous Peoples (n 4 above), arts 10, 11, 19, 29, 29 & 32.
 8. UN Declaration on the Rights of Indigenous Peoples (n 4 above) art 10.
 9. See Oxfam 'Free Prior and Informed Consent in the Philippines: regulations and realities' Oxfam America Briefing Paper (September 2013); Oxfam 'Right to Free, Prior and Informed Consultation and Consent in Latin America: progress and challenges in Bolivia, Brazil, Chile, Colombia, Guatemala, and Peru' (2015); Centre for Social Responsibility in Mining Sustainable Minerals Institute 'Lessons from implementing Free Prior and Informed Consent (FPIC) in the Philippines: A Case Study for Teaching Purposes - Facilitator's Guide' (July 2016).
 10. The Indigenous Peoples' Rights Act (1997).

While this movement has gained equal momentum in Africa, a pertinent challenge has been with respect to the contestation of 'indigenous peoples'.¹¹ States have significantly rejected the idea of certain groups and populations as being indigenous peoples to the exclusion of the general population arguing that the criterion of historic marginalisation was equally experienced by Africans during colonial rule. However, this view has been countered through the clarification advanced by the African Commission on Human and Peoples' Rights (African Commission) with examples of indigenous groups across Africa including the San peoples in Botswana, the Endorois peoples in Kenya, the Mbororo in Central Africa and Amazigh in North Africa.¹² On the application of FPIC to indigenous peoples, the jurisprudence of the African Commission has been emphatic.¹³ Drawing from similar jurisprudence in Latin America,¹⁴ in *Endorois*, the African Commission emphasised that in situations where projects will have a 'major impact' on indigenous peoples, the state duty is 'not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.'¹⁵

International financial institutions are also beginning to recognise FPIC. While the World Bank standard falls short of FPIC,¹⁶ the Asian Development Bank, FMO and EBRD have policies on FPIC.¹⁷ The International Finance Corporation (IFC) Performance Standard 7 emphasises FPIC in engagements with indigenous populations where projects will have an impact on their lands and natural resources; where projects will involve relocation; and where projects will significantly impact on cultural heritage.¹⁸ While this standard is binding on companies that receive IFC funding, the institution's will to enforce this standard is uncertain given that it has supported projects that violate its standards, and has also mentioned that its environmental and social standards are 'not a compliance tool', but rather 'their purpose is to achieve a positive development outcome over a reasonable period of time'.¹⁹ However, the IFC standard is an

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11. F Viljoen *International human rights law in Africa* (2012) 230.
 12. African Commission on Human and Peoples' Rights *Indigenous peoples in Africa: the forgotten peoples?* (2006) 15-16.
 13. See *Centre for Minority Development (Kenya) & Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) 27th Activity Report of the Commission (*Endorois*).
 14. There is a plethora of jurisprudence within the Latin American system on the application of FPIC to indigenous communities, some of these cases include: *Maya Indigenous community of the Toledo District v Belize* Inter-American Commission on Human Rights (12 October 2004); *Case of the Saramaka People v Suriname* Inter-American Court of Human Rights (28 November 2007); *Case of the Sawhoyamxa Indigenous Community v Paraguay*, Inter-American Court of Human Rights (29 March 2006) para 233.
 15. *Endorois* (n 11 above) 219.
 16. See for instance, World Bank *Operational Policy 4.10 – indigenous peoples* (2005, rev 2013).
 17. EBRD Performance Requirement 7 (May 2014); Asian Development Bank 'Safeguarding indigenous peoples through strengthening country safeguard systems' Briefing Note No 4 (2012); FMO 'Position statement on human rights' (29 August 2017).
 18. Similarly, the Environmental and Social Handbook of the European Investment Bank accentuates consent, emphasising that '[i]n all instances involving indigenous peoples, an Indigenous Peoples Development Plan must be prepared, abiding by the principle of free, prior and informed consent (FPIC) and accounting, amongst others, for the recognition awarded by the state to the indigenous groups or communities affected, the duty of the state to consult them, the safeguarding of both their tangible and intangible cultural heritage, their link to resources and territories, and considerations of benefit sharing arrangements with them.' See European Investment Bank *Environmental and Social Handbook* (2013) para 25; International Finance Corporation *Guidance Note 7: Indigenous Peoples* (2012).
 19. P Simons 'The governance gap: multishakeholder and intergovernmental initiatives' in P Simons and A Macklin *The Governance gap: extractive industries, human rights, and the home state advantage* (2014) 139.

important lever to promote accountability for civil society to promote accountability when companies have poor leverage.

Increasingly, corporations are also beginning to recognise the imperative of FPIC in sustaining projects.²⁰ For instance, PanAust Limited a 'leading copper and gold producer', parts of East Asia recognise FPIC as an important component of community engagement.²¹ In its 2016 Sustainability Report, Shell recognized FPIC 'as interpreted by the International Financial Corporate Performance Standards, as a safeguard for indigenous peoples' rights.²²

Moreover, a relevant concern has been with applying FPIC to general populations.²³ Notably, however, standards are beginning to emerge on this practice. While the African Mining Vision (AMV) emphasises the need for states to improve public participation and 'strengthen the capacity of local communities to make informed decisions',²⁴ the Economic Community of West African States (ECOWAS) Mining Directive requires companies to obtain the FPIC of local communities prior to exploration of natural resources.²⁵ Industry based standards on palm oil and forest management have also emphasised FPIC for general populations.²⁶ In 2015, China's Chamber of Commerce of Metals, Mineral and Chemicals Importers and Exporters developed a set of Guidelines for Social Responsibility in Outbound Mining Investments, which incorporates FPIC.²⁷ Given China's presence on the economic landscape of Africa, the Guidelines' incorporation of FPIC is noteworthy. However, good practices of these standards, particularly on FPIC, are yet to be seen in Africa.

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20. E Greenspan, M Katz, J Kim, S Lillywhite and C Madden *Community consent index 2015: oil, gas and mining company public positions on Free, Prior and Informed Consent*, Oxfam Briefing Paper 207 (23 July 2015) https://www.emm-network.org/case_study/cccmc-developing-guidelines-for-social-responsibility-in-outbound-mining-investment/ (accessed June 2017).
 21. PanAust *2015 Business review and sustainability report* (2016)
 22. Royal Dutch Shell Plc *Sustainability Report* (2016) 49.
 23. In this regard, the policy of most financial institutions require consultation and not consent. See African Development Bank *Involuntary resettlement policy* (2003); International Finance Corporation *Performance Standard 5: Land Acquisition and Involuntary Resettlement* (2012); Central American Bank for Economic Integration *Environmental and Social Policy of the Central American Bank for Economic Integration* (2016); World Bank *Operational Policy 4.12 - involuntary resettlement* (2001, rev 2013).
 24. *African Mining Vision* (2009) 33-34.
 25. ECOWAS Directive on the Harmonization of Guiding Principles and Policies in the Mining Sector (2009) art 16(3).
 26. The Roundtable on Sustainable Palm Oil commits its members to ensure that '[u]se of the land for oil palm does not diminish the legal, customary or user rights of other users without their free, prior and informed consent.' In principle 4.2 of the Forest Stewardship Council (FSC) Principles and Criteria for Forest Stewardship, the FSC commits to 'recognize and uphold the legal and customary rights of local communities to maintain control over management activities within or related to the Management Unit to the extent necessary to protect their rights, resources, lands and territories. Delegation by local communities of control over management activities to third parties requires Free, Prior and Informed Consent.' See Roundtable on Sustainable Palm Oil *Principles and Criteria for the Production of Sustainable Palm Oil* (2013) criterion 2.3; A Buxton and E Wilson *FPIC and the extractive industries: a guide to applying the spirit of free, prior and informed consent in industrial projects* (2013); Forest Stewardship Council *FSC International Standard: FSC Principles and Criteria for Forest Stewardship FSC-STD-01-001 V5-0 EN* (2015).
 27. This represents the 'first industry guidance on social responsibility for the Chinese mining industry'. China Chamber of Commerce of Metals, Mineral and Chemicals Importers and Exporters *Guidelines for Social Responsibility in Outbound Mining Investments* (2015); Emerging Market Multinationals Network for Sustainability 'CCCMC: Developing Guidelines for Social Responsibility in Outbound Mining Investment' (2014).

There is a consensus that FPIC involves meaningful engagement that leads to consent. As such, communities, through FPIC, must be able to make informed decisions on issues affecting their livelihood capacities in the lifespan of a project. The African Coalition on Corporate Accountability (ACCA) adopts the view that “free, prior and informed consent is a non-negotiable threshold (or standard) for every aspect of projects likely to affect all communities in Africa including indigenous, customary and affected communities. All communities must be able to participate in decisions affecting them and their livelihoods, including through the negotiation and life cycle of a project”.²⁸ Specific groups including women, children and persons with disabilities must be enabled to participate in the FPIC process.

To understand the content of FPIC, it is relevant not only to distinguish it from other similar concepts, but to advance the clarification from the perspectives of global and regional institutions with a mandate and standards on indigenous peoples considering that FPIC is well-defined in the discourse on indigenous peoples.

28. ACCA Declaration 2013, <http://accahumanrights.org/en/resources/acca-declaration> (accessed on 13 November 2018).

3. Clarifying FPIC

The concept of FPIC is best explained with reference to Kant's theory of autonomy and its emphasis on self-ascendancy. Kant asserts that it is imperative to treat people as 'as an autonomous legislator in the kingdom of ends'.²⁹ Given that a denial of autonomy is a denial of dignity,³⁰ informed consent cannot be insulated from advancing human dignity. FPIC as autonomy emphasises ownership of choice and decisions. It is in this sense that FPIC resonates in institutional approaches to FPIC, howbeit in relation to indigenous peoples.

According to the Permanent Forum on Indigenous Peoples (Forum), FPIC is a 'process undertaken free of coercion or manipulation, involving self-selected decision-making processes undertaken with sufficient time for effective choices to be understood and made, with the relevant information provided and in an atmosphere of good faith and truth'.³¹ As with the Permanent Forum, the African Commission Working Group on Indigenous Populations/Communities (African Commission Working Group) lays an emphasis on FPIC as a procedural requirement. Beyond this, however, it is also substantive as an embodiment of norms.³² The importance of FPIC increases in relevancy from the fact it has the potential to foster 'equitable solutions and evolutionary development which, in turn, may lead to co-management and decision-making'.³³ As a process, its objective seeks to collaborate with local populations and integrate them in decision-making processes. The relevance of FPIC to indigenous peoples, gains impetus from the imperative of indigenous peoples' right to self-determination;³⁴ the ethics of autonomy; the centrality of self-governance to their development; and inclusive participation in decision-making processes integral to democratic processes. With FPIC, indigenous peoples can assert control in the governance of their lands and territories when engaging with external actors, including states and corporate entities.³⁵

29. A Maclean *Autonomy, informed consent and medical law: a relational challenge* (2009) 16.

30. I Kant *Groundwork of the metaphysics of morals: a German - English edition* trans M Gregor & J Timmermann (2011) 101.

31. FPIC represents 'an expression of a wider set of human rights protections that secure indigenous populations/communities' rights to control their lives, livelihoods, lands and other rights and freedoms'. African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs *Extractive Industries, Land Rights and Indigenous Populations/Communities' Rights*, Report of the African Commission's Working Group on Indigenous Populations/Communities (2017) 44 (African Commission's Working Group Report).

32. This African Commission's Working Group Report recognises this substance in articulating that FPIC represents the exercise by indigenous peoples of self-determination. African Commission's Working Group Report (n 34 above) 45.

33. This definition is contained in the Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples noted and endorsed by the Permanent Forum on Indigenous Issues. See Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, UN Doc E/C.19/2005/3 (17 February 2005), para 42; Permanent Forum on Indigenous Issues, Report on the fourth session (16-27 May 2005), para 137.

34. In addition, the relevance of FPIC to indigenous communities further resonates from their rights to culture and to freely dispose of their wealth. See African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity, OAU Doc CAB/LEG/67/3 rev 5 (27 June 1981) (African Charter), arts 17, 21; African Commission on Human and Peoples' Rights v Kenya (Judgement, 26 May 2017).

35. Permanent Forum on Indigenous Issues, *Study on the treatment of traditional knowledge in the framework of the United Nations Declaration on the Rights of Indigenous Peoples and the post-2015 development agenda*, UN Doc E/C.19/2015/4 (2 February 2015) para 5.

In a plethora of areas, the Forum has stressed the relevance of FPIC as a mechanism which is both a means to an end for the realisation of development goals such as extraction of natural resources, conservation projects, climate change protection and food security. As with the Forum, the Expert Mechanisms on the Rights of Indigenous Peoples regard FPIC as a 'mechanism and process whereby indigenous peoples make their own independent and collective decisions on matters that affect them.'³⁶ Beyond being a process for obtaining consent, FPIC is a process through which indigenous populations are also able to assert their own form of governance.³⁷ There are two core principles of this process: good faith and mutual respect – both of which presupposes an engagement between states and indigenous peoples based on the resolve to reach a consensus. These core values are important given that the expropriation of indigenous territories has a strong link to their continuing existence.³⁸

There are four core elements of FPIC from its acronym integral to understanding its substance and form, namely, free, prior, informed and consent. These four elements are indivisible and qualify the legitimacy of the process. In having a better understanding of FPIC, it is relevant to consider each of these elements in turn. Free consent connotes the absence of externalities capable of altering decisions. Significantly, the substance of free consent contemplates the absence of 'coercion, intimidation or manipulation'.³⁹ This is a 'common understanding'⁴⁰ that envisions control and ownership of process. As with the Forum, the Expert Mechanism interprets free consent as the absence of the three-fold encumbrance: coercion, intimidation or manipulation.⁴¹ In the FAO report, this is defined distinctly with reference to voluntariness and self-direction by the communities without coercive hindrances and encumbrances of time and expectations 'externally imposed'.⁴²

Prior consent involves an element of pre-action. The Expert Mechanism emphasises that this requires that consent is 'obtained in advance of the activity associated with the decision being made, and includes the necessary time-frame to allow indigenous peoples to undertake their own decision-making processes.'⁴³ Similarly, the FAO report emphasises consent to be 'sought sufficiently in advance of any authorization or commencement of activities'.⁴⁴ For prior consent, there must be prior information and prior time-line for comprehension of information and decision-making.⁴⁵ The need for prior consent to constitute each phase of a planned activity is also important. The Forum underscores this through detailing that prior consent must be 'at all stages, including from inception to final authorization and implementation of

36. Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making*, report of the Expert Mechanism on the Rights of Indigenous Peoples, UN Doc A/HRC/18/42 (17 August 2011) 23 (Expert Mechanism Report).

37. Food and Agriculture Organization of the United Nations, *Free Prior and Informed Consent: an indigenous peoples' right and a good practice for local communities: manual for project practitioners* (2016) 13 (FAO report).

38. The twin principles of good faith and mutual respect also resonate from the United Nations Declaration on the Rights of Indigenous Peoples.

39. Report of the International Workshop (n 36 above) para 46.

40. See Permanent Forum on Indigenous Issues, Report on the tenth session, UN Doc E/2011/43-E/C.19/2011/14 (16-27 May 2011) 34.

41. Expert Mechanism Report (n 39 above) para 25.

42. FAO report (n 40 above) 15.

43. Expert Mechanism Report (n 39 above) para 25.

44. FAO report (n 40 above) 15.

45. FAO report (n 40 above) 15.

activities'.⁴⁶ Based on this understanding, it will be incorrect to regard FPIC as a process that only relates to the beginning of an activity, and not the entire lifespan of its implementation. The African Commission Working Group emphasises that FPIC must not be a 'one-off yes or no', but a constant negotiation and exchange between indigenous peoples and external actors.⁴⁷

The relevance of information derives from the recognition that meaningful engagement can only arise from awareness on the planned activity. On this matter, it is important for indigenous and non-indigenous peoples to have 'all information relating to the activity'.⁴⁸ The information must also be 'objective, accurate and presented in a manner and form understandable' to them.⁴⁹ Every bit of detail that will affect decision-making must be provided. Information must be correct, coherent and clear. It must also not be biased. As such, information provided must pass the litmus test of objectivity. It must reflect the potential impacts of a planned activity. It must be updated to reflect the current state of the activity and must be provided in a format that is appropriate for the community.⁵⁰

Consent is the action from which the essence of the process resonates. Oftentimes, this proves to be the most challenging given that consent is largely impeded by lack of access to information.⁵¹ Consent presupposes an agreement, consensus, a meeting of minds.⁵² Indigenous peoples may consent with or without conditions and may withhold consent altogether. While the procedural modalities for consultation and consent are similar, it is important to make a distinction between the two concepts.⁵³ The Forum articulates this strongly in emphasising that consent must not be replaced or weakened through the concept of consultation.⁵⁴ The difference between consultation and consent derives from the aim of the two concepts. Consent, unlike consultation, implies an active involvement in decision-making. Although consultation forms an integral part of consent, it does not necessarily involve decision-making capacities. The substitution of consent for consultation reduces the process of FPIC to an opinion gathering exercise, which only heightens the vulnerabilities of indigenous peoples and denies them their right to self-determination.

It is important to note that a violation of any of the four components nullifies consent. As such, it is essential for the process to be guided by the twin principles of good faith and mutual respect.

Taken in the context on the UNDRIP, there are differences between the concepts 'veto and 'consent'. While the term "veto" is not mentioned in the UN Declaration on the Rights of Indigenous Peoples, and involves an absolute power, the UNDRIP makes mention of consent.

In addition, there are situations that reinforce the need for the government to obtain the FPIC of Indigenous peoples. This often occurs in the context of resources development, where

46. Permanent Forum on Indigenous 2011 (n 43 above) 34.

47. African Commission's Working Group Report (n 34 above) 44.

48. Expert Mechanism Report (n 39 above) para 25.

49. Expert Mechanism Report (n 39 above) para 25.

50. FAO report (n 40 above) 15-16.

51. Email communication, Arnold Kwesi, Project Coordinator, Uganda Consortium on Corporate Accountability (18 June 2017).

52. With respect to indigenous peoples, the Expert Mechanism defines consent as meaning that 'indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.' Expert Mechanism Report (n 39 above) para 25.

53. Expert Mechanism Report (n 39 above) para 20.

54. Permanent Forum on Indigenous Issues 2011 (n 43 above) para 36.

adverse impacts affecting indigenous people are severe and far-reaching. The consent needed in such situations is very different from the 'veto'. The difference being that veto implies complete and arbitrary power, with no balancing of rights.

There are six concepts, though related, worth distinguishing from FPIC. The first is consultation. Consultation involves a process of engagement in which the views of communities are sought by external actors. However, these views are not necessarily accepted.⁵⁵ Contribution, like consultation, involves a process of engagement. However, unlike consultation, its emphasis is on the engagement of the community in the advancement of a project.⁵⁶ As with consultation, information gathering is a process of engagement which seeks to collate the views of communities. This form of engagement is, however, realised through the completion of questionnaires and surveys.⁵⁷ In contrast to information gathering, passive participation is a process in which communities are engaged through receiving information.⁵⁸ Involvement implies working with communities to make sure that their concerns are considered.⁵⁹ Placation involves placing some members of the community in decision-making processes; however, external actors retain control of the process.⁶⁰ While FPIC also involves engagement, its understanding cannot be limited to the above-mentioned concepts.

55. See R Adeola 'The legal protection of development-induced displaced persons in Africa' (2017) 10(1) *African Journal of Legal Studies* 91, 99-101.

56. See BC Smith 'Participation without power: subterfuge or development?' (1998) 33(3) *Community Development Journal* 197, 200.

57. H Heyd & A Neef 'Participation of local people in water management: evidence from the Me Sa Watershed, Northern Thailand' International Food Policy Research Institute, Environment and Production Technology Division Discussion Paper No 128, (December 2004) 5; A Niber, H Owusu-Koranteng, D Owusu-Koranteng and E Greenspan *The right to decide: free, prior and informed consent in Ghana* 8 https://www.oxfamamerica.org/static/media/files/FPIC_in_Ghana_FINAL.pdf (accessed June 2017).

58. Niber and others (n 28 above) 8.

59. *Involve People and Participation: how to put citizens at the heart of decision-making* (2011) 18.

60. SR Arnstein 'A ladder of citizen participation' (1969) 35(4) *Journal of the American Institute of Planners* 216, 220.

4. FPIC and non-indigenous communities

While the application of FPIC as a right to indigenous peoples is well-established, a relevant question that needs to be assessed is whether FPIC is applicable to non-indigenous communities in general.⁶¹ Development actors are often reticent to apply FPIC to non-indigenous communities given that some of these communities, unlike indigenous communities, do not have any special attachment to land. However, it is important to note that when we speak about rights, the attitude of the development actor becomes irrelevant, given that it is a legal obligation. Furthermore, the right to self-determination from which the narrative of FPIC of indigenous communities' gains significance is not distinctively applicable to local communities as a specific category of peoples within a state. However, for indigenous peoples, this is a fundamental right to which they are entitled as 'peoples' within a state.⁶² In its jurisprudence, the African Commission has already stated that communities, including non-indigenous, fall within the definition of peoples under its Charter.⁶³ Hence, the reticence to extend FPIC to non-indigenous communities often comes at a high cost for public and private actors. For instance, the displacement of Lagos Water Front Communities such as the Otodo-Gbame community, for the Lagos Mega City, has not only resulted in project delays, but has created bad publicity and questioned the degree to which public and private actors respect local communities' human rights. In more recent times, mining standards in Africa such as the ECOWAS Mining Standard and the AMV have begun to incorporate FPIC as a requirement for projects that are bound to affect local communities.⁶⁴ Even though the AMV is one of the weakest examples of African instruments extending FPIC to local communities,⁶⁵ other African instruments such as the ECOWAS, African Commission, and Pan-African Parliament have called on States to respect the FPIC of local communities facing potential impacts from mining, hydrocarbon development, or natural resource projects more broadly.

Within this narrative, a useful conclusion that emerges from extending FPIC to non-indigenous communities is that it will achieve two purposes: (1) it will foster equitable solutions. (2) it will foster the realisation of human rights commitments of states and private actors. In this vein, FPIC can be regarded as a right in itself certainly for indigenous peoples and increasingly for customary communities. There are four pertinent rights realised through FPIC, namely: the right to privacy, dignity, participation and development. The right to privacy is sacrosanct to the inviolability of the human person. In international human rights instruments, this right is emphatic. The International Covenant on Civil and Political Rights, for instance, recognises the right to privacy and provides that 'no one shall be subjected to arbitrary or unlawful interference with his privacy'.⁶⁶ While not contained in the African Charter,⁶⁷ the right to privacy is rooted in many Constitutions of African states and guaranteed in relation to persons,

61. The term 'communities' refer to individuals/group of individuals affected by a project.

62. See UN Declaration on the Rights of Indigenous Peoples (n 4 above) arts 3&4.

63. African Commission State Reporting Guidelines on Articles 21 and 24 of the African Charter relating to Extractive Industries and the Environment.

64. African Mining Vision (n 22 above); ECOWAS Directives (n 23 above).

65. Free, Prior and Informed Consent in the Extractive Industries in Southern Africa an analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia (http://lrc.org.za/art_external/pdf/2018%20Free%20Prior%20and%20Informed%20Consent%20OXFAM.pdf p27.)

66. International Covenant on Civil and Political Rights, adopted by the UN General Assembly Resolution 2200A (XXI), UN Doc A/6316 (16 December 1966) art 17(1).

67. African Charter (n 37 above).

their homes and families.⁶⁸ Aside from privacy, the right to dignity is intrinsic to the notion of FPIC as explained from its ethical dimension of respect for autonomy. The concept of dignity resonates in African customs and traditions of hospitality as an imperative for advancing broad-based engagements and development.

Grounded in the International Covenant on Civil and Political Rights and the African Charter, the right to participation is the foundation of societal democracy. Participation involves an active engagement in decision-making. In the context of projects, it is a process by which local communities decide on processes that affect them. As a wider expression of dignity and freedom of expression, participation is a means to governance, and the destination of governance. Participation is a process involving choices which are made when people are empowered to decide.

As with participation, the right to development is equally grounded in the African Charter.⁶⁹ This right encompasses the 'economic, social and cultural' sphere of peoples. Peoples, in this context, represent not only indigenous peoples, but 'peoples within a state'.⁷⁰ Literally, the right to development contemplates the right to live better. Within the legal lens, it involves a corollary duty on states to ensure that it moves its machineries towards advancing the social, economic and cultural wellbeing of peoples in societies. The African Commission has emphasised that this right is both instrumental and constitutive of rights. Instrumentally, it achieves the end of wellbeing. Constitutively, it is a wider expression of numerous rights. As both a means and an end, the right to development 'must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes of the right to development'.⁷¹ Given the centrality of equity and choice to the realisation of the right to development, it is important for external actors to seek genuine outcomes – the realisation of which defines the overarching objective of FPIC.

Given the importance of FPIC as an integral process in realising the rights to participation and development of both indigenous and local communities, its content needs to be equally applied to non-indigenous communities. The African Commission stipulates this point:⁷²

It should also be clear that while FPIC is used to highlight a specific set of rights for indigenous populations/communities, it is clear that "non-indigenous, project-affected people have the right to

68. See Constitution of Botswana (1966), sec 9; The Constitution of Malawi (as amended 2010), art 21; Constitution of Kenya (2010), sec 31; Constitution of the Federal Republic of Nigeria (1999), sec 37(1); Constitution of the Republic of Ghana (1992), sec 18(2); Constitution of the Republic of South Africa (1996) Sec 14; Constitution of the Republic of Mozambique (1975), art 41; Constitution of Madagascar (2010), art 13; The Constitution of the Republic of Uganda (1995), sec 27(1); Constitution of Sudan (2005), art 37; Constitution of the Republic of Namibia (1990), sec 13; Constitution of Egypt (2014), sec 57; Constitution of Morocco (2011), sec 24; Constitution of Tunisia (2014), sec 24; Constitution of the United Republic of Tanzania (1977) sec 16; Constitution of Burundi (2005), sec 43; Constitution of Chad (1996), art 17; Constitution of the Republic of Seychelles (1993), art 20(1).

69. African Charter (n 37 above) art 22.

70. Viljoen (n 9 above) 219-228.

71. *Endorois* (n 11 above) 277.

72. In a 2012 resolution on human rights-based approach to natural resources governance, the African Commission equally makes this point with reference to the African Charter. The African Commission specifically mandated states to 'ensure independent social and human rights impact assessments that guarantee free prior informed consent; effective remedies; fair compensation; women, indigenous and customary people's rights; environmental impact assessments; impact on community existence including livelihoods, local governance structures and culture, and ensuring public participation; protection of the individuals in the informal sector; and economic, cultural and social rights.' See African Charter (n 37 above) art 21; Resolution on a Human Rights-Based Approach to Natural Resources Governance, adopted by the African Commission on Human and Peoples' Rights in Banjul, The Gambia at the 51st Ordinary Session (18 April – 2 May 2012), para 4; African Commission's Working Group Report (n 34 above) 45.

consultation and negotiation in decision making processes in ways that are consistent with the principles underlying the right to FPIC”.

However, there is a shortage of FPIC practices in relation to non-indigenous communities in Africa. The reason for this is three-fold. Firstly, state laws on land tenure confer unfettered powers on state authorities to expropriate land for public interest reasons without recourse to the potential effect on local communities.⁷³ It is important to underscore that states rarely expropriate land, but deprive people of it. Expropriation is a regulated process with compensation requirements and various stages of the expropriation process can be challenged in court. Conversely, land grabbing is not regulated and will be more difficult to challenge. Understanding the meaning behind the two processes is crucial. Secondly, constitutional provisions on land expropriation, while recognising the need for fair and just compensation, do not oblige states to conduct FPIC. This provides states with *carte blanche* to determine what is fair and just. While the notion of fairness and justice require that affected communities be engaged, this is not always the case given that compensation is often decided by national valuation authorities. A third reason why FPIC is not often applied to non-indigenous communities in Africa resonates from the restrictive interpretation of national human rights norms as not including socio-economic rehabilitative rights such as adequate standard of living and shelter since they are not included in constitutions as justiciable rights.⁷⁴

However, actor-oriented approaches have sought to challenge the non-applicability of FPIC to non-indigenous communities in Africa. This challenge has been reflected in countries such as Ghana, the Democratic Republic of Congo (DRC), Zimbabwe, Nigeria, Uganda and South Africa.

In Ghana, the advocacy of Wassa Association of Communities Affected by Mining (WACAM) is instructive. Since 2004, Newmont Ghana Gold Ltd has been operating the Ahafo South Gold Mining Project, which has resulted in the significant displacement of communities notwithstanding numerous negative social impacts.⁷⁵ In 2011, the Donkro Nkwanta farming community ‘vowed to employ all legitimate means to protect their farm’⁷⁶ and have undertaken efforts, through the support of WACAM, to insist on their consent.⁷⁷

In the DRC, the Congolese Civil Observatory Society for Peace Minerals (OSVMP-RDC) along with the Episcopal Commission for Natural Resources (CERN), the Dynamic Women in Mines (DYFEM) and the Governance House of the Extractive Sectors (MGSE) have challenged the exploitation of cassiterite by Alphamin Misie Mining in the Walikale region of North Kivu.⁷⁸

73. Reasons adduced in exercise of this discretion have ranged from natural resource extraction to the expansion of cattle markets.

74. Aside from states such as South Africa and Kenya, socio-economic rights are mostly non-justiciable in many African countries. However, even in these countries, there have been concerns with the realisation of socio-economic rights. See *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169; *Mitu-Bell Welfare Society v Attorney General & 2 others* (2013) eKLR.

75. T Salam and F Giovannetti *Newmont Ghana Gold Ltd - Ahafo South Project external social compliance monitoring 4th review - September 2006* (2006) 1.

76. C Boateng ‘Donkro Nkwanta community threatens demo’ *The Chronicle* 23 August 2011.

77. Email communication, Hannah Owusu-Koranteng, Wassa Association of Communities Affected by Mining (WACAM) (6 June 2017).

78. Email communication, Alexis Muhima Shinja, l’Observatoire de la Société Civile Congolaise pour les Minerais de Paix/OSCMP-RDC (2 June 2017).

OSVMP-RDC along with other partners have worked with local communities insisting on the application of FPIC as a basis for engagement.⁷⁹

In Zimbabwe, the Zimbabwe Lawyers Association has challenged mining projects in the Midlands due to the lack of FPIC processes with non-indigenous communities.⁸⁰ Similarly, in Nigeria, the Peace Point Action has significantly challenged the Super Highway Project for the failure of the Cross-River government to conduct FPIC. Umo recalls an instance where communities were gathered in a town hall and informed about the project. This was, however, a monologue.⁸¹

In South Africa, the Legal Resources Centre (LRC) has advocated FPIC for non-indigenous communities displaced by the Dwesa-Cwebe Nature Reserve.⁸² Interestingly, the advocacy efforts of the LRC highlights the utility of customary law and governance in advancing FPIC. While similar trends across Africa are yet to emerge, the strategy of the LRC serves as a pointer that customary laws are a useful tool on which to construct actor-oriented approaches. Given that customary traditions are an integral process in Africa, it is useful to map these laws and traditions that can assist in the advancement of FPIC.

In Latin America and South-East Asia, non-indigenous communities have increasingly called for the recognition of FPIC. In Columbia, for instance, Afro-Colombians along with indigenous peoples rejected the Mandé Norte gold mining project in 2009.⁸³ In 2017, residents of Cajamarca in Colombia voted against the world's biggest gold mining project planned by AngloGold Ashanti.⁸⁴ In Southern Mexico, farming communities rejected the La Parota Dam project in 2003 for failing to realise local consensus.⁸⁵ As with Mexico, farming communities along with indigenous peoples have equally contested projects on this account.⁸⁶

Despite the existence of frameworks and movements, the application of FPIC to non-indigenous communities has been challenging as with its application to indigenous peoples. Specifically, in relation to Africa, the next section highlights these challenges and proposed strategies for addressing them.

79. As above.

80. Email communication, Roissie Midzi, Zimbabwe Human Rights Commission (5 June 2017).

81. Interview with Umo Isua-Ikoh, Peace Point Action (15 June 2017).

82. Email communication, Wilmien Wicomb, South Africa Legal Resources Centre (21 June 2017).

83. G Sanchez-Garzoli 'Stopping irreparable harm: acting on Columbia's Afro-Colombian and indigenous communities protection crisis' Norwegian Peacebuilding Resource Centre (NOREF Report), 13 June 2012.

84. B Ebus 'Villagers vote to ban "La Colosa" gold mining project in Columbia' *Mongabay* 27 March 2017.

85. D Cevallos 'High voltage conflict over Guerrero Dam' *Banderas News* August 2007; R Guerra "'The earth is not for sale, you love and defend her": The La Parota Dam on the Papagayo River-Mexico' http://www.unizar.es/aguariospueblos/pdf/caso/6._La_Parota_Mexico_WEB.pdf (June 2017).

86. JM Soares 'Guatemala's high court affirms right of consent for indigenous and rural communities' *Intercontinental Cry* 20 December 2013.

5. Challenges and strategies

One of the challenges to the realisation of FPIC in Africa is the absence of specific national legislative frameworks supporting FPIC in many African states. In other jurisdictions, the existence of national laws and policies have significantly propelled advocacy on FPIC for indigenous populations. In Paraguay, for instance, the national constitution specifically provides that displacement of indigenous peoples must not occur 'without their express consent'.⁸⁷ In the Philippines, there is an Indigenous Peoples' Rights Act which recognises the FPIC of indigenous populations.⁸⁸ The existence of norms in these jurisdictions drives FPIC processes. In many African countries, however, national FPIC laws that can propel advocacy are lacking. While there are national laws on consultation, these laws do not necessarily emphasise consent as a primary objective, which should be sought both for indigenous and non-indigenous communities. For instance, in the DRC, there are laws which encourage companies to consult communities. However, these laws do not provide legal guarantees.

Related to this challenge is the lack of policy guidance on FPIC at the regional level that can serve as a practice directive for businesses operating in Africa. At the sub-regional level, however, the ECOWAS Mining Directive is a good practice that may be elevated to the continental level. However, there is a need for concerted advocacy to ensure that a regional standard on FPIC is formulated which may be used to national standards. The functionality of this approach resonates from Ghana. Following the formation of the ECOWAS Mining Directive, organisations such as WACAM and the Africa Center for Energy Policy have engaged the government on the domestication of the directive for the protection of mining communities.⁸⁹

Another challenge is the absence of institutionalised national agencies for community engagements with respect to projects. Having such national agencies are important for fostering FPIC, building partnerships with civil society and developing normative standards and good practices that can be extrapolated to other jurisdictions. Such national agencies further serve to validate the commitment of states to the protection of indigenous and local communities which resonate with international and regional human rights frameworks. An example of such an agency is from the Philippines. The National Commission on Indigenous Peoples, within the Office of the President, seeks to promote FPIC through policy formulation and practical engagement for the protection and well-being of indigenous populations.⁹⁰ Although national human rights institutions exist in many African states, the development of a specific FPIC agency within national government will help amplify the voices of local communities and ensure adequate protection prior to the commencement of projects. It is important for advocacy efforts to be strengthened in this regard to ensure that the concerns of local and indigenous populations affected by projects are addressed.

Another challenge is the prevalence of land expropriation laws that run contrary to the rights of local populations. Across Africa, laws on eminent domain significantly hamper the realisation of FPIC for local communities and are often the reference point for public actors in

87. Paraguay Constitution 1992 with Amendments, art 64.

88. The Indigenous Peoples' Rights Act (n 8 above).

89. In 2011, the government gazetted the ECOWAS Mining Directive, which is a notable step towards acknowledging the instrument as useful in the context of mining in Ghana. BY Ashiadey 'Domesticate ECOWAS mining principles - gov't told' *B&FT Online* 21 April 2015.

90. The National Commission on Indigenous Peoples has formulated guidelines on FPIC setting forth key obligations, guiding principles and processes. See: The Revised Guidelines on Free and Prior Informed Consent (FPIC) and related processes of 2012, NCIP Administrative Order No 3, Series of 2012; The National Commission on Indigenous Peoples <http://ncipro67.com.ph/> (accessed June 2017).

justifying state actions. In addressing this practice, it is pertinent for jurisprudence to emerge on constitutional challenges. The Ugandan case of *National Roads Authority v Irumba Asumani and Peter Magelah* is a good reference point on how such a challenge may be advanced.⁹¹ In this case, the Ugandan government commissioned a project to upgrade the Hoima-Kaiso-Tonya road, leading to Uganda's oil fields in the Albertine Graben. Acting under the Land Acquisition Act, the Government forcefully acquired the project land and the Uganda National Roads Authority took possession before payment of compensation to the owners had been completed.⁹² The respondents challenged the constitutionality of the Land Acquisition Act that permitted the Government to forcefully acquire land before payment of compensation. The Supreme Court upheld the Constitutional Court's decision that the Land Acquisition Act was inconsistent with Article 26 of the Constitution and, therefore, unconstitutional. Similar trends hinges on human rights (which is constitutionally recognised in Africa) should be advanced in challenging these laws.

Another significant challenge is the economic-centric approach to development in Africa. This approach measures development based on infrastructure, income generation and per capita income. Consequently, the same principle is applied to local communities whose perspectives are not taken into account. The implication of this is that FPIC becomes a hindrance rather than an opportunity for development, especially for local communities in Africa. In addressing this challenge, there would be a need to recalibrate the conventional approach to development, from economic centrism to human rights for which FPIC is an integral process

A sixth challenge relates to capacity-building on FPIC for local communities. The importance of building the capacities of local communities in fostering FPIC resonates from a plethora of cases in the Latin American context. In 2003, local communities in Southern Mexico resisted the La Parota Dam, and aligned themselves with civil society's argument that 'community members affected by the project have not been properly informed about its potential impact, including, for example the displacement and relocation or reparations and compensations.'⁹³ Through sustained advocacy, the project was eventually cancelled in 2012.⁹⁴ In Ghana, the essence of capacity-building for local communities is an exemplary case of the role played by civil society in the realization of FPIC at the community level. Thanks to the support of WACAM, local communities in mining areas have been empowered to demand the protection of their rights. In 2011, for instance, the Donkro Nkwanta community in the Brong Ahafo region of Ghana resisted the Newmont Ghana Gold Limited. WACAM has been working with the community and providing knowledge on FPIC and related instruments that have been signed by Ghana, which form part of national laws. Similarly, in Uganda, the Ugandan Coalition on Corporate Accountability (UCCA) has been active in empowering communities on mechanisms of self-advocating and have held informative sessions with communities through community dialogues and regional forums.⁹⁵ This practice can prove useful in building the necessary momentum in ending inadequate consultation processes held with communities

91. *National Roads Authority v Irumba Asumani and Peter Magelah* Supreme Court Constitutional Appeal No 2 of 2014; Email communication, Arnold Kwesi, Project Coordinator, Uganda Consortium on Corporate Accountability (18 June 2017).

92. Email communication, Arnold Kwesi, Project Coordinator, Uganda Consortium on Corporate Accountability (18 June 2017).

93. Amnesty International 'Human rights at risk in La Parota Dam Project' (2007) 3 <https://www.amnesty.ie/wp-content/uploads/2016/04/Human-Rights-at-Risk-in-La-Parota-Dam-Project.pdf> (accessed June 2017).

94. B Lowrey-Evans 'Hasta la Victoria: La Parota Dam cancelled' *International Rivers* 20 August 2012.

95. Email communication, Arnold Kwesi, Project Coordinator, Uganda Consortium on Corporate Accountability (18 June 2017).

and instances where communities' consent is obtained in a dubious manner, especially in instances where development projects are likely to have dire impacts on local communities.

A seventh challenge is the monitoring and evaluation of FPIC processes. The discourse on community engagement often overlooks the importance of effectively monitoring and evaluating the effects of these processes. Consequently, the long-term impacts of the process on the livelihood capacities of affected communities often goes unreported. However, such long-term impacts for local communities can be dire where there are no follow-up processes or adequate oversight measures. In Senegal, for instance, the families relocated from the Dambankhoto village to make way for mining activities in the Sabodala region, which followed negotiations were not properly rehabilitated as initially agreed. For instance, housing units were built without important fittings such as doors, in some cases. However, had effective monitoring mechanisms been put in place, such a situation could have been avoided. In addition to fostering protection for local communities, effective monitoring and evaluation are important elements for generating data and developing evidence-based advocacy. A good practice of such monitoring resonates from the strategy of the Endorois Welfare Council in Kenya. Through the deployment of paralegals in strategic locations across counties and national government, the Council has been able to monitor the practices of FPIC across indigenous peoples' territories to ensure that reporting is done.⁹⁶

The political contrivance on FPIC is also a challenge that needs to be addressed. This perception views FPIC as equating FPIC to the exercise of 'veto power'. However, this is not the case. FPIC is a process that seeks to advance equitable solutions geared towards the protection of local communities when projects are implemented. An underlying essence of FPIC is the transfer of ownership of process and solutions to local communities. FPIC counters the hegemony of external actors as sole decision-makers where community interests are bound to be adversely affected. However, the language of veto diminishes the essence of FPIC, reducing FPIC to an autarchic exercise of power which is not what local communities pursue in seeking community engagement. Countering this narrative is important in securing the buy-in of external actors to the process and fostering meaningful engagement between all stakeholders in a project. In countering this perspective, the need for capacity-building of policy makers, public actors and the private sector involved in implementing development projects is manifested. This is a pertinent entry point for civil society.

Further, the participation of specific groups including women, children and persons with disabilities needs to be ensured and enhanced. Often these groups are excluded from FPIC and consultation processes due to social prejudices, political sensitivities and cultural practices. However, if FPIC is to be practiced and truly inclusive, the exclusionary patterns of these groups needs to be addressed. A manner in which the participation of these groups can be enhanced is through legal empowerment programs that incorporate the specific needs of these groups. Furthermore, it is crucial that the protection of human rights defenders is guaranteed, given their pertinent role in fostering FPIC and ensuring the inclusion of various groups in the FPIC process.

Another challenge is the lack of adherence of corporations to business, human rights and, more specifically, the principles of FPIC. The United Nations Guiding Principles on Business and Human Rights (Guiding Principles)⁹⁷ require businesses to engage communities where projects are likely to have human rights impacts. While the emphasis of the Guiding Principles is on

96. Email communication, Kipsang Kipkazi, Endorois Welfare Council, Kenya (12 June 2017).

97. UN Human Rights Council *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie* UN Doc A/HRC/17/31 (21 March 2011).

consultation, there are businesses that have taken steps to incorporate FPIC.⁹⁸ One of the reasons that motivate businesses to recognise the utility of FPIC is based on the narrative of sustainability of projects and profits. This narrative needs to be propelled through data sharing and exchange of information among civil society in Africa.

98. OThe United Nations Global Compact has provided guidance to companies calling on them to respect FPIC. See UN Global Compact *United Nations Declaration on the Rights of Indigenous Peoples: a Business Reference Guide* (2012).

The utility of FPIC in advancing protection for local communities in Africa cannot be overemphasized. FPIC is a process which essentially seeks to foster engagements with local communities in order to obtain satisfactory development outcomes. The abundance of evidence on the utility of FPIC both in policy and practice across various jurisdictions helps strengthen this point. However, the pertinent challenge remains with FPIC in practice (de facto).

In Africa, there are a plethora of challenges to practices around FPIC, notwithstanding the laws on eminent domain, the absence of institutionalised agencies for community engagements; strategic policy guidance on FPIC at the regional level, and political contrivances on the implication of the subject. In addressing these challenges, it is important that the specific measures proposed in this report are implemented. Moreover, given that the central theme of FPIC seeks to empower local communities to make decisions, it is evident that a proposed FPIC advocacy needs to be founded on a tri-dimensional approach based on human rights, capabilities and operational costs.

6. Conclusion

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