

FREE, PRIOR AND INFORMED CONSENT (FPIC) AND ITS APPLICABILITY TO UGANDA'S CONTEXT

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EXECUTIVE SUMMARY

In the last few decades, free prior and informed consent (FPIC) has emerged as an international human rights standard that derives from the collective rights of indigenous peoples to self-determination and to their lands, territories and other properties. The legal history of the right to free, prior and informed consent (FPIC) is so closely aligned to the protection of indigenous peoples' rights, specifically their right to self-determination. This right broadly speaking is a mechanism and a process where indigenous peoples and other local communities undertake their own/independent collective decision on the matters that affect them—especially in utilization of their land and natural resources. It follows therefore that this right is primarily exercised by the indigenous people.

The increasing cases of forced displacement and demands for land for developmental projects has reawakened new debate on the principle of free, prior and informed consent especially within the natural resource exploitation sector in Uganda. This principle of FPIC proposes that indigenous people ought to be allowed to negotiate conditions under which any development on their land should take place. It entails the right of the indigenous people to determine the nature of development that fits into their futures, to be fully informed and to be in a position to freely refuse or accept offers, plans, projects, programs and proposals that affect them or their resources. Thus, this principle lies at the heart of respecting the rights of indigenous peoples and clearly defining their relationship with external stakeholders, including governments and other private actors like companies.

It is on this basis that this research was conducted. The research is aimed at expounding on what the right to FPIC is and to assess how Uganda is faring from legal and policy standpoints. The overarching objectives of this research are: to determine how FPIC has been applied in different policy and legal frameworks especially in light of the current national development plan; to identify the gaps in the legal and policy framework of Uganda with regards to the application of the FPIC principle; to demonstrate how the failure to ensure FPIC is affecting the realization of Economic Social Rights especially , the rights to education, health, housing, food, water, work and social security, adequate standard of living and healthy environment in the communities. It is aimed at illustrating best practices from countries and places where FPIC has been applied and

contextualizing how this respect for FPIC principles can steer Uganda towards sustainable development.

This research investigates the various international instruments to show the global premise for this right to free, prior and informed consent. These instruments include; The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), International Labour Convention No. 169 (ILO) among other instruments which are to the effect that indigenous peoples must not be forcibly removed from their lands or territories and that no relocation should take place without their free prior and informed consent. The ILO on the other hand highlights government's obligation to take necessary steps to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. This research further looks at the African scene and draws from the various legal and policy instruments from the continent among which include positions of the African Commission on Human and Peoples rights. The Commission has noted that FPIC ought to be adhered to in the lands and territories of indigenous peoples and failure to involve indigenous peoples and to obtain their free prior and informed consent in decision-making processes that affect them violates their right to development under Article 22 of the African Charter, and other international laws.

On the National scene, this research examines Uganda's Legal and policy framework guiding FPIC and its application. Hereunder, a three – test criteria for ascertaining who indigenous people are as set out by the African Commission Working Group on Indigenous Populations is discussed and clarity regarding the Ugandan context on this issue is further drawn from the Uganda Human Rights Commission and the Equal Opportunities Commission criteria of including marginalization and vulnerability as key ingredients in determining the minority situation of a community and group. The research thus emphasizes that FPIC proposes to counter the multifaceted and enduring forms of marginalization and oppression experienced by these groups in national indigenous societies as set out in the constitution. It emphasizes the point that FPIC ought to be understood as a stand-alone right but also as a derivative of underlying

substantive rights which it is designed to protect. Hence, it is often referred to as a procedural right that is incidental to or part of some substantive right.

The research also emphasizes the need to strengthen the protective measures of local communities to their land through the observance of the right to free, prior and informed consent of the indigenous people. It also extends to highlight the responsibilities of corporate entities that have previously placed more focus on consulting rather than seeking consent thus indicating a hegemonic world view in society where corporate entities and the state place more importance on economic development over observance of FPIC. The research highlights that the conceptualization of the principle of FPIC is three pronged. Firstly, as a principle to be used as a standard for all engagements with indigenous peoples. Secondly, as a standalone right to be claimed by indigenous peoples, and thirdly, as an expression of a wider set of human rights that must be claimed in order to access other rights. Thus it explains that FPIC is not only a result driven activity where consent of the community is sought, but it also entails a process in which communities exercise decision making freely, equipped with timely and unbiased information and in a culturally appropriate environment leading up to the giving of consent or its denial. Therefore, for the process to be valid, the consent ought to be given after a free, prior and informed decision making process.

This research emphasizes the fact that all elements within FPIC (free, prior, and informed consent) are interlinked, and thus should not be treated as separate elements. Government and private actors therefore have to determine as a preliminary step before undertaking any project, whether a certain project will bring about significant or profound impact as to require FPIC as a further step from consultation. Contextualizing the above to the Ugandan scene, this research takes cognizance of the ambitious plan by the government of attaining middle-income status by the year 2020, a dream that heavily relies on private-sector led growth as outlined in the Second National Development Plan and in Vision 2040¹. These two documents envisage the heavy contribution to economic development of the extractive industries, especially with the discovery of oil in the Bunyoro sub-region.

¹ A private sector not adequately regulated, whose priority is profit as opposed to service delivery to the Ugandans

It is thus in light of these developments that the issues of FPIC and its implementation become critical and must take center stage to give the locals an opportunity to participate in the development process through exercise of their right to free, prior and informed consent. Under this proposition, the rights to access to information, ownership to property and meaningful participation among others guaranteed under the Ugandan constitution are discussed in detail while showing their cross cutting linkages to FPIC.

This research goes on to point out the potent danger of failure to have strict adherence to the principles of FPIC as it can ensue into very grave infringement on the rights of the indigenous peoples most profoundly the enjoyment of social, cultural and economic rights. The research in this regard highlights a few court cases and best practices from other areas where the right to free, prior and informed consent has been applied to achieve sustainable development.

From the foregoing, this research makes a number of recommendations which include:

- The urgent need for express legislation to provide for the right to free prior and informed consent to give it binding force on the government, its agencies and private investors.
- Strengthening of the capacities of indigenous communities to enable them meaningfully defend and advocate for their right to free, prior and informed consent
- Strengthening of the redress mechanisms in place to make the right to FPIC meaningful, since legislation and policy on its own are insufficient for the full realization of the said right.
- Linking the legal framework on FPIC in Uganda with environment impact assessment laws, regulations and processes to ensure better transparency and effective communication

This research concludes by emphasizing that compliance to these principles is not just a matter for human rights enjoyment and protection but it is also an indispensable aspect for sustainable development especially in the face of massive development projects and the quest for middle-income status by the government of Uganda. The principle of FPIC thus offers much needed protection to vulnerable indigenous communities and offers numerous benefits when observed,

for instance, incurring less costs in conflict resolution, promotion of sustainable development among other benefits.

I. INTRODUCTION

In the last few decades, free prior and informed consent (FPIC) has emerged as an international human rights standard that derives from the collective rights of indigenous peoples to self-determination and to their lands, territories and other properties. This right to self-determination is construed as a pillar right, including other rights of peoples and nations to be free from coercion of any sort, to live in dignity and to enjoy all rights equally. It also enjoins the right to be fully informed and to be in a position to freely refuse or accept offers, plans, projects, programs and proposals that affect them or their resources.² FPIC is a right of indigenous peoples “to give or withhold their free, prior and informed consent to actions that affect their lands, territories and natural resource.”³ This right is expounded by various international instruments for instance, the International Labour Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (ILO C169)⁴ and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).⁵ The UNDRIP recognizes the right of indigenous peoples not to be forcibly removed from their lands or territories and stresses that no relocation shall take place without the free prior and informed consent of the indigenous peoples concerned and after agreement on just fair compensation and, where possible, with the option of return⁶. Article 14 of the ILO C169 enjoins governments to take necessary steps to identify the lands that indigenous peoples traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.⁷

At the regional level, the African Charter of Human and Peoples Rights guarantees the right to development.⁸ This right alongside the right to self-determination together with article 21 on the

² Tara Ward, The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law, 10 Nw. J. Int'l Hum. Rts. 54 (2011).

³ Oxfam, Guide to Free Prior and Informed Consent, (June 2010)

⁴ Adopted by the General Conference of the International Labour Organisation, 27th June 1989

⁵ UN Doc, adopted 13th September, 2007.

⁶ Article 10, United Nations Declaration on the Rights of Indigenous Peoples

⁷ See also Article 8 of the Declaration.

⁸ Article 22, African Charter on Human and Peoples Rights.

right to free disposal of wealth and natural resources enshrine the right to free prior and informed consent.⁹ The African Commission on Human and Peoples rights has previously noted that FPIC must be adhered to in the lands and territories of indigenous peoples and failing to involve indigenous peoples and obtaining their free prior and informed consent in decision-making processes that affect their utilization of lands and resources, constitutes a violation of their right to development under Article 22 of the African Charter, and other international laws. As noted above, the legal history of the right to FPIC is in alignment with the protection of indigenous people's rights, specifically their right to self-determination.¹⁰ However, whereas FPIC principles have their evolution within the indigenous peoples' movement, increasing cases of forced displacement and demands for lands for developmental projects have reawakened new debate on the principles especially within the natural resource exploitation sector. There are increasing threats to communities and their land by investment projects and infrastructure development. It is such threats that have called for the need to strengthen the protective measures of local communities to their land and hence the evolution of FPIC principles within broader discussions around local communities and other minorities and communal lands. Companies have previously placed more focus on consulting rather than seeking consent.¹¹

In Uganda, the discussion around indigenous people remains a contested affair, and as such, debates have arisen as to its applicability and reflection in national legal instruments. The Uganda Human Rights Commission has noted the threats affecting specific tribal groups which include the Batwa, Tepeth, Jie, Banyabindi among others and the need for application of free prior and informed consent principles in undertakings within these communities especially when

⁹ See African Commission on Human and Peoples Rights in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, 276/03.

¹⁰ OXFAM and LRC, *Free, Prior and Informed Consent in the Extractive Industry in Southern Africa: An Analysis of Legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe and Zambia* (Johannesburg: OXFAM, 2018) p.21, accessed at: <https://africanlii.org/ebook/free-prior-and-informed-consent-extractiveindustriessouthern-africa>.

¹¹ Rajiv Maher, "What Influences Community Positions towards nearby Mining Projects: Eight Cases from Brazil and Chile" (PhD Thesis, Cranfield University, England, 2014), p.35 accessed at https://dspace.lib.cranfield.ac.uk/bitstream/handle/1826/8835/Maher_Rajiv_Thesis_2014.pdf?sequence=1&isAllowed=.

it comes to dealing with their lands.¹² This research thus seeks to examine the Uganda Legal and policy Framework guiding FPIC, its application together with benchmarking with best practices and making appropriate recommendations.

1.1. OBJECTIVES OF THE RESEARCH

- i. To determine how FPIC has been incorporated in different policy and legal frameworks and their applicability in the current development plan.
- ii. To identify the gaps in the legal and policy framework of Uganda with regards to the application of the FPIC principle.
- iii. To demonstrate how the failure to ensure FPIC is affecting the realization of Economic Social Rights for example, the right to education, health, housing, food, water, work and social security, adequate standard of living and healthy environment in the communities.
- iv. To illustrate Best Practices where FPIC has been applied and how respect for FPIC principles can promote sustainable development.

II. WHO ARE INDIGENOUS PEOPLE?

There is no singularly authoritative definition of indigenous peoples under international law and policy and the United Nations Declaration on the Rights of Indigenous People (UNDRIP) does not set out a definition. Nevertheless, the UNDRIP, though not providing a definition, makes reference in the preamble to indigenous people, as people that have suffered historical marginalization as a result of colonization and dispossession of their lands, territories and resources thus preventing them from enjoying their rights, especially the right to development. Broadly, the right to FPIC is recognized under international law and requires that indigenous people be informed about projects that affect their land, resources and other rights in a timely manner, free from coercion and manipulation.¹³ As noted above in the African context, the applicability of this international law right is contested, which contest is partly informed by the

¹² Uganda Human Rights Commission 21st Annual Report 2018, Chapter 10 at Page 147

¹³ Oxfam and LRC, Supra Note 12.

fact that indigenous identity or the definition of who indigenous people are has been highly disputed in Africa and especially by African governments.¹⁴

The general reference to colonization forms the basis of the contest as to who indigenous people are in the African context. African governments opposed the adoption of the UNDRIP on grounds that since African countries were colonized and obtained independence from their colonial powers, then all Africans should be considered indigenous¹⁵ and there was thus no need to recognize any special group of people as indigenous within the African continent. Indeed, Article 10 (a) of the constitution of Uganda reinforces this stance as it provides for communities that are indigenous under the third schedule. It is notable that these ‘indigenous’ communities under the schedule are the tribes in Uganda, some of which constitute the dominant groups and do not fall within the definition of indigenous people. African governments were skeptical that recognizing indigenous people would create special rights for these groups, which would seriously undermine African state sovereignty.¹⁶

The African Working Group on Indigenous People came up with an advisory opinion¹⁷ and made critical points. Primarily, the group advised that the term indigenous communities is not meant to create a special category of citizens above others but rather guarantees equal enjoyment of rights and freedoms of groups which have been historically marginalized. Furthermore, the group clarified that ‘indigenous peoples’ does not mean ‘who came first’ in reference to aboriginality as opposed to non- African communities or those having come from elsewhere. A definition is not necessary or useful as there is no universally agreed definition of the term and no single definition can capture the characteristics of indigenous populations. Rather, it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa.

¹⁴ ACHPR, “Extractive Industries, Land Rights and Indigenous People’s Rights,” (Banjul: ACHPR, 2018), p.23, Accessed at: <https://www.iwgia.org/en/resources/publications/305-books/3294-extractive-industries-land-rights-andindigneouspopulations-communities-rights>. .

¹⁵ *Id.*,

¹⁶ Oxfam and LRC, Supra Note 12 at 22

¹⁷ *Id.*

On this basis, African states withdrew their opposition and the UNDRIP was adopted.¹⁸ The African Commission, though not providing a definition either, laid down characteristics of indigenous peoples in Africa to include people that practice different cultures, have different social institutions and observe different religious systems.¹⁹ The Commission underscored the fact that the cultures of indigenous people differ from those of the dominant society and are in fact under threat.

The key characteristic according to the commission is that their survival depends on access and rights over their traditional lands and natural resources thereon.²⁰

In the same spirit, the African Commission Working Group on Indigenous Populations laid down three main criteria for identifying indigenous communities in the absence of a definition.²¹ This criteria includes; a) Self-identification; b) a special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples²² and; c) a state of subjugation, marginalization, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life and mode of production in comparison with the national hegemonic and dominant model.²³

Nevertheless, a more broad working definition for indigenous people was first formulated in 1982 by José Martinez Cobo, the Special-Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights. While conducting a special study on the problem of

¹⁸ *Id.*,

¹⁹ ACHPR, “Indigenous Peoples in Africa: The Forgotten Peoples? The African Commission’s work on indigenous peoples in Africa” (Banjul: ACHPR 2011); p 10 Accessed at <https://www.iwigia.org/en/resources/publications/305-books/2545-indigenous-peoples-in-africa-the-forgotten-peoples-the-african-commissions-work-on-indigenous-people-in-africa>

²⁰ *Id.*,

²¹ Advisory Opinion of the African Commission on Human and Peoples Rights on the UNDRIP, Adopted by the African Commission on Human and Peoples Rights at its 41st Session, at p4

²² The African Commission and the International Work Group for Indigenous Affairs (IWGIA) states: “A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon. (Emphasis added)”

²³ Advisory Opinion of the African Commission on Human and Peoples Rights on the UNDRIP, Adopted by the African Commission on Human and Peoples Rights at its 41st Session, at p4

discrimination against indigenous peoples, Special Rapporteur Jose defined indigenous communities, peoples and nations as;

Those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural, social institutions and legal systems.²⁴

Similarly, the African Coalition for Corporate Accountability developed a narrow definition of indigenous peoples, referring to them as a group of 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 marginalized.²⁵

In addition, the African Court has observed that in identifying and understanding the concept of indigenous populations, the relevant factors to consider are;

The presence of priority in time with respect to the occupation and use of a specific territory, a voluntary perpetuation of cultural distinctiveness, self-identification as well as recognition by other groups and state authorities that they are a distinct collectivity and an experience of subjugation, marginalization and exclusion.²⁶

²⁴ José Martinez Cobo, Study of the Problem of Discrimination Against Indigenous Populations, UN Document E/CN.4/Sub.2/1986/7Add.4, Paragraph 379

²⁵ African Coalition for Corporate Accountability, Discussion paper on Free, Prior and informed Consent in Africa.

²⁶ African Commission on Human and Peoples Rights v Republic of Kenya, Application No. 006/ 2012, at para 107.

The ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, distinguishes indigenous people from tribal peoples. It provides under Article 1 that the Convention applies to:

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

It is also important to note that the rights of indigenous peoples including the right to FPIC are communal rights enjoyed collectively and should not be viewed narrowly from the individual perspective. The unique nature of the African human rights system is that unlike other regional human rights instruments it places special emphasis on the collective rights of peoples—ensuring protective measures for group rights.²⁷ This recognition of “peoples” rights is not intended to create a special class of citizens but rather to address historical and present-day injustices.²⁸ In the context of the right to free prior and informed consent, the African Commission on Human and Peoples rights has expressly linked this right to the protection of indigenous people according to the international definition of the right under the UNDRIP and emphasized the recognition of their customary ownership of land as a people.²⁹

From the foregoing discussion, it can be concluded that indigenous peoples have a special identity and attachment to their territories, critical to their survival. They have not been

²⁷ Centre for Minority Rights Development Kenya and Another v Republic of Kenya at para 150

²⁸ *Id.*, at para 149.

²⁹ Oxfam and LRC, Supra Note 12 at 22

accommodated in dominant development paradigms and are being victimized by mainstream development policies and therefore they need [special] recognition and protection of their fundamental rights and freedoms especially as they relate to utilization of their land and exploitation of natural resources thereon. It therefore follows that where the state is carrying out development projects it is important that FPIC principles are promoted and respected in all processes as a measure to protect indigenous peoples and respect their cherished values.

2.1. Definition of Indigenous people in the Ugandan Context

In understanding the meaning of indigenous people, the constitution of Uganda under Article 10 (a)³⁰ acts as a guide by stating that anyone who was born in Uganda one of whose parents, grandparents, was a member of the “indigenous” communities existing and residing within the borders of Uganda as at the first day of February 1962 and is set out in the third schedule of this constitution.

In distinguishing indigenous persons from ethnic minorities, the Uganda Bureau of Statistics defined ethnic minorities as ethnic groups with a population of less than 25,000.³¹ There are approximately 21 such groups in Uganda, including; the Batuku, Batwa, Benet, Ike, Basongora, Nyangia, Lendu and Chope among others.³² However, the Uganda Human Rights Commission and the Equal Opportunities Commission both include marginalization and vulnerability as key ingredients in determining the minority situation of a community and group.³³ However, the focus of government and civil society interventions has largely been on the Batwa and the Karamojong who have experienced systemic and entrenched marginalization and exclusion.³⁴

The International Working Group on Indigenous people has also provided a list of indigenous peoples in Uganda, noting however that some of these groups, like the Karamojong, Ik and Benet

³⁰ Article 10 of the 1995 constitution of the republic of Uganda

³¹ Uganda Bureau of Statistics Population and Housing Census Analytical Report 2002 P.26

³² Uganda Human Rights Commission and The Danish Institute for Human Rights, Human Rights and Business Country Guide Uganda. P.20

³³ Allen Asiimwe et al, Ethnicity and Human Rights in Uganda: A Desk Study of Human Rights issues faced by Ethnic Minorities and Indigenous Groups. Final Report, April 2012. P.13

³⁴ *Id.*,

have never been officially recognized as indigenous people by the government.³⁵ Ethnic minorities in Uganda include former hunter/gatherer communities, such as the Benet and the Batwa, also known as Twa. They also include groups such as the Ik, the Karamojong, and the Basongora. The Benet, who number slightly over 8,500, live in the north-eastern part of Uganda. The 6,700 or so Batwa, who live primarily in the south-western region, were dispossessed of their ancestral land when Bwindi and Mgahinga forests were gazetted as national parks in 1991. The Ik number at about 13,939 and live on the edge of the Karamoja/Turkana region along the Uganda/Kenya border. The Karamojong people live in the north-east and number at around 1,025,800.2. The Basongora numbering 15,897 are a cattle-herding community living in the lowlands adjacent to Mt. Rwenzori in Western Uganda. However, it is imperative to note that although some ethnic minorities in Uganda are referred to as indigenous groups, there is need to draw a distinction between ‘indigenous peoples’ and ‘ethnic minorities.’ It is especially more important to expressly refer to them as indigenous people to bring them within the broader protective international legal instruments. The African Commission notes that referring to these groups as indigenous people encapsulates the real situation of the groups and communities concerned.³⁶ This distinction guarantees a concrete analysis of the human rights issues at stake and underscores the fact that indigenous peoples’ rights are collective rights as distinct from rights of ethnic minorities, which may be individual rights.³⁷ The definitions of indigenous peoples and the criteria for their identification as adopted by the Uganda National Bureau of Statistics, the Uganda Human Rights Commission as well as the Equal Opportunities Commission thus fall short of international standards and Uganda’s human rights commitments under international human rights law.

³⁵ See <https://www.iwgia.org/en/uganda/723-indigenous-peoples-in-uganda.html>

³⁶ ACHPR Supra Note 17

³⁷ *Id.*,

III. WHAT IS FREE, PRIOR AND INFORMED CONSENT?

The principle of free, prior and informed consent (FPIC) is the right of indigenous peoples to make free and informed choices about the development of their lands and resources.³⁸ Broadly, FPIC is a mechanism and a process where indigenous peoples and other local communities undertake their own/independent collective decision on the matters that affect them—especially in utilization of their land and natural resources thereon. As noted above, principles around FPIC are derived from the right to self-determination—a founding principle of indigenous peoples’ rights.³⁹ This right to self determination is provided for under the ICCPR⁴⁰ and ICESCR⁴¹, where by virtue of their self determination; all people including indigenous people freely pursue their economic, social and cultural development. It is the right of indigenous people and other local communities to participate in and contribute to development by giving or withholding their free, prior and informed consent to actions that affect their lands, territories and natural resources, and this principle is intended to assist them to renegotiate their relations with states and companies.⁴² Similarly this right is also rooted in the right to development provided for under Article 22 of the African Charter on Human and Peoples Rights (ACHPR) which guarantees the right of all people to their economic, social and cultural development with due regard to their freedom and identity and equal enjoyment of the common heritage of mankind.

FPIC may thus be understood as a stand-alone right but also as a derivative of underlying substantive rights that it is designed to protect. It is often referred to as a procedural right that is

³⁸ Tara Ward, The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law, 10 Nw. J. Int'l Hum. Rts. 54 (2011).

³⁹ Bartolome Clavero, The Indigenous Rights of Participation and International Development Policies, 22 ARIZ. J. INT'L & COMP. L. 41, 42 (2005); Katsuhiko Masaki, Recognition or Misrecognition? Pitfalls of Indigenous Peoples Free, Prior, and Informed Consent (FPIC), in RIGHTS-BASED APPROACHES TO DEVELOPMENT: EXPLORING THE POTENTIAL PITFALLS 69 (2009); U.N. Comm’n. on Human Rights.

⁴⁰ Article 1, International Covenant on Civil and Political Rights

⁴¹ Article 1, International Covenant on Economic, Social and Cultural Rights

⁴² Ricarda Roesch, The story of a legal transplant: The right to free, prior and Informed Consent in Sub-Saharan Africa. African Human Rights Law Journal Volume 16 No 2 2016. Pretoria University Law Press (PULP) p.506.

incidental to or part of some substantive right.⁴³ It is a norm that supplements and is a means of effectuating these substantive rights for example the right to property, the right to participate, nondiscrimination, self-determination, culture, food, health, and freedom from forced relocation.⁴⁴ Although the concept of FPIC is used mainly in relation to development, it also applies with regard to accessing the knowledge, innovation and practices of indigenous people, as provided for under the Convention on Biological Diversity which in its article 8(J), calls on states to respect, preserve and maintain knowledge, innovation and practices of indigenous and local communities and promote their wider application with the approval and involvement of the holders of such knowledge, innovation and practices.⁴⁵

In the African context, the quest for development has led to the intensive exploitation of natural resources. However, indigenous peoples are particularly vulnerable to the effects of these investment and development efforts mainly because their traditional lands are located in the resource rich areas and unfortunately, their communal land tenures remain unrecognized by the state and private investors. Therefore, developers enter their lands and take up the resources without their free prior and informed consent.⁴⁶

FPIC thus proposes to allow indigenous people negotiate conditions under which this development should take place.⁴⁷ It is about having power and autonomy to decide whether a life changing project can enter the territory of indigenous people and make irreversible changes to

⁴³ Robert Coulter, "Free, Prior, and Informed Consent: Not the Right it is Made out to be," *Indian Law Resource Center* (2013): p.1-3, accessed at: http://www.indianlaw.org/sites/default/files/FPIC_RTC_Oct2013.pdf.

⁴⁴ Guidelines on Free, Prior and Informed Consent, UN-REDD Programme, January 2013, p.9.

⁴⁵ Parshuram Tamang, An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices. *Australian Indigenous Law Reporter*, Vol. 9, No. 2 (2005). p.3 accessed March on 18th 2019. [https:// www.jstor.org/stable/26479590](https://www.jstor.org/stable/26479590).

⁴⁶ Report of the ACHPR Working Group of Experts on Indigenous Populations/ Communities, *The Human Rights Situation of Indigenous Peoples in Africa*, p.22

⁴⁷ David Szablowski, "Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice," *Canadian Journal of Development Studies* 30 (2010): p.114, accessed at: <https://www.fpic.info/en/resources/operationalizing-free-prior-informed-consent-1/>.

the community's identity, culture, way and quality of life.⁴⁸ FPIC comes with the right to say no.⁴⁹

The basic principles of FPIC are to ensure that indigenous peoples are not coerced or intimidated, that their consent is sought and freely given prior to the authorization or start of any activities, that they have full information about the scope and impacts of any proposed developments, and that ultimately their choices to give or withhold consent are respected.⁵⁰

FPIC principles are critical in all development transactions that affect indigenous people and other affected community rights to land. They assist to ensure safeguards for these marginalized communities.⁵¹ It serves as a safeguard to protect the underlying fundamental rights of indigenous people and other local communities. It is critical in ensuring that potential social, economic, cultural and environmental impacts of any project from the perspectives of indigenous peoples are considered in the decision-making process to in order for them to either allow or reject any project that may affect them. Similarly, as a matter of critical importance, respect for FPIC allows indigenous peoples and other local communities to exercise their control and management of their land, territories and the respect to their cultural integrity and self-determination, especially on their own development as distinct peoples.

Overall, promotion of FPIC principles is at the heart of respecting the rights of indigenous peoples and clearly defining their relationship with external stakeholders, including governments and other private actors. This ensures respect for collective decision making ensuring consensus building within indigenous communities.

⁴⁸ Rajiv Maher, "What Influences Community Positions towards nearby Mining Projects: Eight Cases from Brazil and Chile" (PhD Thesis, Cranfield University, England, 2014), p.35 accessed at https://dspace.lib.cranfield.ac.uk/bitstream/handle/1826/8835/Maher_Rajiv_Thesis_2014.pdf?sequence=1&isAllowed=.

⁴⁹ IdK.,

⁵⁰ Tara Ward, The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law, 10 Nw. J. Int'l Hum. Rts. 54 (2011)

⁵¹ OXFAM, Guide to Free Prior and Informed Consent, (June 2010), See also National Guidelines for FPIC, Kenya, See Also A/HRC/39/62, (2018)

All in all, for the indigenous peoples' movement, FPIC proposes to counter the multifaceted and enduring forms of marginalization and oppression experienced by these groups in national societies. It is an attempt to redefine national sovereignty, citizenship and the nation-state in order to make room for meaningful recognition of indigenous political institutions, indigenous sovereignty and indigenous citizenship.⁵²

IV. WHO HAS THE RIGHT TO FPIC?

The right to FPIC is primarily intended to be exercised by indigenous people according to the definition discussed above. However, a number of authors have sought to extend this right to non-indigenous communities or minority communities. Rajiv Maher argues the right to FPIC and the autonomy to decide whether life changing projects should be allowed to enter onto territories must be exercised by communities whether indigenous or not.⁵³ It is widely accepted that indigenous groups have a pre-colonial or pre-occupational history. However the situation is different in Africa since the original population is not threatened out of extinction, and due to the fact that African States are characterized by multi-culturalism.⁵⁴ Therefore, for this right to be relevant in Africa it is important to extend the understanding of indigenesness or broaden the scope of FPIC to non-indigenous groups.⁵⁵

At the international level, the applicability of FPIC to non-indigenous groups is increasingly being discussed so as to include local communities.⁵⁶ The Forest Stewardship Council states that local communities have a right to FPIC when this is based on 'long-established use', whereas the

⁵² David Szablowski, "Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining, Op.Cit., Note 40.

⁵³ Rajiv Maher, "What Influences Community Positions towards nearby Mining Projects: Eight Cases from Brazil and Chile" Op.Cit, Note 41.

⁵⁴ Ricarda Roesch, The story of a legal transplant: The right to free, prior and Informed Consent in Sub-Saharan Africa. African Human Rights Law Journal Volume 16 No 2 2016. Pretoria University Law Press (PULP) p.515.

⁵⁵ *Id.*,

⁵⁶ *Id.*,

Forest Peoples Programme states that it is when they ‘have collective tenure systems governed fully or partly by customary law’.⁵⁷

In 2013, the Human Rights Council Advisory Committee issued a draft declaration on the rights of peasants according to which FPIC is applicable to a ‘man or woman of the land, who has a direct and special relationship with the land and nature through the production of food or other agricultural products’, including landless persons.⁵⁸ According to the Committee on the Elimination of Discrimination against Women (CEDAW Committee), rural development projects may only be implemented with the FPIC of rural women. Therefore, even though a certain tendency to broaden the scope of FPIC can be observed, there is no consensus on the conditions for its application, which has continued to leave local communities disempowered.⁵⁹

It is important to note that the international development agencies have taken note of these contestations and are alive to the current debate. The World Bank in its Environmental and Social Standard safeguards, recognizes that in implementation of all its projects, Indigenous Peoples (or as they may be referred to in the national context) are particularly vulnerable to the loss of, alienation from or exploitation of their land and access to natural and cultural resources. As such, the Bank has noted that in recognition of this vulnerability, it as a safety measure will require “the Borrower to obtain the Free, Prior and Informed Consent (FPIC) of the affected Indigenous Peoples when such circumstances described in ESS7 are present where the project will; have adverse impacts on land and natural resources subject to traditional ownership or under customary use or occupation; cause relocation of Indigenous Peoples from land and natural resources subject to traditional ownership or under customary use or occupation; or have significant impacts on Indigenous Peoples’ cultural heritage that is material to the identity and/or cultural, ceremonial, or spiritual aspects of the affected Indigenous Peoples lives.”⁶⁰

⁵⁷

Id.,

⁵⁸

Declaration on the Rights of Peasants and Other People Working in Rural Areas, Human Rights Council 20 June 2013), UN Doc A/HRC/WG.15/1/2 art 4(5).

⁵⁹

Supra note 17.

⁶⁰

“World Bank Environmental and Social Framework.” World Bank, Washington, DC. 2016, ESS7 P.79

In conclusion, the application of FPIC principles has now been extended beyond indigenous people and now covers all communities that may be affected by projects as long as they fit the criteria within the framework or even self - identify as indigenous.

V. KEY ELEMENTS IN FREE, PRIOR AND INFORMED CONSENT

The conceptualization of the principle of FPIC is three pronged. Firstly, it is a principle to be used as the standard for all engagements with indigenous peoples. Secondly, as a standalone right to be claimed by indigenous peoples and thirdly as an expression of a wider set of human rights that must be claimed in order to access other rights.⁶¹ However, FPIC is not only a result driven activity where consent of the community is only sought, it also entails a process in which communities exercise decision making freely, equipped with timely and unbiased information and in a culturally appropriate environment leading up to the giving of consent or its denial.⁶² Therefore, for the process to be valid, the consent should be arrived at after a free, prior and informed decision making process. All elements within FPIC are interlinked, and they should not be treated as separate elements. Broadly, the expounded;

A. Free refers to a consent given voluntarily and without coercion, intimidation or manipulation.⁶³ It also refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed. More specifically:

- i. Rights-holders determine the process, timeline and decision-making structure;
- ii. The process is free from coercion, bias, conditions, bribery or rewards;
- iii. Meetings and decisions take place at locations and times and in languages and formats determined by the rights-holders; and

⁶¹ ACHPR, Supra Note 17 at 44.

⁶² Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent E/C.19/2005/3, endorsed by the UNPFII at its Fourth Session in 2005.

⁶³ *Id.*,

- iv. All community members are free to participate regardless of gender, age or standing and information is offered transparently and objectively at the request of the rights-holders.⁶⁴

B. Prior means that consent is sought sufficiently in advance of any authorization or commencement of activities, at the early stages of a development or investment plan, and not only when the need arises to obtain approval from the community.⁶⁵ It should be noted that:

- i. Prior implies that time is provided to understand, access, and analyse information on the proposed activity. The amount of time required will depend on the decision-making processes of the rights-holders;
- ii. Before activities can be initiated, at the beginning or initiation of an activity, process or phase of implementation, including conceptualization, design, proposal, information, execution, and following evaluation.
- iii. The decision-making timeline established by the rights-holders must be respected, as it reflects the time needed to understand, analyse, and evaluate the activities under consideration in accordance with their own customs.⁶⁶

C. Informed refers mainly to the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process.⁶⁷ Information should be:

- i. Accessible, clear, consistent, accurate, and transparent;
- ii. Delivered in the local language and in a culturally appropriate format (including radio, traditional/local media, video, graphics, documentaries, photos, oral presentations, or news media) and

⁶⁴ Food and Agricultural Organisation of the United Nations, Free Prior and Informed Consent: An Indigenous People's Right and a Good Practice for Local Communities, at page 15.

⁶⁵ *Id.*,

⁶⁶ *Id.*,

⁶⁷ *Id.*,

- iii. Objective, covering both the positive and negative potential of the proposed activities and consequences of giving or withholding consent.⁶⁸

D. Consent is the final stage in the entire process. It involves collective acceptance or refusal of the proposed project reached through the customary decision making process.⁶⁹ The process of arriving at consent is integral to this. Thus, care must be taken to ensure that this collective decision is representative of all persons in the communities including those who are likely to be marginalized like women, the elderly, persons with disabilities and the youth and they are able to participate including through their own freely chosen representatives. As a whole, as reflected in ILO Convention No. 169, consultation must be undertaken “in good faith ... in a form appropriate to the circumstances, with the objective of achieving agreement or consent.” The element of Consent involves a freely given unequivocal “yes” or “no” or a conditional acceptance or refusal with the option to re-consider if some changes are made, some information availed or as the project progresses.⁷⁰

In addition to the above elements, FPIC has to be accompanied by capacity building of the communities, strengthening traditional institutions to make them more representative and inclusive as well as provision for awareness of their rights and how to defend them for meaningful consent and overall observance of rights to self-determination, rights to lands and resources as well as the cross-cutting right to participation. It is important to note that FPIC is driven by the broader objective of consensus building. Consent in this process is not about majority or legal wins but ought to always be geared towards maintaining community cohesion.

⁶⁸ *Id.*,

⁶⁹ *Id.*,

⁷⁰ *Id.*,

VI. STATE OBLIGATION AND BUSINESS RESPONSIBILITY TO ENSURE FPIC

The United Nations Declaration on the Rights of Indigenous Peoples provides that the free, prior and informed consent of indigenous peoples must be obtained in the following instances;

The undertaking of projects that affect indigenous peoples' rights to land, territory and resources, including mining and other utilization or exploitation of resources⁷¹. In certain circumstances, there is an obligation to obtain the consent of the indigenous peoples concerned, beyond the general obligation to have consent as the objective of consultations.⁷² For example, the Declaration explicitly requires States to obtain consent of indigenous peoples in cases of:

- The relocation of indigenous peoples from their lands or territories (article 10)
- The storage or disposal of hazardous materials on indigenous peoples' lands or territories (article 29)

African Commission Resolution 224, takes note of the interdependence between human rights and development and calls upon states to confirm that all necessary measures are taken to ensure participation, including the free, prior and informed consent of communities in decision making related to natural resources governance as well as ensure effective remedies; fair compensation; women, indigenous and customary people's rights.⁷³ Similarly, General comment no. 24 on state obligations under ICESCR recognises that indigenous people are often disproportionately affected by the adverse impact of business activities particularly in relation to the development, utilization or exploitation of lands and natural resources.⁷⁴ It further explains that the obligation to respect economic, social and cultural rights is violated when States parties prioritize the interests of business entities over Covenant rights or when they pursue policies that negatively affect such rights. For instance, indigenous peoples' cultural values and rights associated with their ancestral lands are particularly at risk when forced evictions are ordered in the context of investment projects.

⁷¹ Article 32 United Nations Declaration on the Rights of Indigenous Peoples

⁷² United Nations Human Rights Office of the High Commissioner, Free Prior and Informed Consent of Indigenous Peoples, at p.1

⁷³ Resolution on a Human Rights-Based Approach to Natural Resources Governance, ACHPR/Res.224 (LI) 2012

⁷⁴ Committee on Economic, Social and Cultural Rights, General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities; Also See the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295, annex, art. 32 (2))

Therefore, states parties and businesses should respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.⁷⁵ States parties should further ensure that, where appropriate, the impacts of business activities on indigenous peoples specifically (in particular, actual or potential adverse impacts on indigenous peoples' rights to land, resources, territories, cultural heritage, traditional knowledge and culture) are incorporated into human rights impact assessments.⁷⁶ In exercising human rights due diligence, businesses should consult and cooperate in good faith with the indigenous peoples concerned through indigenous peoples' own representative institutions in order to obtain their free, prior and informed consent before the commencement of activities.⁷⁷

Further, the African Court of Human Rights in the *Endorois Peoples' Case*⁷⁸ decided that States have the duty not only to consult with the community, but to obtain their free, prior and informed consent in case of any development or investment projects that would have a major impact within the territory of the Indigenous Peoples. [Endorois peoples] According to the World Bank Environmental and Social Standard 7 Policy, a borrower is required to obtain the FPIC of the affected Indigenous Peoples when the projects;

- Impact lands and natural resources traditionally owned, used, or occupied by Indigenous Peoples
- Cause relocation of Indigenous Peoples
- Have significant impacts on Indigenous Peoples' cultural heritage.⁷⁹

Similarly, the Inter American Court decided in the *Saramaka case*⁸⁰ that the state had to abide with certain safeguards to guarantee that restrictions to the lands of the Saramaka peoples did not violate their rights among which was to ensure the effective participation of the members of the

⁷⁵ CESCR GC. No 24, Id; See also the United Nations Declaration on the Rights of Indigenous Peoples, arts. 10, 19, 28, 29 and 32.

⁷⁶ CESCR GC. No 24, Id, See also A/68/279, para. 31; A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, p. 15; A/HRC/33/42; and A/66/288, paras. 92-102

⁷⁷ A Business Reference Guide: United Nations Declaration on the Rights of Indigenous Peoples, p. 16; and the United Nations Declaration on the Rights of Indigenous Peoples, art. 19

⁷⁸ Centre for Minority Rights Development (Kenya) and Anor v Kenya. Comm 276/300 at para 291

⁷⁹ Factsheet Environment and Social Standard 7, p.1

⁸⁰ Case of the Saramaka People v Suriname, Inter American Court of Human Rights, Judgement of November 28 2007

community in; “any development, investment, exploration or extraction plan within the territory of the peoples... and specifically large-scale development or investment projects that have a significant impact on the right of use and enjoyment of [tribal] ancestral territories⁸¹. The Court also added that, “major development or investment plans that may have a profound impact on the property rights of the Saramaka peoples to a large part of their territory must be additionally understood to require the free, prior and informed consent of the Saramakas in accordance with their traditions and customs.”⁸²

From the foregoing discussion, governments and private actors have to determine as a preliminary step whether a certain project will bring about significant or profound impact as to require FPIC as a further step from consultation. The level of impact of the project on the territories, lands and survival of the Indigenous peoples needs to be assessed. In some instances, an objective test is applied. An example is the specific instances that are named such as a project that will require relocation of indigenous peoples named in Article 10 of the UNDRIP as well as in the World Bank Environmental and Social Framework Policy.⁸³ There is potential difficulty with the subjective determination of when FPIC should apply. The courts make reference to projects that have major and significant impact on the environment as those that require FPIC.⁸⁴ The same can be found in the Inter-American Court in the Saramaka peoples’ decision when it held that not all impact or projects would be of a magnitude to require FPIC. The court noted that;

‘There are acceptable levels of “impact” a proposed development plan may have on Indigenous Peoples..., as long as that impact does not amount to a denial of their survival... [W]hen the Court uses the term ‘survival’ it does not refer only to the obligation of the State to ensure the right to life of the victims, but rather to take all

⁸¹ *Id.*, at para 136

⁸² *Id.*, at para 137

⁸³ Note 20 and 61 above

⁸⁴ Note 24 above

the appropriate measures to ensure the continuance of the relationship of the Saramaka People with their land or their culture.⁸⁵

This subjective test turns on the question of “survival” and what it amounts to. The Inter-American Court further guided and defined survival to mean;

‘The ability [of the peoples] to preserve, protect and guarantee the special relationship that they have with their territory so that they continue living their traditional way of life and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are guaranteed and protected...it signifies more than physical survival.’⁸⁶

The scenarios that amount to denial of survival cannot be exhaustively listed and defined, and therefore a more favorable approach would be on a case by case basis allowing governments and private actors to assess each project affecting indigenous peoples as it happens. This may require extensive Environmental, Social and Human Rights Impact Assessments to be carried out during the project-planning phase.

Nevertheless, the UN-REDD Program has developed the checklist below to support partner countries in thinking through whether or not an activity will require FPIC in the context of some of their REDD+ projects. The list does not purport to exhaust all scenarios but is a useful guide in determining whether FPIC is required.⁸⁷ The Checklist notes that if the answer is ‘Yes’ to any of these questions below, it is likely that FPIC will be required of the potentially affected peoples for the specific activity that may result in the impacts identified in the questions.⁸⁸

6.1. Checklist for Appraising Whether an Activity will require FPIC⁸⁹

- a. Will the activity involve the relocation/resettlement/removal of an indigenous population from their lands?

⁸⁵ Saramaka Peoples Judgement at paragraph 29.

⁸⁶ *Id.*,

⁸⁷ UN- REDD Programme, Guidelines on Free, Prior and Informed Consent at p.27

⁸⁸ *Id.*, p.28

⁸⁹ *Id.*, p. 27

- b. Will the activity involve the taking, confiscation, removal or damage of cultural, intellectual, religious and/or spiritual property from indigenous peoples?
- c. Will the activity involve mining and oil and/or gas operations (extraction of subsurface resources) on the lands/territories of indigenous peoples?
- d. Will the activity involve logging on the lands/territories of indigenous peoples?
- e. Will the activity involve the development of agro-industrial plantations on the lands/territories of indigenous peoples?
- f. Will the activity involve any decisions that will affect the status of indigenous peoples' rights to their lands/territories or resources?
- g. Will the activity involve the accessing of traditional knowledge, innovations and practices of indigenous and local communities?
- h. Will the activity involve making commercial use of natural and/or cultural resources on lands subject to traditional ownership and/ or under customary use by indigenous peoples?
- i. Will the activity involve decisions regarding benefit-sharing arrangements, when benefits are derived from the lands/territories/ resources of indigenous peoples?
- j. Will the activity have an impact on the continuance of the relationship of the indigenous peoples with their land or their culture?

Thus the application of the FPIC principles is essential for sustainable development as it amplifies the community voices in setting the terms of development.

VII. FPIC STANDARDS APPLICABLE TO COMPANIES

In recent years, FPIC principles have been advocated for in most development projects especially as they affect marginalized communities beyond indigenous peoples. There has been development of international guidelines that clearly apply to companies, although they have no binding force. IN 2004, the Secretariat of the Convention on Biological Diversity developed the Akwe: Kon Guidelines to support the implementation of the Convention. They are intended to serve as “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.”⁹⁰ These Guidelines call on governments or the “proponent of a development proposal” presumably a business to establish “a process whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community.”⁹¹

Similarly, international financial institutions have also incorporated certain aspects of FPIC into their policies as far as they apply to private actors including companies. Although, these policies are not particularly International Law, they do have normative force and signal a gradual shift in the global approach to indigenous rights. The IFC’s Performance Standards and the World Bank’s Safeguard Policies for example, were updated in 2006 to include a requirement of free, prior, and informed consultation with indigenous peoples for IFC or World Bank-supported projects that are likely to adversely impact them.⁹² Whereas consultation is used instead of

⁹⁰ “COP 7 Decision VII/16, Article 8.(j) and related provisions,” Convention on Biological Diversity, Conference of the Parties, F, available at http://www.cbd.int/decision/cop/?id=7753#_ftn58 Article 8.(j) of the Convention on Biological Diversity calls on signatory States to obtain the “approval” of holders of knowledge of the uses of biodiversity: “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge...” U.N. Convention on Biological Diversity (29, Dec. 1993), 1760 U.N.T.S., Art. 8.(j), available at <http://www.cbd.int/doc/legal/cbd-un-en.pdf>. The working group on the relevant clause (8.j) has interpreted it to refer to consent. See, e.g., “COP 5 Decision V/16: Article 8.(j) and related provisions,” Convention on Biological Diversity, Conference of the Parties, available at <https://www.cbd.int/decision/cop/?id=7158>.

⁹¹ Secretariat of the Convention on Biological Diversity, Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment 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 Montreal (CBD Guidelines Series) (2004), .., available at <http://www.cbd.int/doc/publications/akwe-brochure-en.pdf> [hereinafter Akwe: Kon Guidelines].

⁹² For a further discussion of the World Bank’s Safeguard Policies on indigenous peoples, see Fergus MacKay, “The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or more of the same?” 22 Arizona J. of int’l And Comp. lAw (2005). The World Bank’s policies also address the need for consultation with communities, indigenous and non-indigenous. The World Bank Safeguard on Environmental Assessment requires that the project proponent “consults project-affected groups and local nongovernmental organizations (NGOs) about the project’s environmental aspects and takes their views into account,” for many projects. World Bank Safeguard Policies, OP 4.01 - Environmental Assessment, The World Bank Group (January 1999), available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL>

consent, the three elements of free prior and informed consent go a long way to entrench meaningful engagements with communities. The IFC’s Policy on Social and Environmental Sustainability requires the IFC to review potential projects for “broad community support” if the project is likely to have significant adverse impacts on communities.⁹³

Under the Inter-American System, the Inter-American Development Bank (IADB) Operational Policy on Indigenous Peoples also touches on issues of informed consent. The IADB requires informed consent of indigenous peoples to resettlement before it will fund a project.⁹⁴ The IADB stipulates that for projects of particularly significant potential adverse impacts that carry a high degree of risk to the physical, territorial, or cultural integrity of the affected indigenous peoples or groups, the proponent demonstrate that it has “through a good faith negotiation process, obtained agreements regarding the operation and measures to address the adverse impacts as necessary to support, in the Bank’s judgment, the socio-cultural viability of the operation.”⁹⁵ In other words, companies must gain agreement from the communities, thus demonstrating that the company has a social license to operate.

Similarly, the European Bank for Reconstruction and Development explicitly requires companies to obtain FPIC in its latest Environmental and Social Policy, issued in 2008. The Policy’s

⁹³ “Policy on Social and Environmental Sustainability,” IFC (2006), ¶ 15, available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/\\$FILE/SustainabilityPolicy.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_SocEnvSustainability2006/$FILE/SustainabilityPolicy.pdf)

⁹⁴ The IADB Resettlement Policy states: “Indigenous Communities. Those indigenous and other low income ethnic minority communities whose identity is based on the territory they have traditionally occupied are particularly vulnerable to the disruptive and impoverishing effects of resettlement. They often lack formal property rights to the areas on which they depend for their subsistence, and find themselves at a disadvantage in pressing their claims for compensation and rehabilitation. The Bank will, therefore, only support operations that involve the displacement of indigenous communities or other low income ethnic minority communities, if the Bank can ascertain that: (i) the resettlement component will result in direct benefits to the affected community relative to their prior situation; (ii) customary rights will be fully recognized and fairly compensated; (iii) compensation options will include land-based resettlement; and (iv) the people affected have given their informed consent to the resettlement and compensation measures.” “Involuntary Resettlement: Operation Policy and Background Paper,” IADB (October 1998.), p. 2, available at <http://idbdocs.iadb.org>

⁹⁵ “Operational Policy on Indigenous Peoples,” IADB (22 Feb. 2006), 4.4 (iii), available at <http://idbdocs.iadb.org/wsdocs>

Performance Requirement 7 “recognizes the principle, outlined in the U.N. Declaration on the Rights of Indigenous Peoples, that the prior informed consent of affected Indigenous Peoples is required [for specified project-related activities], given the specific vulnerability of Indigenous Peoples to the adverse impacts of such projects.”⁹⁶ The project proponent must obtain and document consent for activities that are on traditionally used land that would affect the livelihoods, or cultural, ceremonial, or spiritual uses, that define the identity and community of the indigenous peoples; would lead to their relocation; or would affect their cultural resources.⁹⁷

In addition to the guidelines of international financial institutions, the growing acceptance of the need to seek indigenous people’s consent can be seen through the statements of a number of multi-stakeholder bodies. These initiatives have no immediate legal effect but reflect changes in societal understandings of best practice and social justice. The World Commission on Dams was one of the first multi-stakeholder bodies to address FPIC.⁹⁸ The Commission was an independent, international, multi-stakeholder process that addressed controversial issues associated with large dams. The Commission included FPIC as a policy best practice, recommending: “Where projects affect indigenous and tribal peoples, such processes are guided by their FPIC.”⁹⁹ A number of other multi-stakeholder initiatives that focus primarily on the role of companies, such as the Forest Stewardship Council (“FSC”) and the RSPO also use FPIC terminology. The RSPO is of interest because its members are supposed to implement the

⁹⁶ Cathal Doyle, “Free Prior Informed Consent (FPIC) -- a universal norm and framework for consultation and benefit sharing in relation to indigenous peoples and the extractive sector,” Paper prepared for Office of the High Commissioner of Human Rights Workshop on Extractive Industries, Indigenous Peoples and Human Rights (December 2008.), p.6, available at http://www2.ohchr.org/english/issues/indigenous/docs/workshops/Doyle_AntonIvanov_Moscow_workshop.doc.

⁹⁷ “Environmental and Social Policy,” Performance Requirement 7 European Bank for Reconstruction and Development (May 2008.), p. 7

⁹⁸ The Commission was established in 1998 and presented its findings in 2000.

⁹⁹ See “Dams and Development: A New Framework for Decision-Making,” World Commission on Dams (2000), p. xxxiv, available at <http://www.dams.org/docs/report/wcdreport.pdf> [hereinafter “Dams and Development: A New Framework for Decision-Making”]. A wide range of donors supported the World Commission on Dams, including U.N. agencies, governmental development agencies, foundations, international financial institutions, and companies.

principles of FPIC.¹⁰⁰ The FSC also, in slightly less explicit language, requires that member companies show that their wood was obtained with the FPIC of local communities.¹⁰¹

In contrast, the International Council on Mining and Metals (“ICMM”), a key industry group for mining companies, has not adopted a standard of FPIC. The ICMM’s Position Statement on Mining and Indigenous Peoples includes strong requirements for consultation with potentially affected indigenous peoples from the beginning of activities, even before exploration begins. Its Position Statement also requires members to seek broad community support for new projects or activities and include a recognition that, “following consultation with local people and relevant authorities, a decision may sometimes be made not to proceed with developments or exploration even if this is legally permitted.”¹⁰²

Owing to the need to accord the indigenous persons protection in the face of projects, efforts are visible to try and guide corporate actors on how best to carry out their development plans. However, the efforts are still non-binding which places the indigenous persons in harm’s way.

VIII. THE RIGHT TO SAY NO; EXAMPLES FROM SOUTH AFRICA

The concept of the “Right to say No”, based on the concept of FPIC, is an important step towards the right to self-determined development. It stresses the communities’ fundamental right to not only be involved in and informed about the plans, but also, in cases of unsatisfying outcomes of negotiating processes, to finally say “No” to the proposals. This essential notion does not only

¹⁰⁰ RSPO members include large multinationals such as Unilever, Cadbury, Kelloggs, Seventh Generation, and Johnson & Johnson, as well as their suppliers, retailers, banks and investors, and NGOs

¹⁰¹ Their criteria require that “Local communities with legal or customary tenure or use rights shall maintain control, to the extent necessary to protect their rights or resources, over forest operations unless they delegate control with free and informed consent to other agencies.” The Guidance Document for this criteria notes that it should be assumed to include: “[t]he right to ‘free and informed consent’, including the right to grant, withhold or withdraw consent.” “FSC Principles 2 and 3: Guidance on Interpretation,” FSC-GUI-30-004, FSC A.C. (March 2006), pp.5,7, available at http://www.fsc.org/fileadmin/webdata/public/document_center/international_FSC_policies/guidance_documents/FSC_GUI_30_004_EN_Guidance_on_FSC_P2_and_P3_2005.pdf

¹⁰² “ICCM Position Statement on Mining and Indigenous Peoples,” ICMM (May 2008.), ¶ 9, available at <http://www.icmm.com/document/293> [hereinafter “ICCM Position Statement on Mining and Indigenous Peoples”]

amplify communities’ voices and put them in a more equitable position, but also puts pressure on corporations to respect indigenous knowledge and customary law.¹⁰³

The right to say “No” to mining is therefore also the right to say “Yes” to a self-determined living and gives communities a concrete instrument to come up with their own development model through grass root processes and law from below. There have been communities which effectively opposed the mining interests of corporations – for instance the case of the Amadiba Crisis Committee in Pondoland, an area in South Africa’s Eastern Cape, provides a powerful example of how a community did not only reject extractives and mining, but instead also came up with their own development alternatives like eco-tourism and renewable energy projects.¹⁰⁴

The Amadiba Crisis Committee represent the Xolobeni community, which has been fighting for sixteen years to prevent Australian mining conglomerate, Transworld Energy and Minerals (TEM), from mining the titanium-rich sand along the Wild Coast of South Africa.¹⁰⁵ For the Amadiba Crisis Committee, land is an intrinsic part of the community’s identity, past, present and future. Nonhle Mbuthuma, a founding member of the group says, **“We believe that we know who we are because of the land. We believe that once you have lost the land, you have lost your identity.”**¹⁰⁶

In April 2018, the Committee took their case to South Africa’s High Court in a brave push for justice.¹⁰⁷ Now, months later and just over a week after the Peoples Tribunal, **The courts have ruled in favour of the community, declaring that the Department of Mineral Resources**

¹⁰³ We want the right to say NO!, Alternatives to mining and extractivism, Amandla, Ulutsha Newsletter Issue No.5 available at <http://aidc.org.za/want-right-say-no/> accessed on Thursday, 22 June, 2019

¹⁰⁴ *Id.*,

¹⁰⁵ Rising for the Right to Say NO: Southern African Peoples Permanent Tribunal | WRM in English , available at <https://wrn.org.uy/articles-from-the-wrm-bulletin/section1/rising-for-the-right-to-say-no-southern-africa-peoples-permanent-tribunal/> accessed on Thursday, 20th, June, 2019

¹⁰⁶ *Id.*,

¹⁰⁷ *Id.*,

must obtain “full and formal” consent from the people of Xolobeni before granting mining rights.¹⁰⁸

VII. THE BENEFITS OF FREE PRIOR AND INFORMED CONSENT (FPIC) PROCESS

The current increased policy debates around respect for FPIC principles are largely the result of effective advocacy by indigenous peoples to have their fundamental human rights respected and to reverse the historical trajectory of unsustainable development based on expropriation of their lands, resources and, increasingly, their knowledge and cultures.¹⁰⁹ The debates also reflect the power struggles between governments, mining companies and indigenous communities over land and resources and often refer to who holds and grants the final decision over mining projects—the company, the state or the community?¹¹⁰

In elaborating the concept of FPIC in the UNDRIP, scholars and indigenous peoples relied on existing human rights principles regarding equal rights and self-determination.¹¹¹ FPIC has indeed been referred to as a fundamental right that must be enjoyed by all.¹¹²

There has been much debate in the international community over the legal status of the UNDRIP.¹¹³ Although the UNDRIP was adopted through a General Assembly Resolution,¹¹⁴ its

¹⁰⁸

Id.,

¹⁰⁹

Joji Carino, Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice, 22 *Ariz. J. Int'l & Comp. L.* 19 (2005), pg. 20.

¹¹⁰

Rajiv Maher, p.36

¹¹¹

See, e.g., Hanna & Vancly, *Indigenous Peoples and the Concept of Free, Prior and Informed Consent*, 31 *IMPACT ASSESSMENT & PROJECT APPRAISAL*, 150 (2013) There is a timeline of the codification of non-indigenous FPIC requirements: the UNFAO Code of Conduct was amended in 1989 to include mandatory consent; the 1989 Basel Convention on hazardous wastes includes FPIC; The 2001 Stockholm Convention on Persistent Organic Pollutants includes FPIC; and the 2002 Convention on Biological Diversity also includes FPIC.

¹¹²

ACHPR, *Supra* Note 9

¹¹³

See Luis Rodriguez-PiferoRoyo, “Where Appropriate”: Monitoring/Implementing of Indigenous Peoples' Rights under the Declaration, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*, *supra* note 16, at 314, 315, 316, 317

¹¹⁴

See Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous People*, 58 *INT'L & COMP. L.Q.* 957, 959 (2009).

status as soft law does not divest it of legal authority.¹¹⁵ The UNDRIP can function as an embodiment of international "principles of self-determination and cultural integrity" that collectively "uphold the right of indigenous peoples to maintain and develop their own customary law systems of self-governance."¹¹⁶ The former U.N. Special Rapporteur on the Rights of Indigenous Peoples, Professor James Anaya, points specifically to Article 33 of the UNDRIP, which is to the effect that "*indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognised [sic] human rights standards.*"¹¹⁷ According to Anaya, included in these "internationally recognised human rights" are rights that comport with indigenous conceptions of ownership that have proven to be problematic sources of dissonance between Western culture and native communities throughout the course of history.¹¹⁸

Important to note however is that there has been failure to realize these principles, for example, the World Commission on Dams and Development (WCD) findings on large dams and indigenous peoples showed that large dams have disproportionately impacted indigenous peoples, and future dam building continues to target their lands disproportionately.¹¹⁹ Major consequences in this regard include loss of lands and livelihoods, the undermining of the fabric of their societies, cultural loss, fragmentation of political institutions, breakdown of identity, and human rights abuse. This development has had an especially detrimental effect on the indigenous women, leaving the majority worse off than they were before.¹²⁰ There is also inadequate

¹¹⁵ Ibid

¹¹⁶ Carla F. Fredericks, Operationalizing Free, Prior, and Informed Consent, 80 Alb. L. Rev. 429 (2016), at 434

¹¹⁷ Anaya, *International Human Rights*, *supra* note 36, at 51. Anaya's article was published in 2004 when the UNDRIP was still a proposed draft. Article 34 of the resulting UNDRIP states essentially the same as the draft: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical Systems or customs, in accordance with international human rights standards."

¹¹⁸ See Anaya, *International Human Rights*, *supra* note 36, at 37, 51;

¹¹⁹ WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION MAKING (2001) available at <http://www.dams.org/report/contents.htm>

¹²⁰ *Id.*, pg. 21

compensation, ill-planned resettlement, and tardy and insufficient reparations are common, as is denial of land of equal value and quality in exchange for the land lost as a result of involuntary displacement, especially for indigenous peoples.¹²¹

In practice, the FPIC process, or any "consultation" process, rarely begins before government decisions are taken, especially in mining operations, because mineral exploration, has usually generated positive results and governments have issued permits before they or the mining corporations even consider any consultation with local people. When government or mining officials do undertake any consultations with the local population after successful exploration, they do not enter such discussions open to the prospect that local interests might oppose their plans.¹²² Such officials thus have an interest in delaying consultations as long as possible in order to organize any local allies, prepare the public relations campaign that now accompanies any presentation to potentially affected communities, and, most of all, to defer as long as possible the potential formation of organized opposition to the planned exploitation.¹²³

Such challenges thus create the need for the continued advocacy of an authentic FPIC process that is aimed at reflecting the views of the communities in which these projects are commenced. Joji Carino notes that a fair, informed, and transparent decision-making process based on the acknowledgement and protection of existing rights and entitlements must give all stakeholders the opportunity to fully and actively participate in the decision-making process.¹²⁴ It has also been argued for FPIC, that communities should be able to define what development they pursue and ensure their resources are used in ways that align with their cultural context, in juxtaposition to western notions of development.¹²⁵

Meaningful exercise of FPIC requires a preparedness and capacity among various affected and interested parties to engage in processes based on respect and equality, leading to negotiated

¹²¹ *Id.*,

¹²² Robert Goodland, *Responsible Mining: The Key to Profitable Resource Development* 2012

¹²³ Brant McGee, *Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, *The* , 27 *Berkeley J. Int'l Law* 591 (2009)

¹²⁴ *Id.*, pg. 24

¹²⁵ *Id.*,

outcomes. It also means acceptance of the indigenous peoples' right to reject developments that do not gain community acceptance, based on informed choice.¹²⁶ Even where national laws give a weak protection of the right to FPIC, and the right of project-affected peoples to consultation and participation in decision-making processes, these rights can and ought to be recognised by project developers.¹²⁷ Also, "informed" consent implies that government and business entities must provide full and accurate relevant information concerning the entire project, in a language best understood by the affected community, of the anticipated risks and benefits of a proposed development in a form that is accessible and understandable to the affected population.¹²⁸ Similarly, because there is little consensus regarding what FPIC means in practice,¹²⁹ Coulter argues that there must be monitoring of the processes to guard against fraud and dishonorable dealings.¹³⁰

VIII. FPIC LEGAL FRAMEWORK AND ITS APPLICABILITY IN THE CURRENT LEGAL AND POLICY FRAMEWORK

Article 10 (a) of the 1995 Constitution of Uganda¹³¹ defines indigenous as anyone who was born in Uganda one of whose parents, grandparents, was a member of the "indigenous" communities existing and residing within the borders of Uganda as at the first day of February 1962 and is set out in the third schedule of this constitution. However, as noted earlier, not all the groups listed under the third schedule qualify as indigenous and the schedule falls short in its determination as to who are considered as indigenous communities in Uganda. This is largely informed by the interpretation that African governments ascribed to 'indigenous people' and their objections to the adoption of the UNDRIP.

¹²⁶ *Id.*, pg. 20

¹²⁷ Christina Hall, Serena Lillywhite and Michael Simon, Guide to Free Prior and Informed Consent, Oxfam Australia, June 2010. Available at https://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf

¹²⁸ Perrault, Kirk Herbertson & Owen J. Lynch, *Partnerships for Success in Protected Areas: The Public Interest and Local Community and Rights to Prior Informed Consent (PIC)*, 19 GEO. INT'L ENVTL. L. REV. 522 (2007).

¹²⁹ David Szablowski, p.116 Supra Note 53

¹³⁰ Robert Coulter Supra Note 28

¹³¹ 1995 Uganda Constitution, Article 10

The origins of Free, Prior, and Informed Consent (FPIC) began with the realization that indigenous peoples do not usually have political power and power in terms of knowledge and decision-making when it comes to projects on their own lands. The right of indigenous peoples to give or withhold their free, prior and informed consent to projects that affect their land and livelihood is a key component of the right to self-determination. Recognition that indigenous peoples, like all other peoples, enjoy this right has been a long time coming and efforts to secure recognition of this right can be dated back in time.¹³² Therefore the failure for the constitution to clearly provide for who the indigenous communities in Uganda are, for purposes of protection of the rights of indigenous peoples under the human rights system and in accordance to international standards creates a precarious situation for these groups.

In the last decade or so, the government of Uganda has been on an ambitious plan of attaining middle-income status by the year 2020¹³³. This plan relies heavily on private-sector led growth as outlined in the Second National Development Plan and in Vision 2040. These two documents also envisage the heavy contribution to economic development of the extractive industries, especially with the discovery of oil in the Bunyoro sub-region.¹³⁴ In both documents, the role of the government is to facilitate economic growth by making conditions more favorable for private investment. It is in light of these developments that the issues of FPIC and its implementation become critical and must take center stage to give the locals a form of veto power to sanction or reject any project plan that affects them and their land and natural resources. Many National laws in several African countries require some level of public participation in environmental decision making, including engagement in project environmental impact assessment (EIA) processes prior to the implementation of extractive industry projects.¹³⁵ Unfortunately, most EIA public participation requirements refer to information provision or consultation and fall short of FPIC.

¹³² Marcus Colchester. "Free, Prior and Informed Consent Making FPIC work for forests and peoples." TFD Publication Number 11 July 2010

¹³³ Second National Development Plan 2015/16-2019/20

¹³⁴ The World Bank, "Uganda: Social Inclusion with Middle-Income Status in Sight." 28th January 2014 Accessed at <http://www.worldbank.org/en/country/uganda/publication/uganda-social-inclusion-with-middle-income-status-in-sight>

¹³⁵ 1995 Uganda Constitution, National Objective XXVII

The distinction between consultation and consent must be made more pronounced as alluded to earlier, with focus placed on obtaining consent because it is this that grants autonomy to indigenous communities over their land and natural resources.

Furthermore, the effectiveness and meaningfulness of consultations has always been contested. Where consultations are to be conducted, Article 6 of Convention No. 169 creates the standard for the mode of consultation—emphasizing those consultations sought to be carried out through appropriate procedures using indigenous peoples’ representative institutions. It is provided thereunder that whenever consideration is being given to legislative or administrative measures which may affect them directly. The same article notes that consultations must be carried out in good faith, in an appropriate form, and “with the objective of achieving agreement or consent to the proposed measures.”¹³⁶

The question is then that, how has the legal framework in Uganda bridged these gaps in the law to insert FPIC and to what extent has it succeeded? This shall be addressed in light of the various Legal Instruments in Uganda.

a. The 1995 Constitution of Uganda

The main characteristics which underpin the FPIC principles are that it is: (1) freely given; (2) fully informed; (3) obtained before permission is granted to a proponent to proceed with the project; and (4) is consensual. The rights that have a direct bearing on this principle include the right to access of information,¹³⁷ civic participation,¹³⁸ right against discrimination,¹³⁹ affirmative action in favour of marginalized groups, right to own property. Indeed, all the provisions of the constitution that have a bearing on FPIC ought to be considered together. In doing so, sight must not be lost of the spirit of our Constitution which is the establishment and promotion of a just, free and democratic society.

¹³⁶ International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169, 27 June 1989, C169, available at: <https://www.refworld.org/docid/3ddb6d514.html>. [accessed 31 May 2019]

¹³⁷ Article 41 of the Constitution of Uganda

¹³⁸ Article 38

¹³⁹ Article 21

i. Right to Access to information

The Right of access to information ¹⁴⁰ is provided for under Article 41 of the Constitution and is to the effect that every citizen has a right of access to information in the possession of the State or any other organ or agency of the State. The above article is operationalized by the Access to information act of 2005. Section 7 of the above act requires all public bodies concerned to compile manual about the information that the body/institution possesses. Residents of Lwengo, Rakai, and Kyotera districts protested the irregularities in the valuation process of the East African Crude Oil Pipeline project. Total Uganda had sub-contracted NEWPLAN Limited to carry out valuation on their behalf and they failed to follow the proper guidelines and disclose all the information necessary for the project to be in line with the FPIC principles.¹⁴¹

ii. Right to Participation

Citizen participation according to Lister¹⁴² is private citizen intervention in public activities. It is viewed as a process that provides private individuals with the opportunity to influence public decisions such that they reflect their social interests; this has been a component of the democratic decision-making process, for a considerable time.

In Uganda, citizen participation is provided for under Article 38 of the Constitution, which requires every citizen of Uganda to participate in the affairs of government, individually or through his or her representatives in accordance with law. Emerging trends point to the role of states as being able to create ‘an enabling environment’ for citizens to participate in political decision-making processes. This enabling environment is expected to give an incentive to citizens to engage in political mobilization. Indeed, the participation of the poor in defining their own priorities, by means inter alia of participatory poverty assessments, advocacy for pro-poor policies, etc., has gained considerable traction as discourses of governance and participation have

¹⁴⁰ Article 41 *ibid*

¹⁴¹ Business and human rights Centre. “Uganda: Locals to be displaced by oil pipeline oppose land valuation process; includes Total's comments.” April 2018, Accessed at <https://www.business-humanrights.org/en/uganda-locals-to-be-displaced-by-oil-pipeline-oppose-land-valuation-process-includes-totals-comments>

¹⁴² Eric J. Jokela “Adapting Free, Prior, and Informed Consent (FPIC) Local Contexts in REDD+: Lessons from three Experiments in Vietnam” (2015) *Forests* at 6

encouraged citizen participation, influence and the exercise of accountability in respect of governance. Citizens thus assert their citizenship through the pursuit of accountability by means of participation in policy processes, which are actively claimed as a right rather than by invitation. In *Saleh Kamba V Attorney General*,¹⁴³ the constitutional court held that the purpose of the right of participation is to ensure accountability and transparency of all government organs.

According to Article 36 of the constitution, minorities have a right to participate in decision-making processes, and their views and interests shall be taken into account in the making of national plans and programs.¹⁴⁴ UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya compellingly describes self-determination as "a universe of human rights precepts concerned broadly with peoples... and grounded in the idea that all are equally entitled to control their own destinies."

iii. Right to Own Property

Article 26 of the constitution of Uganda stipulates that everyone has a right to own property either individually or in association with others, and further refrains any person from taking away another's property compulsorily. However, even with clear frameworks around compulsory acquisition of land, most African governments still have quite expansive powers with regard to the taking of communal land. In general, they own the country's land and natural resources or hold them in trust for the people. In addition, like most governments, they control the rights to minerals and subsoil resources the government has the power to institute compulsory acquisition for a public purpose or use (also referred to as eminent domain or land expropriation), generally with the provision of fair compensation.¹⁴⁵

The government tends to have considerable discretion in instituting compulsory acquisition of land. Although a government may have the legal authority to institute compulsory acquisition of land, it should refrain from doing so for economic development projects that present significant

¹⁴³ Constitutional Petition No. 16 of 2013) [2014] UGCC 5 (21 February 2014)

¹⁴⁴ Article 36 of the Constitution

¹⁴⁵ Article 26(2)b

risks to local communities, such as extractive industry projects. These projects should proceed only with the FPIC of the local communities that will be affected by the project. These statements underscore the idea that “public purpose” should not be interpreted to favor private investment or economic development at the expense of local community rights and interests, especially indigenous communities that have experienced marginalization within these societies. Governments should refrain from instituting compulsory acquisition for economic development projects that present significant risks to local communities, such as extractive industry projects. These projects should proceed only with the FPIC of the local communities that will be affected by the project.

Under the Land Act, acquisition can be by mutual agreement-willing buyer willing seller undertaking, however, when no mutual agreement is reached, the line minister can compulsorily acquire the land. An appointed government official may enter private land by giving not less than three days’ notice of the proposed entry to the owner or occupier of the land.

The Land Acquisition Act regulates the expropriation of unregistered land and land registered under the Registration of Titles Act, Chapter 220 and contains relatively detailed provisions. Accordingly, acquisition may be by agreement between the government and the property owners. The proposed Land amendment bill 2017 proposes to introduce a land tribunal where persons affected by the government projects, take their valuation disputes to be heard, removing the previous practice of depositing money with the government, which is in accordance with the FPIC principles.¹⁴⁶

iv. Right to Culture and Similar Rights

Article 37 of the constitution lays down the fact that every person has a right as applicable, to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. This right is especially important in so far as indigenous people are concerned, given the fact that one of the characteristics is their

¹⁴⁶ Mary Karugaba, “Government reintroduces the compulsory land acquisition amendments” 20th March 2019. Assessed at https://www.newvision.co.ug/new_vision/news/1496642/govt-reintroduces-compulsory-land-acquisition-amendments.

unique culture. States parties should obtain their free and informed prior consent before projects in their territories commence especially those that threaten the survival of their culture and cultural practices. It must be born in mind that the cultures of indigenous people are under increasing threat.¹⁴⁷

FPIC represents a critical tool for evaluating community support for a project early on and for monitoring this support and respecting the decisions of communities throughout the life of the project. It is also a tool that can guarantee the protection of the rights to culture of communities in the face of development projects. However, the scope of FPIC is limited because the state and companies often limit its application to projects that have the potential to affect indigenous peoples, whilst if applied throughout the board the principle could help every land and property owner no matter the status.

v. The National Environment Act¹⁴⁸

The NEA¹⁴⁹ provides for EIAs under S.19 of the Act. It tasks the developer to conduct the EIA to assess the impact of the project on the environment. Where it is discovered that the project may, is likely or will have a significant impact on the environment, S.19(5) (a)-(c) requires that an environmental impact review, study or evaluation is conducted. The authority (NEMA) under S.19(8) is in that regard required to adopt guidelines for conducting the review, study or evaluation which have to provide for participation of the communities most affected by the project in question. This provision is important given the fact that the survival of indigenous people depends on their access to land and natural resources.¹⁵⁰ Requiring the effective participation of the communities most affected by these projects if done in good faith presents an opportunity for the communities to object and guarantee their survival. In so doing, the core aim of the FPIC can be achieved.

¹⁴⁷ ACHPR, Supra Note 9

¹⁴⁸ Chapter 153

¹⁴⁹ *Id.*,

¹⁵⁰ ACHPR, Supra Note 9

vi. The Environment Impact Assessment Regulations (EIA)

Regulation 12 of the EIA¹⁵¹ regulations is the most crucial and clear exposition on FPIC in the area of EIA as it looks at the issue of Public Participation. Modern environmental operations require the involvement of the public in all activities since the environment is a public good.

Public involvement is critical in identifying a project's potential environmental impacts and possible mitigation measures. As users of potentially affected resources, communities are quite knowledgeable regarding their sustainable use. They often present evidence about potential consequences of a project and can make suggestions to scientists or decision-makers on ways to minimize their adverse impacts and how to capture potential benefits.¹⁵²

Kakuru notes that public involvement gives those who will be affected by a project an opportunity to shape its construction and operation, thereby ensuring a more harmonious long-term relationship between the project and the surrounding community.¹⁵³ This is in line with the primary objective of FPIC that is the right to self-determination, and granting autonomy to communities to decide how the natural resources from which they derive sustenance are exploited. On that note therefore public participation should ensure that issues concerning the community are addressed in EIA. Thus, while seeking the views of the people, the following should be taken into consideration;

- Publicizing the intended project, its anticipated effects and benefits through the media in a language that the affected communities understand.
- Holding meetings with the affected communities to explain the project and its effects in places convenient to the affected people and agreed by the local leaders.
- Conducting an EIA is a process of analysing the positive and negative effects of a proposed project, plan, or activity on the environment, which is carried out before the commencement of the project. The effects of which if this is not followed then a project maybe refused to take off for example; The Freba Tannery in Kakoba, Mbarara was

¹⁵¹ No. 13 of 1998.

¹⁵² Arctic Environment Protection Strategy 1997: Guidelines for Environmental Impact Assessment (EIA) in the Arctic. Sustainable Development and Utilization. Finnish Ministry of the Environment, Finland, 50 p.

¹⁵³ Kakuru, *ibid* page 8

closed down for failure to prevent pollution of the environment by untreated effluent.¹⁵⁴

An EIA would have identified the need to put into place a system for the treatment and disposal of effluent. Most crucially, EIA exposes the adverse effects on the environment and project affected persons. Therefore, any developer found to contravene the law will have legal action taken against him or her.¹⁵⁵

vii. The Social Impact Assessment and Accountability Bill, 2019 (SIAA)

This Bill provides for Social Impact Assessments as a regulatory tool in planning and implementation of planned interventions. The assessments must be carried out by a body of government and private entities. The Bill defines Social Impact Assessment as the process of analyzing, monitoring and managing the intended and unintended social impacts, both positive and negative, of planned interventions and any social change processes invoked by those planned interventions. The Bill endeavors to encompass issues of FPIC and this is seen from the clauses below;

- Clause 5 provides for effective participation of people in the planned interventions in order to protect their livelihoods and guarantee their social wellbeing.
- Clauses 6 and 7 lay down the types of Social Impact Assessments to be carried out which involves interacting the affected communities and goes ahead to state that carrying out the Social Impact Assessment is a must, respectively.
- Clause 15 talks about communities giving consent. It states that communities affected by a planned intervention shall, in addition to a peer review process of a report, assess a social impact report and signify their acceptance of the final report. This therefore shows that the community actually has been granted the power to either consent or reject the project.

The above clearly shows that FPIC principles have to some extent been incorporated in the Social Impact Assessment and Accountability Bill, 2019. If passed, this will greatly benefit different communities where projects are to be carried out because before carrying out the

¹⁵⁴ Kenneth Kakuru, Rachel Odoi, Irene Kyakuwaire, "A guide to the environment impact assessment process in Uganda." Sustainable Development series No.1 September 2001.

¹⁵⁵ Id.,

projects, not only is there a requirement for the community to consent but also consideration as to be put to the enjoyment of economic, social and cultural rights and adverse effects of the project must be avoided in the community.

b. Compulsory Acquisition of Land

The Constitution allows the government to compulsorily acquire land if the taking or possession is necessary for public use or interest of defence, public safety, public order, public morality and public health.¹⁵⁶ This must be done after a prompt payment of fair and adequate compensation prior to the acquisition.¹⁵⁷ Compulsory acquisition of land seems to involve an arbitrary determination of what amounts to “public interest” by the government which then proceeds to take possession of the land after compensation. The process is informal and not an open or participatory process; it [public interest] is defined so broadly that it usually is not a limit to the government’s power of compulsory acquisition.¹⁵⁸

The concept of compulsory acquisition is on the face of it inherently inconsistent with the principles of free prior and informed consent. Whereas prior compensation is an important part of adherence to FPIC principles, the determination of whether or not the land should be compulsorily acquired or whether the taking of the land will be in the public interest is most critical to FPIC.

That determination should be participatory and involve a clear process for the affected communities to give their input.

Governments should refrain from instituting compulsory acquisition for economic development projects that present significant risks to local communities, especially extractive industry projects.¹⁵⁹

Therefore, in the context of indigenous peoples, where a project will cause profound impact on the lands of indigenous peoples, FPIC is required¹⁶⁰ and the government should not compulsorily

¹⁵⁶ Article 26(2) (a)

¹⁵⁷ Article 26(2)(b)

¹⁵⁸ Veit, Nhsala, Ochieng Odhiambo and Manyindo, “Protected Areas and Property Rights: Democratising Eminent Domain in East Africa

¹⁵⁹ *Id.*,

acquire land in such an instance. However, the Ugandan Constitution does not incorporate in express terms the principles of FPIC; but recourse can be had to Article 38 on the right to civic participation and Article 42 on the right to just and fair treatment in administrative decisions to challenge the determination of what amounts to public interest.

IX. EFFECTS OF FAILURE TO FOLLOW FPIC PRINCIPLES ON ENJOYMENT OF DIFFERENT RIGHTS

As earlier discussed, FPIC is grounded in the fundamental right to self-determination guaranteed by the ICCPR, ICESCR and ICERD.¹⁶¹ Consent is a key principle that enables indigenous peoples to exercise their right to self-determination including the development that comprises control or otherwise affects their lands, resources and territories.¹⁶² The process of arriving at a consent decision involves consultation and meaningful participation in all aspects of the assessment, planning, implementation, monitoring and closure of a project.¹⁶³ The failure to have FPIC followed can result in to very grave disadvantages on the indigenous peoples especially in the enjoyment of social, cultural and economic rights. The different economic and cultural rights likely to be affected include; the right to education, health, housing, food, water, work and social security, adequate standard of living and healthy environment in the communities.

a. Right to Education

The right to education is provided for in the ICESCR¹⁶⁴ under article 13 and 14 to which Uganda is a party. Under the Constitution¹⁶⁵ which is the supreme law of the country, the right to education is provided for under Article 30. General comment No.13 on the Right to education

¹⁶⁰ Case of the Saramaka Peoples, Supra Note 83

¹⁶¹ Draft Study on Free, Prior and Informed Consent; A Human Rights based approach; Study of the Expert Mechanism on the Rights of Indigenous Peoples by the Human Rights Council, eleventh session, 9-13th July 2018, pg. 3.

¹⁶² *Id.*, pg.10.

¹⁶³ Forest Peoples Programme; Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review by Fergus Mackay, 28th June 2004, pg. 35.

¹⁶⁴ International Covenant on Economic, Social and Cultural Rights; Adopted and opened for signature, ratification and accession by the General Assembly Resolution 2200A (XXI) of 16th December 1966, entry into force 3 January 1976, in accordance with article 27.

¹⁶⁵ Constitution of the Republic of Uganda; Commencement date of 8th October, 1995.

lays down criteria under which the state parties must follow while providing the right to education.¹⁶⁶ These include but are not limited to; Accessibility, Acceptability and Adaptability.¹⁶⁷ This means that the education put in place must be accessible both physically and economically.¹⁶⁸ Therefore, the failure to follow the FPIC principles while putting in place projects will lead to disruption of the everyday life of the community. This disruption leads to forced migrations and relocation of the community which disrupts access of the children in the community to the schools and in the long run to education. Furthermore, many of the community members lose their sources of livelihood and finances which make it nearly impossible for them to afford the ever increasing prices of education in Uganda.

b. Right to Health

The right to health is provided for under Article 12 of the ICESCR. The General Comment No.14 on the right to health provides that this right must be accessible, available, of quality and acceptable.¹⁶⁹ This means that the health facilities and the health services must be easily accessed by all members of the community.¹⁷⁰ The right to health also entails the highest attainable physical and mental health of an individual. Therefore, people in the community ought to access health services, have adequate health care and health facilities with proper medical personnel.

The impact of the failure to follow FPIC processes on the right to health can be discussed in two major ways. Firstly, the projects if unchecked may have an impact on the environment, water systems and air in the community and thus pose significant health risks to communities. A scenario of this in Uganda is demonstrable by the situation in Kijayo, where the people have been forced to drink heavily polluted water since their evictions from their land by the Hoima

¹⁶⁶ CESR General Comment No.13: The Right to Education (Article 13); Office of the High Commissioner For Human Rights; Adopted at the twenty-first session of the committee on Economic, Social and Cultural Rights, on 8th December 1999, (Contained in Document E/C. 12/1999/10), para 6.

¹⁶⁷ *Id.*,

¹⁶⁸ *Id.*,

¹⁶⁹ CESR General Comment No.14: The Right to the Highest Attainable Standard of Health (Article 12); Office of the High Commissioner For Human Rights; Adopted at the twenty-second session of the Committee on Economic, Social and Cultural Rights, on 11th August 2000 (Contained in Document E/C.12/2000/4) para 12.

¹⁷⁰ *Id.*,

Sugar Limited Company.¹⁷¹ The water is obtained from wells that are contaminated with molasses and acid from the Hoima Sugar Limited Factory hence greatly affecting their health.¹⁷² Secondly, people in these communities may be forced to migrate to areas that might not have adequate accessibility to health facilities hence falling short of the standard on the right to health clearly laid down in General Comment No. 14 on the right to health.

c. Right to Housing

The General Comment No.4 on the right to an adequate housing states that the right to adequate housing applies to everyone regardless of their age, economic status, group or other affiliation or status or other such factors.¹⁷³ Article 11(1) of the ICESCR is clearly to the effect that states should recognize the right of everyone to an adequate standard of housing. The United Nations General Committee on Economic, Social and Cultural Rights has underlined that the right to adequate housing should not be interpreted narrowly but rather it should be seen as the right to live somewhere in security, peace and dignity.¹⁷⁴ The right to adequate housing contains freedoms which include; protection against forced evictions and the arbitrary destruction and demolition of one's home, the right to be free from arbitrary interference with one's home, privacy and family and the right to choose one's residence, to determine where to live and to freedom of movement.¹⁷⁵

Failure to follow FPIC principles could occasion arbitrary evictions of people from their homes to pave way for the various development projects, as was the case with the Endorois people of Kenya.

¹⁷¹ The Community In Kijayo Evicted By Hoima Sugar Limited Drinking Polluted Water found at <https://www.albertinewatchdog.org/2019/05/22/the-community-in-kijayo-evicted-by-hoima-sugar-limited-drinking-polluted-water>

¹⁷² *Id.*,

¹⁷³ CESCR General Comment No.4: The Right to Adequate Housing (Article 11(1) of the Covenant) ; Office of the High Commissioner For Human Rights; Adopted at the sixth session of the Committee on Economic, Social and Cultural Rights, on 13th December 1991 (Contained in Document E/1992/23), para 6.

¹⁷⁴ UN Habitat; The Right to Adequate Housing; Fact Sheet No. 21/REV.1; by the Office of the United Nations High Commissioner for Human Rights, pg.3.

¹⁷⁵ *Id.*,

In Uganda, a vivid example of where this has occurred is the eviction of five thousand (5,000) people from their land in Kijayo by the Ugandan Police Force and Bunyoro Royal Guards in order to pave way for sugar growing project of Hoima Sugar Limited.¹⁷⁶ Therefore, due to the rampant forced migrations and evictions from such places, people lose their homesteads, which greatly interfere and infringes on their right to housing.

d. The Right to Food

The right to food is a very fundamental human right that contributes to the very existence of mankind. This right is provided for under Article 11(1) of the ICESCR and this includes the fundamental right to be free from hunger. This human right is recognized in several instruments under international law and this right is of crucial importance for the enjoyment of all rights.¹⁷⁷ The Committee affirmed in the General Comment No.12 on the right to food is realized when every man, woman and child alone in the community with others have physical and economic access at all times to adequate food or means for its procurement.¹⁷⁸ States have a core obligation to take necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of article 11 even in times of natural or other disasters.¹⁷⁹ The Committee also stated that the core content of the right to adequate food implies the availability of food in quantity and quality and this availability refers to the possibilities of either feeding oneself directly from productive land or other natural resources.¹⁸⁰

In most situations, indigenous people largely survive on their lands. Livelihood and sustenance is ultimately derived through land utilization for food production and exploitation of their natural resources on land. Therefore, respect for FPIC in all development plans that affect their land and natural resources should be key in any plans. In all engagements, community consensus should

¹⁷⁶ The Community In Kijayo Evicted By Hoima Sugar Limited Drinking Polluted Water found at <https://www.albertinewatchdog.org/2019/05/22/the-community-in-kijayo-evicted-by-hoima-sugar-limited-drinking-polluted-water>

¹⁷⁷ CESCR General Comment No.12: The Right to Adequate Food (Art.11); Office of the High Commissioner For Human Rights; Adopted at the twentieth session of the Committee on Economic, Social and Cultural Rights on 12th May 1999 (Contained in Document E/C.12/1999/5), para 1.

¹⁷⁸ Id., para13.

¹⁷⁹ Id., para 6.

¹⁸⁰ Id., para 8.

be reached on the nature and mode of compensation and any resettlement or relocation plans. Failure to adhere to the FPIC principles has many effects on the people's right to food.

Firstly, it can lead to the arbitrary eviction of people and deprivation of their land, which is their main source of food. Secondly, it also leads to destruction of the crops of the members of the community while the project work goes on. This has been noticed in the communities of Karamoja where gold mining is taking place and the communities where the East Africa Oil Pipeline is passing for example Lwengo District. Community members in Karamoja have accused members of the East African Mining Ltd, a Ugandan Subsidiary of East African Gold of destroying their crops while taking soil samples without any explanations.¹⁸¹ Likewise, in Lwengo District, Vincent Kasajja one of the locals of Byanjiri Village in Kitto Parish alleges that with the East African Crude Oil Pipeline project passing just 13 metres from his house, he will lose over two acres of banana plantations, a fish pond in addition to cassava and avocado trees and yet he wasn't compensated for all this.¹⁸²

Secondly, the degradation of the land which is an adverse effect of these projects causes low productivity of the land which leads to shortage of crop growth and productivity in the communities. This in the long run leads to hunger due to the total failure of the soil to support crop growth. This clearly falls below the standard set down for the attainment of the right to food.

e. Right to Water

The right to water is provided for under articles 11 and 12 of the ICESCR. This right falls under the right of everyone to an adequate standard of living provided for under Article 11(1) and the right of everyone to the enjoyment of the highest standard of physical and mental health provided for under Article 12 of the ICESCR. The General Comment No. 15 on the right to water under Article 11 and 12 of the Covenant states that the human right to water entitles

¹⁸¹ How Can We Survive Here? The Impact of Mining on Human Rights in Karamoja, Uganda found at <https://www.hrw.org/report/2014/02/03/how-can-we-survive-here/impact-mining-human-rights-karamoja-uganda>

¹⁸² Residents Protest Oil Pipeline Valuation Process, Jon Kibu found at <https://www.whispereye.com/2019/05/25/residents-protest-oil-pipeline-valuation-process>

everyone to sufficient, safe, acceptable, physically and affordable water for personal and domestic use.¹⁸³

FPIC ensures that the above principles of the right to water are adhered to since in utilizing these resources consent is gained from the community and a proper way of waste disposal is attained to preserve the water sources. This mitigates the pollution on the water sources in the community.

Therefore, failure to follow the FPIC principles leads to water problems like pollution of the water through dumping of waste in the water and water shortages due to the adverse effects of the project. A case in point is in Kijayo community where the evicted community members are now drinking water from wells contaminated with molasses and acid from Hoima Sugar Limited Factory.¹⁸⁴ In some instances, there is contamination of the water sources through the direct mining of resources like oil, which affects the right to safe water. It is thus important that in future projects FPIC principles are applied to prevent such incidences from happening.

f. Right to Work and Social Security

Article 7 of the ICESCR provides for the right to work while Article 9 of the same Covenant provides for the right of everyone to social security including social insurance. It also points to the fact that everyone has a right to work in favorable conditions. In the general Comment No.19 on the Right to Social Security, it's stated that the right to social security encompasses the right to access and maintain benefits.¹⁸⁵

The Social Security system in place should provide the health systems which are established to provide adequate access of health care to all which work to promote the right to health, all

¹⁸³ General Comment No.15: The Right to Water(Arts.11 and 12 of the Covenant); Office of the High Commissioner For Human Rights; Adopted at the twenty-ninth session of the Committee on Economic, Social and Cultural Rights, on 20th January 2003, (Contained in Document E/C.12/2002/11), para 2.

¹⁸⁴ The Community In Kijayo Evicted By Hoima Sugar Limited Drinking Polluted Water found at <https://www.albertinewatchdog.org/2019/05/22/the-community-in-kijayo-evicted-by-hoima-sugar-limited-drinking-polluted-water>

¹⁸⁵ CESCR General Comment No.19: The Right to Social Security; Office of the High Commissioner For Human Rights; Committee on Economic, Social and Cultural Rights, adopted on the thirty-ninth session, 2007, UN Doc. E/C.12/GC/19 (2008), para 2.

persons should access the social security system and so on.¹⁸⁶ Failure to follow FPIC can be discussed in two fold; first, it leads to arbitrary evictions of indigenous persons from their community which leads to the loss of jobs, employment and livelihood which are the core basics of the right to work.

Secondly, these projects always take over their source of livelihood and work for example in Karamoja district, locals have expressed fears that the companies carrying out gold mining would eventually seek to remove them from their own ability to mine, a key source of livelihood during the dry season.¹⁸⁷

g. Right to adequate standard of living and healthy environment

Article 11 of the ICESCR clearly provides for the right to an adequate standard of living and this includes the right to a healthy environment. Under Article 39, every Ugandan has a right to a clean and healthy environment. This right also encompasses the right to highest attainable state of mental and physical health. This means that everyone has a right to live in a healthy environment that is free from pollution and any other substance. Therefore, before any project is put in place, FPIC principles have to be adhered to so that informed consent can be sought from the people before putting in place these projects since they are the most affected and they must be adequately informed about the effects of the projects being put in place. Failure to follow the FPIC principles leads to the violation of the right to a healthy environment and adequate standard of living, which is one of the core rights of every single person since these rights form the premise of the right to life. This is created where the investors and the government go ahead and carryout activities that pollute the lands and creates other environmental degradation hence negatively affecting the right to an adequate standard of living and a right to a healthy environment of the people living in those communities. A case in point is the situation in Karamoja, where the mining is a major source of noise and air pollution for those living

¹⁸⁶ Ibid, para13 and 14.

¹⁸⁷ How Can We Survive Here? The Impact of Mining on Human Rights in Karamoja, Uganda found at <https://www.hrw.org/report/2014/02/03/how-can-we-survive-here/impact-mining-human-rights-karamoja-uganda>

nearby.¹⁸⁸ Human Rights Watch observed that the drilling machines cutting through the stone churn out tremendous noise and dust particles that cover all the vegetation in the surrounding area.¹⁸⁹

On the other hand, the standard of living becomes high since the projects attract different people into the community, which makes the livelihood expensive and unaffordable in the community. Therefore, from the above discussion, it's evident that failure to follow the FPIC principles negatively affects the realization of economic, social and cultural rights which include the right to education, health, housing, food, water, work and social security, adequate standard of living and healthy environment in the communities as ably discussed above. Seeing the effects of failure to follow the FPIC principles on the above rights, it is important to note that there are remedies that are available to the parties concerned in the communities. These remedies include the judicial avenues like the courts of law in the country. Other remedies available include; mediation and arbitration among others. Whereas the government may argue that requiring for FPIC stalls government projects and development projects as a whole, it is extremely important that FPIC is obtained before commencement of these projects in order to avoid infringement of the above rights as their promotion is one of the core obligations of any state.

X. CASE LAW ON FPIC IN UGANDA

a. Muhindo James and 3 Others v Attorney General ¹⁹⁰

This case was concerned with the forceful eviction of Ugandans in Rwamutoga, Karamoja and Mbuya, by public and private companies without giving the community members eviction notices, as well as the use of violence on the community while being evicted at awkward hours. Such evictions, although required for development led to loss of lives, loss of property, displacement of families, among other human rights violations. The applicants sought a declaratory order to the effect that the absence of adequate procedure governing evictions is a violation of the right to life, and additionally sought an order compelling the government of

¹⁸⁸ Id.,

¹⁸⁹ Id.,

¹⁹⁰ Miscellaneous Cause No.127 of 2016 [2019] UGHCCD 2 (25 January 2019)

Uganda to develop comprehensive guidelines governing land evictions before and after the fact. The Judge held that the applicants' contention was valid to the extent that the absence of eviction guidelines is a threat to possible violations of rights enshrined in the Constitution. He also referred to the **UN Habitat Fact Sheet No. 21/Rev.1**, and stated that when evictions are carried out those affected must be afforded effective procedural guarantees, which may have a deterrent effect on planned evictions. These include:

- a) An opportunity for genuine consultation.
- b) Adequate and reasonable notice;
- c) Availability of information on the proposed eviction in reasonable time;
- d) Presence of government officials or their representatives during an eviction;
- e) Proper identification of persons carrying out the eviction;
- f) Prohibition on carrying out evictions in bad weather or at night;
- g) Availability of legal remedies;
- h) Availability of legal aid to those in need to be able to seek judicial redress.

The applicability of FPIC can be seen with regard to the need for genuine consultation, adequate and reasonable notice, as well as the availability of information on the proposed eviction in reasonable time. Although FPIC is a very high standard, the procedural guarantees mentioned above reflect the elements of free, prior and informed consent.

XI. BEST PRACTICES IN THE APPLICATION OF FPIC

14.1 North America

As the movements for sustainable development and environmental justice progressed, it became increasingly evident that they were inextricably linked since they both addressed the confluence of social, environmental and economic factors. Both required that the environment be preserved at a level sufficient to maintain a healthy quality of life, and both considered justice implications of development projects and processes.

Some threats can be addressed by using standard human rights mechanisms in international law. For example, the *Awas Tingni* case, the Inter-American Court of Human Rights addressed the

violations of the right to property of the community by the Nicaraguan State. Nicaragua had granted a concession to a company to carry out road construction work and logging exploitation on Awas Tingni lands, without the consent of the Awas Tingni community.¹⁹¹ The court addressed the rights to property of the AwasTingni, and other indigenous communities in Nicaragua and elsewhere, in their finding that, "indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. The Court ruled that the State had to adopt legislative, administrative, and other necessary measures to provide property title to the indigenous communities in accordance with their customary law, values, and customs.

Much of this progress is a result of shareholders concerned about the financial and reputational risks to which their companies are exposed when operating on indigenous lands without the consent of the impacted community.¹⁹² For instance, in 2007, 91.6% of Newmont Mining Corporation's shareholders passed a resolution that directed the corporation to assess its practices and policies with respect to indigenous peoples. Newmont, as a founding member of the International Council on Mining and Metals ("ICMM"), recently approved an "Indigenous Peoples and Mining" position statement created by ICMM-that recognizes FPIC and discusses the importance of engaging and consulting with indigenous communities that may be impacted by the corporation's business operations. The most recent ICMM position statement requires that indigenous people should be;

Able to freely make decisions without coercion, intimidation or manipulation; . . .
given sufficient time to be involved in project decision-making before key decisions

¹⁹¹ See, e.g., *San Mateo de Huanchor v. Peri*, Petition 504/03, Inter-Am. C.H.R., Report No. 69/04,OEA/Ser.L/V/II.122, doc. 5 rev. 1 (2004), discussed *infra* at text accompanying notes [40-42] [hereinafter *San Mateo*]. See also *Mayagna (Sumo) AwasTingni v. Nicaragua*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79, at 25 (Aug. 31, 2001), discussed *infra* at text accompanying notes [37-39] [hereinafter *AwasTingi*].

¹⁹² FIRST PEOPLES WORLDWIDE, INDIGENOUS PEOPLES GUIDEBOOK ON FREE PRIOR INFORMED CONSENT AND CORPORATION STANDARDS 4 (2011), <http://www.firstpeoples.org/images/uploads/IPs%20Guidebook%20to%20FPIC.pdf>. [hereinafter *FIRST PEOPLES WORLDWIDE, GUIDEBOOK*].

are made and impacts occur; and . . . fully informed about the project and its potential impacts and benefits.¹⁹³

Some of the methods that have been used are discussed below.

14.1a) Tribal Business Council

Under this model, a Tribal Business Council would be solely responsible for ensuring that businesses comply with the FPIC chapter in obtaining a tribe's free, prior, and informed consent. In order to comply with the FPIC chapter, the company would likely have to provide any required information to the Tribal Business Council. The Council would need to set a minimum standard of information, which may include how the proposed business activity would impact the reservation's environment, culture, and economy both positively and negatively. The Council would then review the information and have a process in place through which to determine whether it wants to give consent, thus bringing the company into compliance with the FPIC chapter and allowing the company to move forward with the chapter on business licensing process.¹⁹⁴

14.1 b) Separate Tribal Government Entity

Under the FPIC chapter, a tribe could task an entity within the tribal government to ensure compliance with the FPIC code and to provide tribal consent. The Tribal Business Council would be responsible for evaluating information regarding the impact of proposed extractive activity and then either deny or provide consent. This may help alleviate the constraints associated with the first model.

¹⁹³ INT'L COUNCIL ON MINING & METALS, INDIGENOUS PEOPLES AND MINING: POSITION STATEMENT (2013), <http://www.icmm.com/document/5433> [hereinafter ICMM 2013 POSITION STATEMENT].

¹⁹⁴ See, e.g., REVISED LAW AND ORDER CODE OF THE SPOKANE TRIBE OF INDIANS § 31-4.06 (2013) (providing an example of a current code section that describes conditions that must be met before a license will be granted).

14.1c) Tribal Membership

Most discussions of FPIC emphasize the need to engage individual stakeholders and community members in the consent process. We understand, however, that there are times that the Tribal Business Council disagrees with the tribal membership and vice versa. It is ultimately up to a tribe to determine the role of tribal members in the consent process.¹⁹⁵ If a tribe chooses to engage its members in the consent process, the engagement could take a variety of forms. Similarly, ensure that the membership remains informed, the FPIC chapter could require that information concerning proposed extractive activity and any potential impacts be disseminated throughout the community by radio, newspapers, flyers, and/or during community meetings.

14.2 ASIA

Asia is a resource rich continent and home to two-thirds of the world's Indigenous Peoples Population. Asia, like Africa is part of the developing world and is host to some of the most ambitious development projects.¹⁹⁶ The principle of FPIC is therefore equally important and applicable in the Asian Context. This section discusses best practices from Asia, with particular focus on the Philippines that demonstrate best practices in FPIC as well as briefly making a business case for observance of FPIC principles.

Formal Recognition of Indigenous Peoples

The Constitution of the Philippines recognizes the rights of Indigenous cultural communities under Article 2 section 22.¹⁹⁷ In addition to constitutional protection, the Indigenous Peoples' Rights Act (IPRA) protects and promotes indigenous peoples' rights within the framework of national unity and development the right to own and develop their ancestral domains and most importantly the right to free and prior informed consent (FPIC). Section 3 of the Act defines Free Prior and Informed Consent as,

¹⁹⁵ National Environmental Policy Act Review Process: Environmental Impact Statements (EIS), ENVTL. PROT. AGENCY, <https://www.epa.gov/nepa/national-environmental-policy-actreview-process> (last visited Mar. 3, 2017).

¹⁹⁶ Asia Indigenous People's Pact, An Overview of the State of Indigenous Peoples in Asia, at P1

¹⁹⁷

Consensus of all members of the Indigenous peoples to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community.¹⁹⁸

The Act puts in place the National Commission on Indigenous Peoples (NCIP) which has the mandate to provide prior certification that the area affected by the project doesn't overlap with any ancestral domain. No certification is to be issued without the free, prior informed and written consent of the Indigenous Peoples concerned. Furthermore, cement this protection, all government agencies and departments are enjoined not to issue or renew any license or lease without prior certification from the NCIP. The NCIP has also enacted NCIP Revised Guidelines on FPIC and Related Processes of 2012, which substantiate on the processes to be observed when acquiring FPIC. However, the Philippines despite having a good legislative and regulative framework do not have a good track record with regard to observance of the FPIC principles. There have been cases where the government has provided military protection for large scale mining operations in the face of growing resistance from indigenous peoples and other affected local communities.¹⁹⁹

In the Philippines, said to host one of the world's biggest deposits of undiscovered minerals especially of gold and copper, 60% of its predominantly indigenous northern Cordilleran region is covered by either mining operations or mining applications. Communities who have resisted mining were met with repression and militarization of the region. Most of the killings of indigenous leaders and members of peoples' organizations, numbering 44 in the 45 months of the current administration, were in response to mining resistance.²⁰⁰

¹⁹⁸

¹⁹⁹ Ibid at p8

²⁰⁰ www.aippnet.org accessed 1st May, 2019

A rare success story was however described by Sohn, Hertz, and Vina (2007). When Shell aimed to extract natural gas in the Philippines, they employed four strategies to gain community consent. These strategies included contacting the community and interviewing local leaders (1), informing the community about the proposed activities (2), investigating the stance of the community towards the project by perception surveys and participatory workshops (3), and involving the community in the development of environmental management plans (4). The involvement of the community led to changes to the project and, ultimately, to consent. This case also specifically points to the business case for implementing FPIC: conducting FPIC involves costs, yet, these costs are minor compared to the costs of conflicts when they lead to disrupted operations or abandoned projects.²⁰¹

From the foregoing, it is evident that countries have taken strides in protecting indigenous persons by ensuring the application of the principles of FPIC in their development agenda.

XII. RECOMMENDATIONS

1. There should be express legislation providing for FPIC to make it a legally binding obligation for government, its agencies and private investors to obtain the free, prior and informed consent of indigenous communities before implementation of development projects. The legislation should set out criteria to guide on which projects require FPIC and how it should be attained.
2. There should be strengthening of the capacities of indigenous communities to enable them meaningfully defend and advocate for their rights. This will create a mechanism of accountability and do away with impunity in the violations perpetuated by private investors and governments.
3. The redress mechanisms in place should be strengthened and popularized in order to make the right to FPIC meaningful and attainable, since legislation and policy on its own is not sufficient to result into realization of rights.

²⁰¹ World Resources Institute, Development Without Conflict: The Business Case for Community Consent, at P21.

4. FPIC in the Uganda legal framework should be linked with environment impact assessment and impact assessment laws, regulations and processes to ensure better transparency and effective communication which are crucial to FPIC.
5. Laws and regulations should be drafted and passed to guide the implementation of FPIC and make it binding in nature in the Ugandan legal regime, so as to give the indigenous people greater bargaining power when it comes to issues of development and government and private aided projects that need the higher standard of FPIC.
6. FPIC principles should be adhered to whenever projects are to be carried out in order to avoid the adverse effects it creates on the realization of human rights that are set out in local and international law.
7. Effective access to remedies should be strengthened so that those affected communities and other persons can adequately access them. Caution should be taken as well by the project developers to ensure that no fundamental human rights are breached during the development and life span of these projects.

XIII. CONCLUSION

By way of conclusion, in the face of massive development projects and the quest for middle-income status by the government of Uganda, the principle of FPIC offers much needed protection to vulnerable indigenous communities and project affected communities. The need to adhere to the elements of FPIC is justified by the resultant benefits of conducting it, which include among others; a social license from the affected communities, less costs incurred in conflict resolution and most importantly sustainable development. Therefore, compliance to these principles is not just for human rights enjoyment and protection but also an indispensable aspect for sustainable development. Thus, the Government of Uganda needs to incorporate a Human Rights Based Approach to the development policies and related legislation especially to expressly provide for FPIC as a substantive right and a procedural guarantee to enhance the realization of economic, social and cultural rights for all.