STUDY ON CONSULTATION AND FREE, PRIOR AND INFORMED CONSENT WITH INDIGENOUS PEOPLES IN AFRICA

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Contents

ACRONYMS AND ABBREVIATIONS 5

1. INTRODUCTION 7

2. INTERNATIONAL AND COMPARATIVE OVERVIEW OF INDIGENOUS PEOPLES' RIGHTS 7

a. International standards on Consultation and Free, Prior and Informed Consent 7

b. FPIC as addressed in the African Regional Human Rights System 9

i. African Commission on Human and Peoples' Rights 9

ii. African Court on Human and Peoples' Rights 12

c. Comparative experiences in the recognition and implementation of Consultation and Free, Prior and Informed Consent 14

i. Developments in the Latin America Region 14

ii. Consultation standards within the inter-American system 14

iii. Challenges in the effective implementation of Consultation in Latin America 17

d. Experiences in the development of FPIC Protocols and other Indigenous governance instruments in Latin America 18

3. IMPLEMENTATION OF FPIC IN AFRICA 21

a. Recognition of Indigenous Peoples: A fundamental problem 21

b. Challenges and possibilities in the implementation of FPIC 24

i. FPIC and land rights issues in extractive, infrastructure and other investment projects 24

ii. Consultation and consent in domestic legal provisions on minerals, natural resources and customary law 29

ii.a. Traditional authority structures and customary law 30

ii.b. Forest and natural resource management rights 33

ii.c. Land, mining and customary law issues: South Africa 34

iii. FPIC and Green Energy Projects – Kenya 36

iv. Issues related to environmental assessments and FPIC 39

v. National FPIC Guidelines for REDD+ 43

vi. Trends and patterns identified in the online consultations and individual meetings 45

vii. FPIC within specific Indigenous rights legislation – Republic of Congo 49

c. Experiences in the use of Indigenous Peoples' Protocols 51

i. FPIC in the context of Biocultural Community Protocols and the Nagoya Protocol 51

ii. FPIC Protocol initiatives: Ogiek in Kenya 57

4. CONCLUSIONS AND RECOMMENDATIONS 58

BIBLIOGRAPHY 66

AUTHOR INFORMATION 70

Acronyms and Abbreviations

ABS	**Access and Benefit-Sharing Agreements**
ACHPR	**African Commission on Human and Peoples' Rights**
BCP	**Biocultural Community Protocol**
CAR	**Central African Republic**
CBD	**Convention on Biological Diversity**
CERD	**Committee on the Elimination of Racial Discrimination**
CESCR	**Committee on Economic, Social and Cultural Rights**
COP	**Conference of the Parties**
DRC	**Democratic Republic of Congo**
EACOP	**East African Crude Oil Pipeline**
ESIA	**Environmental and Social Impact Assessment**
FPIC	**Free, Prior and Informed Consent**
IACHR	**Inter-American Commission on Human Rights**
ICCPR	**International Covenant on Civil and Political Rights**
ILO	**International Labour Organization**
IPILRA	**Interim Protection of Informal Land Rights Act**
KenGen	**Kenya Electricity Generating Company**
KPLC	**Kenya Power and Lighting Company**
LAPSSET	**Lamu Port South Sudan Ethiopia Transport Corridor**
LTWP	**Lake Turkana Wind Power Project**
MINEPDED	**Ministry of Environment, Nature Protection and Sustainable Development**
MPRDA	**Mineral and Petroleum Resources Development Act**
MRG	**Minority Rights Group International**

MOU	**Memorandum of Understanding**
NGO	**Non-Governmental Organization**
OBC	**Otterlo Business Corporation**
OPDP	**Ogiek Peoples' Development Program**
PAICODEO	**Parakuiyo Indigenous Community Development Organisation**
PILIDO	**Pilot Light Development Organization**
PINGOs Forum	**Pastoralist and Indigenous Peoples Organisation**
REDD+	**Reducing Emissions from Deforestation and Forest Degradation**
UCRT	**Ujaama Community Resource Team**
UN	**United Nations**
UNDRIP	**United Nations Declaration on the Rights of Indigenous Peoples**
UNFCC	**United Nations Framework Convention on Climate Change**
WGIP	**Working Group on Indigenous Populations/Communities**
WMZ	**Western Mediterranean Zinc Company**

1. Introduction

The purpose of this study is to provide an analysis of the implementation in Africa of international human rights related to Indigenous Peoples and Free, Prior and Informed Consent (FPIC) with a view to providing recommendations for its implementation in Africa.

The study is primarily a desk study of applicable human rights standards related to FPIC in Africa and the experiences and challenges of implementing FPIC in a number of African countries. To that end, online consultations were held with representatives of Indigenous Peoples, communities, organizations and experts from various countries. These online consultations were organized by expert members of the Working Group on Indigenous Populations/Communities and Minorities in Africa (Working Group) of the African Commission on Human and Peoples' Rights (ACHPR) and involved participants from southern, northern and central African countries. In addition, individual online meetings were held with representatives of Indigenous communities and NGOs from Kenya, Tanzania, Uganda and the Democratic Republic of Congo, and ACHPR Working Group experts from Cameroon and Togo.

Through those online consultations and meetings, as well as desk research, information was collected for this report regarding the overall situation of implementation, or lack thereof, of FPIC in Africa, including experiences with Biocultural Community Protocols (BCPs) in the framework of implementing the Nagoya Protocol, extractive or other similar development projects.

Another important component of the study is a comparative overview of experiences and developments in the implementation of FPIC in other regions, primarily Latin America. A particular focus of this comparative analysis has been experiences of legislation dealing with consultation in Latin America, and Indigenous Peoples' own initiatives, particularly through autonomous consultation protocols. Through this international and comparative perspective, it is hoped that there may be some avenues that can be gleaned via which to address the challenges of implementing FPIC and other rights of Indigenous Peoples in Africa.

The study concludes with recommendations to States, business enterprises, Indigenous Peoples, international institutions, cooperation agencies and conservation organizations, as well as the African Commission on Human and Peoples' Rights and its Working Group on Indigenous Populations/Communities and Minorities in Africa.

2. International and comparative overview of Indigenous Peoples' rights

a. International standards on Consultation and Free, Prior and Informed Consent

The right of Indigenous Peoples to consultation and Free, Prior and Informed Consent is primarily rooted in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the General Assembly in 2007. Under Article 19 of UNDRIP, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Good faith prior consultation and cooperation with Indigenous Peoples, through their representative institutions, with a view

to obtaining their FPIC, is also provided with respect of "the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (Art. 31(2)). Consultation and cooperation are principles contained throughout the text of the Declaration in various other areas, including the promotion of activities to combat prejudice and eliminate discrimination, the adoption of measures to protect Indigenous children, and legislative and other measures to achieve the aims of the Declaration (Arts. 15, 17, 38).

ILO Convention No. 169 on Indigenous and Tribal Peoples (1989) is another major reference point regarding consultation standards. Article 6 of the Convention provides that States are to consult the Indigenous Peoples concerned, "through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly." Said consultations "shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures" (Art. 6 (2)). Although ILO Convention 169 has been ratified by only one African nation, the Central African Republic, it is, along with the UNDRIP, a major international legal source on the rights of Indigenous Peoples worldwide. The Convention's provisions on land and on cultural rights, as well as on consultation and consent, have formed the basis of legislative, policy and jurisprudential developments and initiatives in the Latin America region[1], and thus it is also relevant to an understanding of the comparative analysis provided in the study.

Indigenous Peoples' rights to consultation and consent are also grounded in the main international human rights treaties, and clarified by the interpretations provided by the respective treaty monitoring bodies. The U.N. Committee on the Elimination of Racial Discrimination (CERD) has called on State Parties to the Convention on the Elimination of All Forms of Racial Discrimination to "[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."[2]

There are also General Comments from other U.N. treaty monitoring bodies affirming FPIC. With regard to State Party obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that States violate their obligations under the treaty if priority is given to business entities over Covenant rights without adequate justification or to policies that negatively affect such rights. The CESCR makes specific reference to forced evictions in the context of investment projects and when Indigenous Peoples' cultural values and rights associated with their ancestral lands are at risk. In line with the UNDRIP, the CESCR General Comment provides that "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."[3]

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1 See in general, ILO, Application of Convention No. 169 by domestic and international courts in Latin America: a case book / International Labour Office. - Geneva: ILO, 2009.

2 UN CERD, General Recommendation No. 23: Indigenous Peoples (1997), Art. 4 (d).

3 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, E/C.12/GC/24 (10 August 2017), para. 12.

The jurisprudence of the U.N. Human Rights Committee has also addressed FPIC in the context of State Party obligations under the International Covenant on Civil and Political Rights (ICCPR). In the case of Poma Poma (Peru), the Committee recognized that a State may legitimately take steps to promote its economic development but it cannot undermine the rights connected to Article 27 of the ICCPR on the right to the enjoyment of culture by members of distinct ethnic, religious or linguistic groups. In that sense, a measure whose impacts result in a denial of a community's enjoyment of its own culture is incompatible with Article 27. As stated by the Committee, the admissibility of measures that "substantially compromise or interfere with the culturally significant activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy". Thus, in the view of the Committee, effective participation in that decision-making process, "requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members."[4]

b. FPIC as addressed in the African Regional Human Rights System

i. African Commission on Human and Peoples' Rights

In the landmark case of the Centre for Minority Rights Development & Minority Rights Group International (MRG) on behalf of the Endorois Community v. Republic of Kenya of 2009, the Endorois Indigenous people contested their eviction from their ancestral land by the Kenyan government in the 1970s, which was done to make way for the creation of the Lake Bogoria Game Reserve. The Endorois claimed that the government had failed to recognize and protect their ancestral lands, provide adequate compensation for appropriating their land, or grant restitution. They alleged violations of the right to property, religion, culture, natural resources and to economic, social and cultural development. The ACHPR accepted these arguments, finding that the Endorois were a distinct Indigenous people and that the government's actions had violated the African Charter provisions as alleged by the complainants.[5]

The Endorois people from Kenya.
Credit: IWGIA

4 U.N. Human Rights Committee, Poma Poma v. Peru (CCPR/C/95/D/1457/2006), paras. 7.4, 7.6

5 ACHPR, 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya. Adopted at 46th Ordinary Session, November 2009; Lucy Claridge, Landmark ruling provides major victory to Kenya's indigenous Endorois, MRG briefing (July 2010).

The Endorois case sets an important legal precedent as the first decision by the African Regional Human Rights System that recognizes Indigenous Peoples' collective rights to traditionally-owned land. In this decision, the ACHPR cited international and regional human rights standards and jurisprudence, including the jurisprudence of the inter-American human rights systems on Indigenous Peoples' rights, when interpreting and analysing provisions of the African Charter on the right to property, natural resources, culture and other rights. However, the analysis of Article 22 of the African Charter on the right to development is of particular importance.

The ACHPR considered that the issue of participation was closely allied to the right to development. Taking note of the inter-American jurisprudence on the issue of participation of Indigenous Peoples regarding development or investment projects in their territory, as well as UNDRIP and other international standards, the ACHPR affirmed that the State has a duty to actively consult with the community according to their customs and traditions. This process entails constant communication between the parties, in which the State is required to both accept and disseminate information, ensuring that consultations are in good faith, through culturally-appropriate procedures and with the objective of reaching an agreement.[6]

The ACHPR did not consider that the consultation processes the State asserted it had undertaken were sufficient, as it was evident that that the State did not obtain the prior, informed consent of all the Endorois before designating their land as a Game Reserve and evicting them. The ACHPR stated its view that in "any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."[7]

It also viewed that, under the right to development, the Endorois were also entitled to an equitable distribution of the benefits deriving from the game reserve. The Endorois had therefore been excluded from the development process since the State had failed to provide adequate compensation and benefits, as well as suitable land for their traditional grazing practices, which also resulted in a violation of Article 22 on the right to development.[8] The reparations set out in the ACHPR's recommendations included, inter alia, recognition of the rights of ownership of the Endorois and restitution of their ancestral lands; ensure the Endorois unrestricted access to Lake Bogoria and surrounding sites for religious and cultural practices and grazing; pay adequate compensation and royalties from existing economic activities related to the reserve; and engage in dialogue with the complainants for the effective implementation of the recommendations.[9]

The ACHPR's analysis in the Endorois case marks an important precedent for the incorporation of FPIC into African regional human rights law as it states that the right to development under the African Charter entails the duty of a government to: (1) consult with Indigenous Peoples in a meaningful and culturally-appropriate manner, (2) obtain their informed consent prior to any development or investment projects that have a major impact on their lands, and (3) ensure that the Indigenous Peoples concerned share in the benefits and/or receive compensation resulting from a restriction of their property and natural resource rights.[10]

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6 ACHPR, 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/Kenya, Adopted at 46th Ordinary Session, November 2009, para. 289.

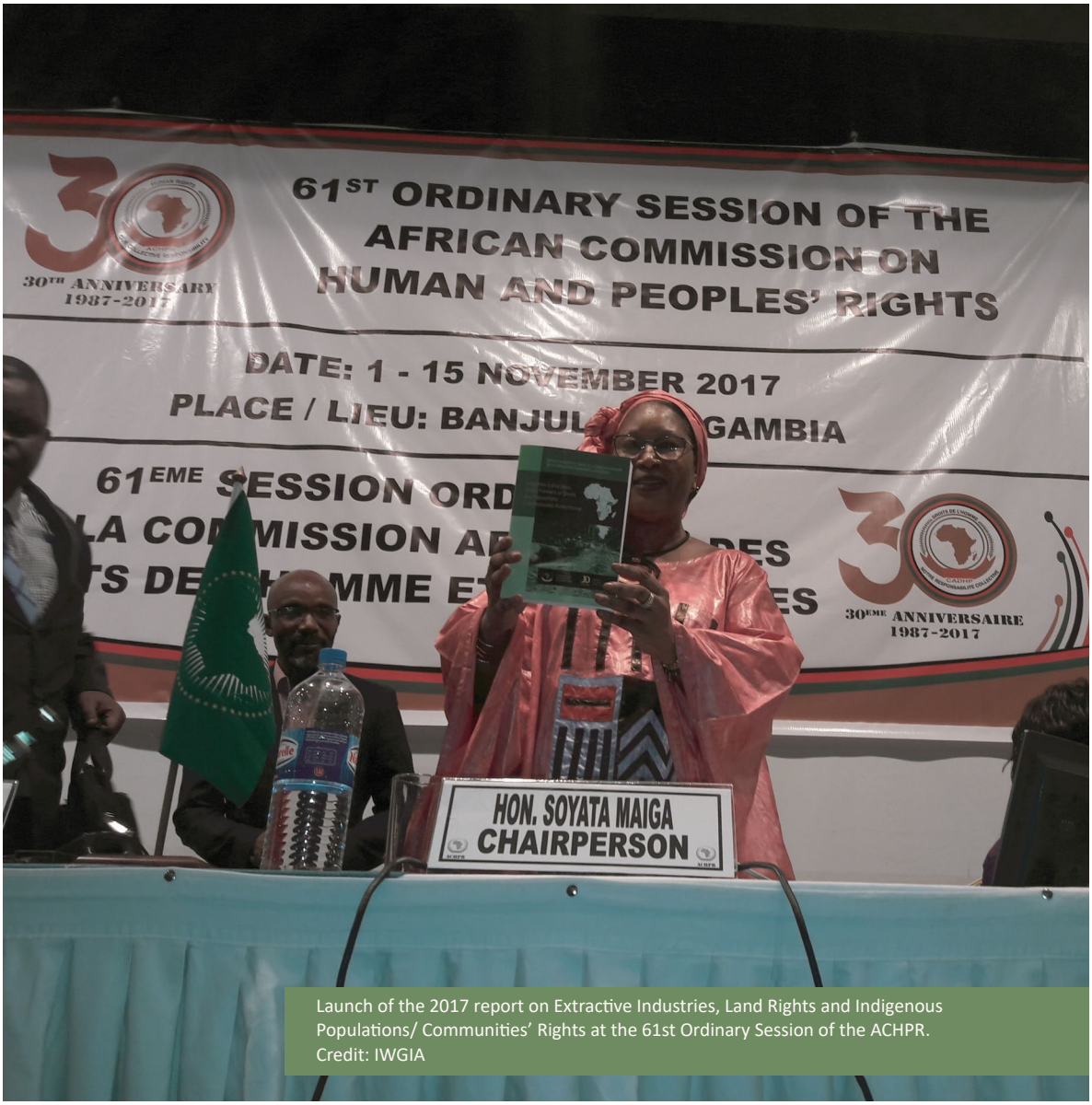
7 Ibid., para. 291.

8 Ibid., paras. 297-298.

9 Ibid., Recommendations.

10 See, Lucy Claridge, Landmark ruling provides major victory to Kenya's indigenous Endorois, MRG briefing (July 2010), p. 19.

The ACHPR has further promoted the incorporation of FPIC in other instances. In its 2017 report on Extractive Industries, Land Rights and Indigenous Populations/ Communities' Rights, the ACHPR affirmed the rights of Indigenous Peoples to consultation and negotiation in decision-making processes consistent with the principles of FPIC. First among its recommendations was that "States should put in place frameworks that safeguard indigenous populations/communities' rights to customary ownership and control over their lands, especially as this is a fundamental precondition for a people's FPIC in relation to extractive industries. In doing so, states must recognise the authority of indigenous populations/communities in this process to manage conserve, and develop their resources according to their own customary institutions and law."[11]



Launch of the 2017 report on Extractive Industries, Land Rights and Indigenous Populations/ Communities' Rights at the 61st Ordinary Session of the ACHPR. Credit: IWGIA

11 ACHPR, Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights: East, Central and Southern Africa, Adopted by the ACHPR at its 58th Ordinary Session (2017), p. 132.

In line with the above report, the ACHPR has recently issued resolutions reaffirming the rights of Indigenous Peoples to land, FPIC, participation, governance, and use of their natural resources. In its Resolution 490 of December 2021, the ACHPR urged State Parties to the African Charter to adopt policies and laws safeguarding Indigenous Peoples' rights to customary ownership and control over their lands and to recognize Indigenous lifestyles, especially hunting and pastoralism, as well ensure that legislation governing the granting of concessions includes provisions on consultation and consent in accordance with international human rights standards.[12]

Among other important points, Resolution 490 also urged State Parties, together with extractive industries, to: develop and implement national public participation models that ensure full participation of all citizens, including Indigenous populations/communities; ensure that Indigenous Peoples actually or potentially impacted by business activities have complete and timely access to relevant information in order to participate effectively in decision-making processes; ensure and require that, in addition to an environmental assessment, a participatory social, cultural, economic and human rights impact assessment is conducted prior to the implementation of any extractive activities in Indigenous community lands; recognize Indigenous Peoples' customary laws and conflict resolution mechanisms; and undertake capacity-building that enables Indigenous Peoples to develop their own representative structures to ensure effective participation in decision-making processes.[13]
Additionally, the ACHPR also recently issued Resolution 489 on the Recognition and Protection of the Right of Participation, Governance and Use of Natural Resources by Indigenous and Local Populations in Africa. In said Resolution, it called on the African States to recognize Indigenous populations' and communities' rights "over the conservation, control, management and sustainable use of their natural resources including wildlife" and urged them to "take the necessary measures to strengthen community governance and institutions."[14]

ii. African Court on Human and Peoples' Rights

With regard to the African Court on Human and Peoples' Rights, there are references to Indigenous consultation in its ruling in the case brought by the Ogiek Indigenous people against Kenya. The case centred on the lack of recognition of the ancestral land rights of the Ogiek stemming from an eviction notice issued by the Kenya Forestry Service in 2009, which required the Ogiek and other settlers to leave the Mau Forest within 30 days.[15] The case also dealt with the States' lack of recognition of the Ogiek as an Indigenous people.

In analysing the State's action in light of Article 14 of the African Charter dealing with the right to property, the Court had to determine if the justification for restricting that right was justified under the requirements of necessity and proportionality for a public interest purpose as stated in the Charter. The State's public interest justification for evicting the Ogiek from the Mau Forest (preservation of the natural ecosystem) was not deemed justified as there was no evidence presented that the Ogiek's

12 ACHPR, 490 Resolution on Extractive Industries and the Protection of Land Rights of Indigenous Populations/Communities in Africa, 5 December 2021, Resolution points 1, 2.

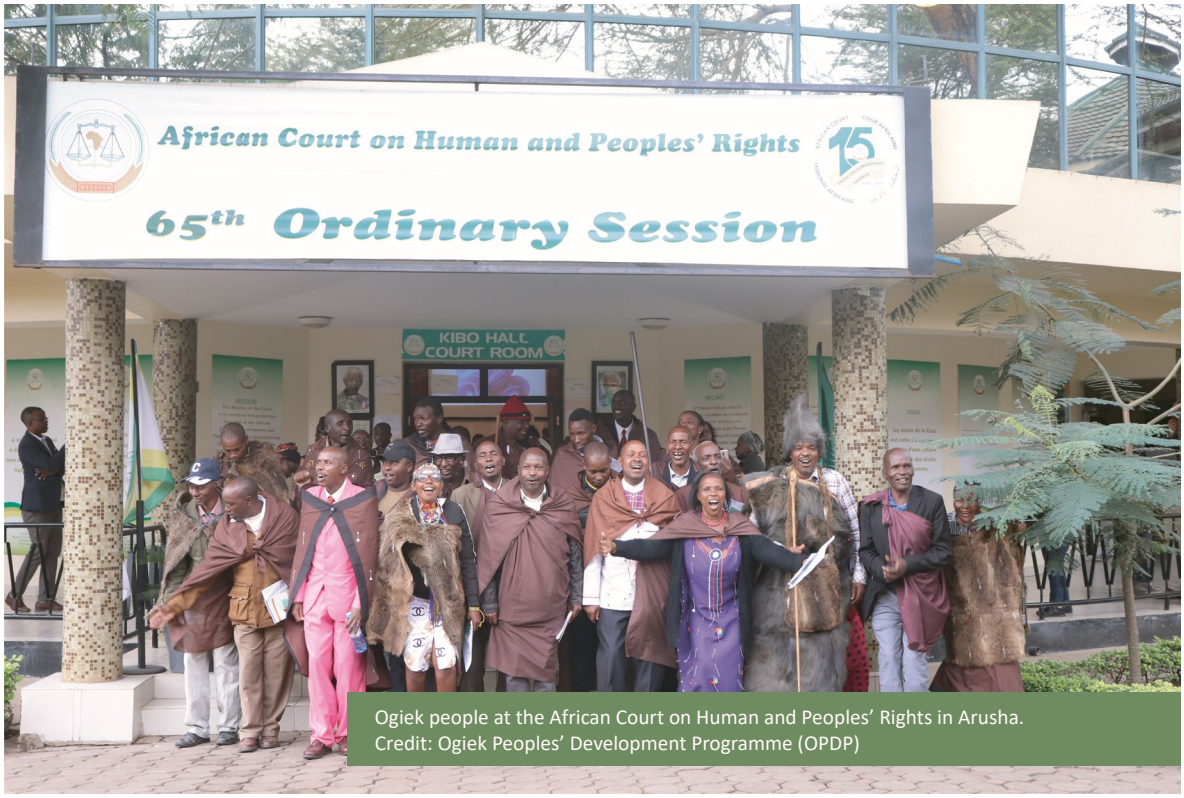
13 Ibid., Resolutions points 3-6.

14 ACHPR, 489 Resolution on the Recognition and Protection of the Right of Participation, Governance and Use of Natural Resources by Indigenous and Local Populations in Africa, 5 December 2021, Resolution points 1, 2.

15 African Ct HPR, African Commission on Human and Peoples' Rights v. Republic of Kenya, Application No. 006/2012, Judgment 26 May 2017, para. 3.

continued presence in the area was the cause of environmental degradation. In fact, reports prepared by or in collaboration with the government revealed the main causes of degradation were land encroachment by other groups and government excisions for settlements and logging concessions. Consequently, the Court held that "by expelling the Ogieks from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent [State] violated their rights to land […] as guaranteed by Article 14 of the Charter read in light of the United Nations Declaration on the Rights of Indigenous Peoples of 2007." [16]

In the Ogiek case, the applicant also claimed violation of Article 22 of the Charter on the right of all peoples to their economic, social and cultural development by evicting the Ogiek from their ancestral territory without consulting them and seeking their consent. The applicant pointed out that fulfilment of this right would entail establishing a framework for the realization of this right through procedural and substantive processes of consultation and participation. The Court held that continued evictions of the Ogiek from the Mau Forest without effective consultation was adversely impacting their economic, social and cultural development. It also determined that the Ogiek had not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.[17]



Ogiek people at the African Court on Human and Peoples' Rights in Arusha.
Credit: Ogiek Peoples' Development Programme (OPDP)

16 Ibid., paras. 122-131. The Court analyzed the right to property in light of Article 26 of UNDRIP recognizing the right of Indigenous Peoples to the lands, territories and resources they have traditionally owned, occupied or otherwise used or occupied.

17 Ibid., paras. 202, 203, 210.

Although, in its decision in the Ogiek case, the Court does not go further in specifically stating free, prior and informed consent as the objective of consultations, the decision represents an important entry point for the further incorporation of international standards on Indigenous Peoples. Conceivably, future cases could define the contours of the rights to consultation and free, prior and informed consent. Consequently, the ACHPR's Endorois decision, the African Court's judgment in the Ogiek case and resolutions issued by the ACHPR should be viewed as authoritative interpretations of the African Charter, in line with, and to be complemented by, current developments in international law on Indigenous Peoples' rights. This shows the application and relevance of the UNDRIP and jurisprudence of universal and other regional human rights bodies within the context of Indigenous Peoples in Africa.

c. Comparative experiences in the recognition and implementation of Consultation and Free, Prior and Informed Consent

i. Developments in the Latin America Region

As noted earlier, major legislative, policy and jurisprudential developments and initiatives have occurred in the Latin America region with regard to the implementation of international standards on consultation of Indigenous Peoples. A major factor behind these developments has been that ILO Convention 169 has been widely ratified by the majority of Latin American countries. UNDRIP has also played an influential role, as evidenced by Bolivia's adoption of the Declaration in its entirety as part of its domestic legislation.

Since the 1980s, there have been significant advances in the constitutional recognition of Indigenous Peoples' rights, which have occurred as part of a regional trend that saw the recognition of the multicultural, pluricultural and plurinational nature of nations, for example in Bolivia, Ecuador and Mexico. In this context, there has been express constitutional recognition of the right to consultation in the constitutions of the Plurinational State of Bolivia and Ecuador. Other constitutions do not explicitly recognize the right to consultation but contain important related rights. This includes the Colombian Constitution of 1991, as well as that of Brazil and Guatemala.

In terms of legislation, Peru was the first country to enact a Consultation Law in 2011, and its Regulations in 2012. In Colombia, there have previously been Executive Decrees on Indigenous consultation which, however, were deemed unconstitutional by the Constitutional Court. In Bolivia, the Hydrocarbons Law contains provisions on Indigenous consultation. Provisions on Indigenous consultation have also been included in regulations related to environmental assessments. Elsewhere in the region, there have been proposed legislative initiatives on consultation in Colombia, Guatemala, Honduras and Mexico.

In addition to legislation, the constitutional and high courts of various of these same countries have interpreted domestic legislation and international standards on consultation. In some countries, "Constitutional litigation has been, and continues to be, crucial to untangling political process, especially when regulatory debate and development comes to a standstill or encounters resistance from certain actors."[18]

ii. Consultation standards within the inter-American system

The inter-American human rights system has played an important role in the Americas with regard to further analysis and interpretation

18 Due Process of Law Foundation, OXFAM, Right to Free, Prior and Informed Consultation and Consent in Latin America: Progress and challenges in Bolivia, Brazil, Chile, Colombia, Guatemala and Peru (Executive Summary), OXFAM, 2015 p. 10.

of the content and scope of consultation and FPIC standards. In the 2007 Case of Saramaka People v. Suriname, the Inter-American Court of Human Rights determined consultation as one of three safeguards that States must provide to Indigenous and tribal peoples in the context of concessions affecting their collective property rights. It analysed consultation and consent within the framework of the right to property under Article 21 of the American Convention on Human Rights. Thus, it held that "regarding large-scale development or investment projects that would have a major impact within [an indigenous] territory, the State has a duty, not only to consult [them], but also to obtain their free, prior and informed consent, according to their customs and traditions."[19]

Visit to Brazil by the Inter-American Commission on Human Rights (IACHR).
Photo: IACHR

19 IACtHR, Case of the Saramaka People v. Suriname, Judgment of November 28, 2007, (Preliminary Objections, Merits, Reparations and Costs), para. 134

In the 2012 Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, the Inter-American Court analysed the right to consultation in relation to both the right to communal property and the right to cultural identity. After examining how Indigenous consultation was recognized in the legislation, policies, jurisprudence and other practices of States both within and outside the inter-American system, the Inter-American Court held that "the obligation to consult, in addition to being a treaty-based provision, is also a general principle of international law".[20] It further stated that the obligation to consult Indigenous Peoples on any administrative or legislative measures that may affect their rights must be undertaken through special and differentiated consultation processes that "respect the particular consultation system of each people or community, so that it can be understood as an effective interaction with State authorities, political and social actors and interested third parties." [21] In addition, the obligation to consult Indigenous and tribal peoples:

> "entails the duty to organize appropriately the entire government apparatus and, in general, all the organizations through which public power is exercised, so that they are capable of legally guaranteeing the free and full exercise of those rights. This includes the obligation to structure their laws and institutions so that indigenous, autochthonous or tribal communities can be consulted effectively, in accordance with the relevant international standards. Thus, States must incorporate those standards into prior consultation procedures, in order to create channels for sustained, effective and reliable dialogue with the indigenous communities in consultation and participation processes through their representative institutions." [22]

Another important component of consultation addressed by the inter-American system is the need for prior social, cultural and environmental impact assessments regarding development and investment activities likely to affect Indigenous Peoples' rights. This also follows from ILO 169, which states in Article 7(3) that studies are needed to evaluate the social, spiritual and environmental impact that development activities may have. Further, the results of these studies should be fundamental criteria for the implementation of those activities.

It was in the Saramaka case that the Inter-American Court first held that States should guarantee that no concessions be granted until independent and capable entities, under State supervision, had undertaken a social and environmental impact assessment.[23] These should go beyond the kinds of impact assessments commonly found in national environmental legislation or that are commonly undertaken by private companies. As further clarified by the Inter-American Commission on Human Rights (IACHR), these impact assessments should seek to identify the direct and indirect impacts on the lifestyles of the Indigenous Peoples that depend on that territory and the impacts on the resources they use for their subsistence.[24] In addition, another important objective of these impact assessments is:

> "the identification of the rights that correspond, or that might correspond, to indigenous peoples over the lands and natural re-

20 IACtHR, Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment of June 27, 2012, (Merits and reparations), para. 164.

21 Ibid., para. 165.

22 Ibid., para. 166 (footnotes omitted).

23 IACtHR, Saramaka Case, para. 130.

24 IACHR, Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser.L/V/II ["IACHR Lands and Resources Jurisprudence Report"], 30 December 2009, para. 254.

> sources that will be directly or indirectly affected by investment or development projects at hand [.] This way, if environmenta and social impact assessments identify claims to indigenous communal property that have not been previously registered by the State, the execution of the project should be suspended until said claims have been duly determined through adequate procedures."[25]

These studies are intended to ensure that Indigenous Peoples have full knowledge of the possible health and environmental risks and can provide their opinion knowingly and voluntarily.[26] These assessments should respect Indigenous Peoples' traditions and cultures and be completed before the granting of a licence or concession. This would ensure that Indigenous Peoples are informed about all projects proposed in their territories and that they can participate in the decision-making process related to the concessions.[27] The Inter-American Commission has also emphasized Indigenous Peoples' participation in these impact assessments, pointing out that these necessarily require Indigenous Peoples' knowledge, as they are better able to identify said impacts and the possible alternatives and mitigation measures.[28]

iii. Challenges in the effective implementation of Consultation in Latin America

Despite the important level of activity in Latin America with regard to the legislation and regulation of Indigenous Peoples' consultation and the developments in inter-American jurisprudence, the actual implementation of consultation as a human rights safeguard has been less than satisfactory for Indigenous Peoples in the region. The previous U.N. Special Rapporteur on the rights of indigenous peoples addressed the challenges and lessons learned from the implementation of international standards on consultation and FPIC in the Latin America region.

One of the first challenges identified by the former Special Rapporteur was the tendency of State and business actors in the region to base consultation exclusively on a restrictive interpretation of ILO 169 and from the standpoint of labour or employment matters. The Special Rapporteur emphasized the need to understand consultation and FPIC as a matter of international human rights law, which is based on a much broader body of legal sources. The other legal sources referred to include various instruments and resolutions, particularly UNDRIP, as well as jurisprudence and authoritative interpretations developed by international and regional human rights systems.[29]

In addition, consultations with Indigenous Peoples need to be understood as the basis of a new model of relations, dialogue and cooperation between Indigenous Peoples and States. Indigenous consultations are not equivalent to standard procedures for notice and comment available to the general public. Differentiated consultation procedures that are appropriate to their distinctive characteristics and that can adequately address Indigenous Peoples' specific concerns are therefore required.[30] This is largely due to the historical and political context of marginalization, discrimination and exclusion that Indigenous Peoples have faced.

The former Special Rapporteur also highlighted the tendency to conceive of consultations "as mere formalities or procedures to provide information about measures or projects that

25 Ibid., paras. 248, 249.

26 Case of Saramaka Peoples v. Suriname, Interpretation of Judgment, 12 August 2008, para. 40.

27 Ibid., para. 41.

28 IACHR Lands and Resources Jurisprudence Report, paras. 267.

29 Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/45/34, 18 June 2020, para. 48.

30 Ibid., para. 50.

have previously been designed and approved by State and business actors".[31] In this sense, Indigenous consultations are not a singular or one-time event but a continuous process whereby States both accept and disseminate information, a process that entails constant communication between the parties.[32] In the context of extractive projects, "consultation and consent may be necessary at different stages – from impact assessment to exploration to production to project closure".[33]

The main point of debate and disagreement regarding Indigenous consultation, as observed by the former Special Rapporteur, has been the binding nature of its results and, particularly, the criticism by State and business actors that FPIC amounts to a veto power. However, "[r]educing the principle of consultation and consent to a debate about the existence of a veto power would amount to losing sight of the spirit and character of these principles which seek to end historical models of decision-making regarding indigenous peoples that have excluded them and threatened their survival as peoples".[34]

The Special Rapporteur observed that under the principles of progressive realization and non-regression of human rights, obtaining free, prior and informed consent should be understood as the objective of consultations and an obligation where there are significant impacts on Indigenous Peoples' human rights. [35] Along the same lines, the Inter-American Commission on Human Rights has pointed out that labelling FPIC as a veto power implies accepting the forcible imposition of activities or initiatives by the State, which would not be appropriate from the standpoint of an inclusive democracy, and would undermine Indigenous Peoples' right to self-determination. Thus, if Indigenous Peoples oppose a decision that they consider to be seriously detrimental to their rights, this is not a "veto" but the exercise of their self-determination.[36]

In view of the above, the Special Rapporteur observed problems with proposed and existing legislation on the right to consultation and how consultation processes have been executed throughout the Latin America region. As stated by the Special Rapporteur, "the problem lies in the fact that consultation laws and procedures themselves were not developed with the participation of indigenous peoples".[37]

d. Experiences in the development of FPIC Protocols and other governance instruments in Latin America

Throughout the Latin America region, the dissatisfaction felt by Indigenous Peoples with the legal and other initiatives promoted by governments with regard to Indigenous consultation has prompted Indigenous Peoples to develop their own autonomous consultation and consent protocols. The IACHR has taken

31 Ibid., para. 51.

32 Ibid., para. 51, citing IACtHR, Case of the Saramaka People v. Suriname, Judgment of November 28, 2007, (Preliminary Objections, Merits, Reparations and Costs), para. 133.

33 Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/45/34, 18 June 2020, para. 51; Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples, A/HRC/24/41, 1 July 2013, para. 67.

34 Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/45/34, 18 June 2020, para. 59.

35 Ibid., para. 51; Report of the Special Rapporteur on the rights of indigenous peoples: Extractive industries and indigenous peoples, A/HRC/24/41, 1 July 2013, para. 60.

36 IACHR, Right to self-determination of Indigenous and Tribal Peoples, OAS/Ser.L/V/II. Doc. 413, 28 December 2021, para. 190.

37 Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/45/34, 18 June 2020, para. 64.

38 IACHR, Right to self-determination of Indigenous and Tribal Peoples, OAS/Ser.L/V/II. Doc. 413, 28 December 2021, para. 300.

note of the growing interest of Indigenous Peoples in the Americas in developing their own consultation protocols. For the Indigenous Peoples of the region, the power and authority to develop these protocols derive from their right to self-determination and international instruments, including ILO 169, UNDRIP and the American Declaration on the Rights of Indigenous Peoples.[38]

Visit to Brazil by the Inter-American Commission on Human Rights (IACHR).
Photo: IACHR

One of the countries in which this practice has proliferated is Brazil. As noted by the IACHR, since 2014, various protocols have been developed by Indigenous, traditional and Afro-descendent peoples and communities in Brazil through various means, including written, oral, and audio-visual. Up until 2021, there were 13 protocols developed by Afro-Brazilian Quilombola communities, 25 by Indigenous Peoples, 1 joint protocol between Indigenous and Quilombola communities that share a territory, and 14 protocols by traditional fishing or coastal communities, including fishers, river-dwellers and Calon-Roma communities. Several biocultural protocols have also been developed concerning traditional knowledge and biodiversity issues.[39]

These protocols have served to inform States and other actors about the internal rules, norms and procedures for undertaking consultations, as well as the forms of organization and decision-making processes and structures of the respective Indigenous and Afro-descendent tribal peoples.[40] As another study on Latin America noted, "The terms 'FPIC protocol'

38 IACHR, Right to self-determination of Indigenous and Tribal Peoples, OAS/Ser.L/V/II. Doc. 413, 28 December 2021, para. 300.

39 Ibid., para. 298. See also, Autonomous Protocols Observatory Website.

40 IACHR, Right to self-determination of Indigenous and Tribal Peoples, OAS/Ser.L/V/II. Doc. 413, 28 December 2021, para. 297.

or 'autonomous protocols' – among others such as regulatory or normative frameworks, policies, guidelines or manifestos – are used by indigenous peoples as shorthand to describe documents that formalize their engagement rules and procedures in relation to consultations aimed at obtaining their FPIC".[41]

It is worth noting the observation by Doyle, Whitemore and Tugendhat that Indigenous FPIC protocols in various Latin American countries have:

> "demonstrated their potential to contribute to tackling critical shortcomings in existing law and practice around consultation and consent. They have acted as tools for resistance, challenging the absence of, or flaws in, consultation processes and establishing standards and procedures with which future consultation processes must comply. Their legitimacy in this regard has been recognized by national courts as well as local, national and international oversight bodies. The autonomous development of FPIC protocols has opened spaces for reflection and dialogue among and between indigenous peoples […] This has allowed indigenous peoples to address how they wish to take decisions when confronted with powerful external actors seeking to operate in their territories, and has contributed to addressing the significant power imbalances that generally occur between indigenous peoples and external actors proposing projects of economic interest to the State. It has provided them the time and freedom necessary to articulate what consultation and FPIC mean in their own terms".[42]

Another important contribution of the development of consultation and consent protocols is that they have complemented other self-government and territorial defence strategies employed by Indigenous Peoples. In the case of the Wampis Nation in Peru, for example, this has accompanied the establishment of its own autonomous statute and affirmation of its integral territory.[43]

In line with the above, FPIC protocols can also be complemented with other important practices, such as Life Plans (planes de vida) – a practice that some Indigenous Peoples in the Latin America region have also developed. In Colombia, Indigenous Peoples implemented this practice as a means to exercise the rights to cultural diversity and pluralism recognized in Colombia's Constitution of 1991, as well more recent normative instruments that helped consolidate the recognition and functioning of autonomous governments in Indigenous reserves. A Life Plan is understood to be a guideline for the management of an Indigenous territory based on an Indigenous people's cultural foundations or "Law of Origin". In the Colombian Amazon, Indigenous Peoples have used these instruments to state their reflections and decisions on cultural, social, economic, environmental and political matters. It can include information on "purposes, ways of organization, functions as special authorities, mechanisms of operation and financing, as well as the actions necessary to achieve common purposes".[44] Life Plans can be a means for Indigenous Peoples to promote public policies and articulate mechanisms for coordinating functions with other State entities and other national and regional planning processes.[45]

The IACHR has also made reference to Life Plans as an important expression of the right of Indigenous and tribal peoples to self-determination. It noted the case of the Boca Pariamanu Indigenous community in the Peruvian Amazon. This community's Life Plan is

41 C Doyle, A Whitemore & H Tugendhat (2019) (eds), Free Prior Informed Consent Protocols as Instruments of Autonomy: Laying the Foundations for Rights based Engagement (Infoe, ENIP), p.8.

42 Ibid., pp. 9-10.

43 Ibid., p.85.

44 Gaia Amazonas website, "What is the Indigenous Life Plan?"

45 Ibid.

conceived as a community work plan for the defence of their rights, a development planning tool based on their own worldview and a roadmap for dialogue and coordination with the Peruvian State. The community engages in a periodic revision and updating of its Life Plan to address any new challenges with regard to the protection of land rights, natural resource management, conservation, education, food security and other sustainable economic activities. Similar to the case in Colombia, the Boca Pariamanu community aims to articulate its Life Plan with the development plans of municipalities and regional governments so that it can be incorporated into regional polities and budgets.[46]

3. The implementation of FPIC in Africa

a. Recognition of Indigenous Peoples: A fundamental problem

In the regional consultations and meetings held for the undertaking of this study, as well as the written sources reviewed, a consistent problem highlighted is the lack of recognition by most, albeit not all, African States of the existence of Indigenous Peoples. This relates, in particular, to their objection to the application of international Indigenous rights standards on collective, land, natural resource, self-determination and other rights to particular ethno-cultural groups. This presents a fundamental problem and significant barrier for the conceptualization and implementation of FPIC, bearing in mind that States are the primary duty-bearers of guaranteeing consultation and consent rights under international human rights. However, the African Regional Human Rights System has clearly and explicitly recognized Indigenous Peoples in Africa, providing criteria for their identification and thus spelling out the corresponding obligations to recognize, respect and protect their distinct cultures, identities and their special relationships with their lands, as well as to consultation and FPIC.

Session of the African Commission on Human and Peoples' Rights, based in Banjul, The Gambia.
Credit: IWGIA

46 IACHR, Right to self-determination of Indigenous and Tribal Peoples, OAS/Ser.L/V/II. Doc. 413, 28 December 2021, paras. 271-273, citing FENAMAD, COINBAMAD, AFIMAD, Plan de Vida de la Comunidad Nativa Boca Pariamanu, Período 2014-2018.

A view held by most, albeit not all, African governments is that all Africans are Indigenous. Indeed, concerns over the use of this term, which they view as only applicable to other regions like the Americas, as well as related rights to self-determination, were a major factor of resistance to the adoption of the UNDRIP. The ACHPR has previously clarified that the term Indigenous as applied in Africa does not mean the "first inhabitants" of the continent nor refer to their "aboriginality" in relation to non-African communities or those coming from elsewhere.[47]

In the case of North African countries, where the Amazigh are the main Indigenous people, the prevailing practice by governments has been a denial of the Amazigh's Indigenous status, their language and culture and a constant effort to assimilate or "Arabize" all cultural groups within their respective borders. In Tunisia, the 2014 Constitution that followed the 2011 "revolution", refers only to the "Arab and Muslim identity" of Tunisian citizens and calls for national unity, but only through the Arabic language and Islam as religion. Thus, the Amazigh do not exist for the Tunisian State.[48] In Morocco, some progress was made with the 2011 Constitution, which officially recognizes the Amazigh identity and language. In 2019, an organic law for the implementation of the Constitution's recognition under Article 5 on the Amazigh language as an official language was adopted. However, this recognition of the Amazigh is still theoretical as teaching of Amazigh language and its use in official documents is still pending.[49]

As has been noted in the case of Morocco, the Amazigh are not recognized as an Indigenous people because that would entail recognition of their right to lands, territories and natural resources. In seeking national unity, the Moroccan government has confounded self-determination with separatism.[50] In Algeria, the ACHPR has expressed concern that the government has classified the Amazigh Movement for the Self-Determination of Kabylia, and other political movements calling for an autonomous status for Kabylia (a region with predominantly Amazigh population), as terrorist movements, leading to serious repression and incarceration of members of this movement.[51] This situation in North Africa is indicative of the challenges in recognizing Indigenous status and self-determination as advocated by the Indigenous Peoples of the continent.

The ACHPR has addressed the misunderstandings surrounding the use of the term "Indigenous Peoples". including the misconception that protection of Indigenous rights would give special rights to some ethnic groups over and above the rights of other groups within a State. As pointed out by the ACHPR, the issue is not that certain groups have special rights but that "certain marginalized groups are discriminated in particular ways because of their particular culture, mode of production and marginalized position within the state. A form of discrimination that other groups within the state do not suffer from."[52] The use of the term "Indigenous Peoples" by certain marginalized groups is not to deny all other Africans their legitimate claim and identity. What these groups assert is the present-day international law understanding of Indigenous Peoples "because it is a term by which they can very adequately analyse the particularities of their sufferings and by which they can seek protection

47 ACHPR, Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, Adopted at its 41st Ordinary Session (May 2007) ["ACHPR Advisory Opinion"], para. 13.

48 Belkacem Lounes, Tunisia (Country Report), in IWGIA, The Indigenous World 2022, IWGIA: Copenhagen, pp. 140-141

49 Amina Amharech, Morocco (Country Report), in IWGIA, The Indigenous World 2022, IWGIA: Copenhagen, p. 93.

50 Ibid., p. 94.

51 Belkacem Lounes, Algeria (Country Report), in IWGIA, The Indigenous World 2022, IWGIA: Copenhagen, pp. 29, 34.

52 ACHPR, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, Adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session, (2005)["ACHPR Working Group of Experts Report 2005"], p. 88.

in international human rights law and moral standards."[53]

As explained by the ACHPR, a particular characteristic of the groups that self-identify as Indigenous is that their cultures and ways of life differ considerably from the dominant societies and that they are under great threat. The survival of their culture and way of life depends on access and rights to their traditional lands and natural resources.[54] This last point is one of the key fundamental differences between the nature of rights recognized in international human rights law related to Indigenous Peoples and that relating to minority or other population groups. The ACHPR correctly points out that "Indigenous rights are clearly collective rights, even though they also recognize the foundation of individual human rights."[55] Collective rights to land, territory and natural resources are central elements in the Indigenous rights regime – rights that are not contained, for example, in the UN Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. These collective land and natural resource rights "are one of the most crucial demands of indigenous peoples – globally as well as in Africa – as they are closely related to the capability of those groups to survive as peoples and to be able to exercise other fundamental collective rights such as the right to determine their own future, to continue and develop on their own terms their mode of production and way of life and to exercise their own culture."[56]

Furthermore, the ACHPR has emphasized that it is of great importance to address the particular human rights situation faced by the groups identifying as Indigenous in the present-day decolonized and multicultural African States. In that sense, all groups and their distinctive cultural, social and other characteristics should be respected in order for them to flourish in a truly democratic spirit. As pointed out by the ACHPR, this prevents the type of conflict that arises when the rights and identities of certain ethnic groups are ignored or undermined by others. The rich ethnic and multicultural diversity within African States should therefore be seen as an asset and not a source of tension and conflicts.[57]

In line with the above discussion, the ACHPR has emphasized the following constitutive elements or characteristics of Indigenous Peoples in Africa:

> 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 peoples;
>
> c) A state of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.[58]

In addition, the ACHPR issued an Advisory Opinion on the UNDRIP that addressed African States' concerns regarding the right to self-determination of Indigenous Peoples. The ACHPR pointed out that the right to self-determination "has evolved with the development of the international visibility of the claims made by indigenous populations whose right to self-determination is exercised within the standards and according to the modalities which are

53 Ibid., p. 88.

54 Ibid., p. 89.

55 See the ACHPR's analysis in this regard, in ACHPR Working Group of Experts Report 2005, pp. 95-97.

56 Ibid., p. 97.

57 Ibid., pp. 88-89, 102-103.

58 ACHPR Advisory Opinion, para. 12.

compatible with the territorial integrity of the Nation States to which they belong."[59] In evaluating communications and complaints on this topic, the ACHPR has stated that Indigenous populations could exercise the right to self-determination in accordance with all the forms and variations compatible with the territorial integrity of State Parties.[60] As per the ACHPR Advisory Opinion, self-determination as espoused in the UNDRIP and by the international Indigenous Peoples' movement is not the same as that stemming from Resolution 1514(XV) (1960) applicable to populations and territories under colonial dominance or foreign occupation.[61] Consequently, it is not the same concept of self-determination that led to the creation of independent nation states during the process of decolonization.

As explained by the ACHPR, the right to self-determination in its application to Indigenous populations and communities, both at the UN and regional levels, should be understood to include a series of rights involving:

> "[T]he full participation in national affairs, the right to local self-government, the right to recognition so as to be consulted in the drafting of laws and programs concerning them, to a recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their culture. It is therefore a collection of variations in the exercise of the right to self-determination, which are entirely compatible with the unity, and territorial integrity of State Parties."[62]

In line with the ACHPR's approach to the use of the term "Indigenous", it is also worth highlighting the purpose of the standards contained in instruments such as the UNDRIP and other international sources. These instruments address the human rights situations and concerns of specific groups of peoples that seek the perpetuation of their distinct cultural identities, social and political institutions that are invariably connected to their ancestral lands. As previously pointed out, Indigenous consultation and consent standards seek to reverse the exclusion of Indigenous Peoples from decision-making processes that have affected their rights.

The above understanding of the concept of Indigenous Peoples in Africa and of the scope and content of the right to self-determination is important in applying FPIC in the African context. Self-determination, in the terms explained by the ACHPR, is an important underlying basis of consultation and FPIC, and should be a major point of reference for addressing the challenges Indigenous Peoples face in the context of projects and activities that affect their rights.

b. Challenges and possibilities in the implementation of FPIC

i.FPIC and land rights issues in extractive, infrastructure and other investment projects

The Working Group on Indigenous Populations/Communities (WGIP) of the ACHPR (since August 2020 known as the Working Group on Indigenous Populations/Communities and Minorities in Africa) addressed the challenges that Indigenous Peoples in Africa face in the context of extractive, energy, agro-industrial, infrastructure and other development projects in its 2017 Report on Extractive Industries, Land Rights and Indigenous Populations'/ Communities' Rights. The WGIP Report examined the impacts of extractive and similar

59 Ibid., para. 22.

60 ACHPR Advisory Opinion, para. 23, citing, Communication 75/92 of 1995 – the Katangese People Congress v. Zaire, reported in the 8th Annual Activity Report of the ACHPR.

61 ACHPR Advisory Opinion, para. 26.

62 Ibid., para. 27.

activities on the land and natural resource rights of Indigenous Peoples, and the extent to which African States are promoting, protecting and fulfilling these rights, including the right to free, prior and informed consent in line with international and regional human rights standards.[63] In addition to international human rights standards related to extractive industries, including FPIC, the WGIP examined extractive and other industry impacts on Indigenous Peoples in Uganda, Namibia, Kenya and Cameroon. These country case studies provide different dimensions of the challenges in recognizing land rights and FPIC throughout the African continent.

Launch in Uganda of the Report on Extractive Industries, Land Rights and Indigenous Populations'/ Communities' Rights. Credit: IWGIA

The WGIP's examination of Uganda evidences the challenges in implementing FPIC that stem from the insufficient protection of recognized community land rights in the face of mining interests. It noted that, in principle, the Ugandan Constitution provides for the recognition and formalization of customary land tenure, and its 1998 Land Act provides that groups of persons can form Communal Land Associations. However, in practice, the government has been slow in issuing certificates of customary ownership and no communal land association had been registered as of the date of that study. These domestic land rights provisions are, however, affected by State mining interests and domestic mining legislation stating that sub-surface minerals are vested in the government. Sub-surface and surface rights are treated as two independent legal interests. Mining rights, such as prospecting or exploration licences, can be awarded without consultation of the surface landowners.[64]

The mining legislation provides that a mineral right shall not adversely affect the interests of the surface owner, and compensation is to be provided for damage inflicted on the surface because of a sub-surface interest. If a landowner is not satisfied with the compensation offered by a mineral right holder, the matter

63 ACHPR, Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights: East, Central and Southern Africa, Adopted by the ACHPR at its 58th Ordinary Session (2017).

64 Ibid., pp. 74-76.

can be sent to arbitration. It is thus apparent that, in this legal framework, the issue of compensation can be disputed but a landowner cannot withhold consent for a proposed mine. However, the landowner protections afforded by the Mining Act apply only to lawful owners or occupiers of land. As observed by the WGIP, "[g]iven that indigenous populations/communities' lands are typically owned under communal tenure and that no communal land associations have been registered by the government, it does not seem possible for indigenous populations/communities to protect their rights to their lands and they are therefore extremely vulnerable to defending their lands from business interests."[65]

A major concern pointed out in the WGIP Report is the prevailing attitude of the Ugandan government, which has encouraged mining business interests to operate despite the presence of surface landowners. In addition, the government has been more willing to recognize individual customary land claims than communal claims, which can be interpreted as an official preference for individual ownership. The official government criticism and discouragement of Indigenous pastoralist practices adds to this problem, thus making Indigenous land tenure practices and rights precarious.[66] In this context, the adequate implementation of international standards on FPIC is difficult.

In Namibia, the WGIP Report also found that the nature of communal land rights afforded by domestic legislation presented limitations for the assertion of ancestral land rights by Indigenous Peoples in the context of extractive industries. The former UN Special Rapporteur on indigenous peoples noted that, in Namibia, communal landholders only enjoy usufruct but not full ownership rights, in contrast to the freehold titles typically held by private commercial farms. The communal lands of the San and other Indigenous groups are under continuous threat of encroachment by larger and more powerful groups who move onto their lands.[67] Furthermore, these land-use rights are allocated and administered by local chiefs and councillors incorporated into the local government and paid under the Traditional Authorities Act of 2000. Traditional Authorities and regional Communal Land Boards reporting to the Ministry of Lands and Resettlement therefore share legal authority to allocate and administer communal lands.[68]

Indigenous communities in Namibia have also resorted to incorporating themselves as communal conservancies and community forests as a way of securing certain ownership rights over natural resources. Yet, rights to wildlife and game under conservancies, and to forests and grasslands, in the case of community forests, do not extend to the land itself, which remains under State ownership and managed by the Traditional Authorities and Communal Land Boards. This limits the ability of Indigenous traditional authorities to control their lands and resources.[69]

Under Namibian law, mineral resources belong to the State. The Mineral Act 1992 provides compensation for landowners whose lands are damaged due to exploration or extraction operations. However, since most Indi-

65 Ibid., pp. 77.

66 Ibid., pp. 87.

67 Ibid., p. 92, citing UNHRC (2013), Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: The situation of indigenous peoples in Namibia, A/HRC/24/41, para. 24.

68 ACHPR, Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights: East, Central and Southern Africa, Adopted by the ACHPR at its 58th Ordinary Session (2017), p. 88, citing S. Harring and W. Odendaal (2012), 'God stopped making land!': Land rights, conflict and law in Namibia's Caprivi Region, LAC, Windhoek, Namibia, p. 6.

69 ACHPR, Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights: East, Central and Southern Africa, Adopted by the ACHPR at its 58th Ordinary Session (2017), p. 91.

genous Peoples live on communal lands, and these are also vested in the State, this compensation would be available only to the State. As noted by the WGIP Report, "despite the fact that communities manage resources through community forests and conservancies, they have no control over whether extractive industry activities take place in their forests or conservancies and have no grounds for compensation."[70]

The WGIP mentioned the difficulties that San communities in Namibia that are incorporated as conservancies have faced in protecting their lands from invasions by outside cattle grazers, illegal fencing by land encroachers, and diamond mining. Affected Indigenous San communities are not consulted and have no participation in that process. As the WGIP Report observes, the exploratory licences are awarded by the Ministry of Mines and Energy. The entity that regulates conservancies, the Ministry of Tourism and Environment is the one to which environmental impacts assessments are submitted. This has generated great concern over the effects on the ecosystems, and the tourism and other business interests connected to the conservancies.[71]

As noted by the WGIP, this situation has forced the San in Namibia to navigate numerous legislative and institutional frameworks. However, neither framework resolves the key fundamental issue of the lack of their right to own and freely manage their lands and territories, which leaves them defenceless against external threats and the loss of their lands from illegal cattle grazers and extractive industries.[72]

In Morocco, the precariousness of Indigenous Amazigh land rights is evidenced by a series of dahirs (or laws imposed by the sultan, which gradually replaced the Azref or Amazigh customary law) that have marked the legal treatment of Amazigh lands for over a century. The Dahir of 27 April 1919 on collective lands recognized Amazigh "ethnic communities" and tribal lands but limited this right to a right of use, subject to State guardianship – mainly by the Ministry of the Interior.[73] Said law was replaced in 2019 by Law No. 62.17 on the administrative guardianship of soulaliyate (an Arabic word referring to descendants) communities and management of their property. In principle, the land provides for equal land rights for women and men. However, it is yet to significantly benefit Amazigh women.[74]

The 2019 Law has strengthened the Ministry of Interior's powers over collective lands; limited the use of custom and tradition in the management of those lands; provides for the sale and lease of lands to private or public actors for investment projects without the need for calls for tenders or bids and, if necessary, by mutual agreement upon decision of the Minister without needing to inform, consult or refer to the affected communities; and provided for the seizure of property in the "public interest" and the management of funds related to compensation, lease or sales by said Minister. The control given to the Minister of the Interior through this and other recent land laws has left communal landowners with no legal recourse, since any legal action against abuses by the Ministry would require the consent of the Central Council.[75]

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70 Ibid., pp. 91-2.

71 Ibid., p. 98.

72 Ibid., p. 101.

73 Amina Amharech, Acal El Hajeb, Groupe AZUL, et al, EMRIP: Rights to Land, Territory and Natural Resources of the Amazigh of Morocco, Submission to Expert Mechanism on the Rights of Indigenous Peoples (2020), p. 4.

74 Amina Amharech, Morocco (Country Report), in IWGIA, The Indigenous World 2022, IWGIA: Copenhagen, p. 95.

75 Amina Amharech, Acal El Hajeb, Groupe AZUL, et al, EMRIP: Rights to Land, Territory and Natural Resources of the Amazigh of Morocco, Submission to Expert Mechanism on the Rights of Indigenous Peoples (2020), pp. 5-6.

The Moroccan government has also facilitated investor access to lands through the liberalization of land markets. This has encouraged questionable land appropriation practices by investors and the rise of a "Land Mafia" monopolizing land throughout the country by fraudulent and illegal means. In this context, communal lands have also been lost to the agro-industrial sector without compensation.[76]

Regional sensitization seminar on the rights of Indigenous Populations/Communities in North Africa, held in Tunisia 2014. Credit: IWGIA

In Algeria, the Amazigh are also facing government actions that disregard rights to land, consultation and consent. In 2021, the government granted a permit to the Western Mediterranean Zinc (WMZ) company for zinc, lead and other mineral exploitation in a densely populated area in Kabylia. The first technical facilities have been set up by WMZ but the local population has not been consulted nor received any information on the content of the project or its economic, social, health and environmental impacts.[77]

Notwithstanding the importance of the existence of national legislation and policies that recognize Indigenous Peoples and their rights, it is a challenge to ensure the political will for the approval and implementation of domestic legal frameworks. In the Democratic Republic of Congo (DRC), one important development was the adoption of a law on the protection of Indigenous Pygmy peoples' rights by the National Assembly on 7 April 2021. It still requires review and adoption by the Senate before it is transferred to the President of the Republic for its promulgation and publication. It will enter into force six months after being published.[78]

The adoption of this law in the DRC has been a historic moment, as it is the result of over 20 years of efforts by Indigenous Peoples and civil society organizations to get Indigenous Peoples' rights recognized. The law provides

76 Amina Amharech, Morocco (Country Report), in IWGIA, The Indigenous World 2022, IWGIA: Copenhagen, pp. 95-96.

77 Belkacem Lounes, Algeria (Country Report), in IWGIA, The Indigenous World 2022, IWGIA: Copenhagen, pp. 31, 32.

78 Diel Mochire, Chouchouna Losale, et al, Democratic Republic of the Congo (Country Report), in IWGIA, The Indigenous World 2022, IWGIA: Copenhagen, p. 72.

for the recognition of their status as Indigenous Peoples as well as free health care, education, assistance before the courts and rights to lands and natural resources. It also provides for the creation of a "national fund" to finance these reforms, which is to be financed by the State, NGOs and foreign partners.[79]

However, as of the date of writing, the Senate is still reviewing the law. In the meantime, the Indigenous Pygmy peoples of the DRC are still enduring threats and attacks to their existence, their lands and ways of life. Their ancestral lands "are widely coveted, seized by large multinational extractive companies, armed groups and protected areas are created by the government without the consent of the indigenous populations."[80] An example of the latter problem is the grave situation faced by Batwa/Pygmy Indigenous Peoples affected by the creation of the Kahuzi-Biega National Park in the eastern region of DRC. The expansion of the park led to the confiscation of Indigenous lands and, in the period since 2018, there has been a concerted campaign of forced expulsions, which has reportedly led to the deaths of at least 20 Batwa community members and the rape of 15 Batwa women by park guards and soldiers in operations carried out in July and November-December 2021.[81] It is hoped that eventual promulgation and publication of the law on Indigenous Peoples in the DRC can provide the needed legal support for the protection of Indigenous land and natural resource rights in the context of protected areas, extractive and other outside interests that affect their rights and existence.

ii. Consultation and consent in domestic legal provisions on mineral, natural resources and customary law

A study commissioned by Oxfam examined laws and policies relevant to community consent in five southern African countries (Malawi, Mozambique, South Africa, Zimbabwe and Zambia). Although not limited specifically to Indigenous Peoples, it shows general patterns and trends in the region that impact the implementation of consultation and consent principles for communities in general. Although there was no explicit inclusion of FPIC in the domestic legislative frameworks of these countries, the study did find that some elements of consent and consultation are in some ways recognized in regulatory frameworks related to land and minerals and customary law, in ways that could potentially be used to benefit Indigenous and local communities with customary tenure. It noted, for example, that, at least on paper, written consent of the lawful occupiers is required in mining legislation in Malawi, South Africa, Zambia and Zimbabwe. However, the serious lack of implementation of these provisions has made them seem obsolete among communities and civil society.[82]

The aforementioned study noted that none of the constitutions in those countries require the consultation or consent of affected communities regarding specific development decisions. Mention is made of the Zimbabwean Constitution, which requires the involvement of the affected peoples in the formulation and implementation of development plans and

79 EURAC, Press Release – Victory for civil society in the DRC: Adoption of the law on the protection of indigenous Pygmy peoples and the launch of the PEUPLE project, 05 May 2021.

80 Ibid.

81 France 24, DR Congo Pygmies attacked in wildlife park: rights group, 06 April 2022.

82 Legal Resource Centre, Free, Prior and Informed Consent in the Extractive Industries in Southern Africa: An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia, Oxfam America, 2018, pp. 10-11.

requires that local communities benefit from resources in their areas.[83] On the other hand, constitutional and legislative provisions recognizing customary property rights and traditional communal authority structures in these five countries present both opportunities and challenges for the implementation of FPIC.

A major drawback in the customary property and law regime found throughout these countries is that a State still has the power to expropriate lands for certain purposes, such as for public purpose, utility, necessity, or interest. There are provisions for compensation for relocation, loss, or damage to an interest in land. But, in general, these compensations are determined by the State.[84] The contradictions of relatively positive land rights recognition, on the one hand, and legislation clearly indicating a preference for mining and other extractive industries, on the other, therefore presents significant challenges.

Mozambique's 1997 Land Act is well regarded in the region. Notions of community and customary law are not codified and the community is established as the base from which other rights or rights holders derive, such as the individual or family rights. Under the law, each community determines how it will administer its land. While it provides for registration of land titles, it is not required for the existence of rights.[85] It has been observed that the principles behind Mozambique's land law and policy were sound and progressive but it "has proven not to be robust enough to guard against the power realities and imbalances inherent in exchanges between under-resourced communities and large capital and governing elite interests. These tendencies were heightened significantly in the wake of the mineral discoveries in recent times."[86]

The recognition of the above customary land rights stands in tension with the decision-making powers of the State regarding lands in general, which are also accorded in the Constitution and which are based on notions of the social purpose of land as well as economic considerations. Subsequent government resolutions provide that those investors wanting more than 10,000 hectares have to include in their proposals the terms of the partnership with the rights holders to the lands in question. To that end, two consultation meetings with local communities are required for land acquisition applications – the second one must be held within 30 days of the first. This is clearly not enough time for communities to be able to effectively negotiate the terms of a proposed project and make an informed decision. It has been noted that the Land Act does not explicitly provide that communities can decline a project but it could be argued as a possibility under a more positive legal interpretation.[87] Within this framework, mining authorizations can be issued prior to the consultation provided under the land legislation. Consequently, this renders any capacity to consent meaningless.[88]

ii.a. Traditional authority structures and customary law

In various African countries, there is strong constitutional and legal recognition of traditional leadership. The mandates and powers of traditional or customary leaders vary throughout the continent. While some countries have no explicit constitutional recognition of

83 Ibid., p. 12, FN9.

84 Ibid., p. 13.

85 Ibid., p. 47, citing Lei de Terras 19/97.

86 Legal Resource Centre, Free, Prior and Informed Consent in the Extractive Industries in Southern Africa: An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia, Oxfam America, 2018, p. 48.

87 Ibid., p. 48, referencing 70/2008 and Ministerial Order 158/2011.

88 Ibid, p. 49.

traditional authorities or customary law, they may still have de facto powers at the level of local government.[89] The recognition and existence of these traditional leadership structures presents important entry points for the consultation and participation of Indigenous Peoples. Significant challenges do need to be addressed, however, such as the lack of recognition of the distinct traditional structures of Indigenous Peoples.

In Uganda, the Constitution provides for the recognition of the institution of traditional or cultural leaders, which may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom the institution applies.[90] However, only ethnic groups with substantial numbers and political influence have benefited from this provision. And this has not been the case for Batwa communities, which do not have defined traditional leadership structures.[91]

In the case of the Democratic Republic of Congo, the Constitution recognizes the institution of customary authority and foresees the adoption of legislation in this regard, which is still pending.[92] However, Indigenous Batwa people are not organized in a manner consistent with the notion of a centralized hierarchical authority. For this reason, Indigenous Peoples have not been part of institutions like the Association of Customary Chiefs. This evidences that need for national laws to include Indigenous Peoples' own distinct social and political structures in national decision-making processes.[93]
In South Africa, the Constitution includes provisions for recognizing the institution, status and role of traditional leadership according to customary law.[94] Under the Traditional Leadership and Governance Framework Act, traditional communities that have traditional leadership and observe customary law are given recognition. This would exclude San and Khoe communities that do not have the established traditional leadership structures provided for in this Act, although they have made efforts to be recognized under the Act. The system of Houses of Traditional Leaders at the national and local provincial levels under the Constitution, which serve as advisory bodies, did not include Khoi-San communities in their initial conception.[95] It is worth noting the Traditional Khoi-San Leadership Act 3 of 2019 which provides for the recognition of, inter alia, traditional and Khoi-San communities, leadership positions and for the withdrawal of such recognition, as well as traditional Khoi-San Councils, sub-councils and for the establishment of a national and provisional houses of traditional Khoi-San leaders.[96]

Traditional authorities and customary law are also constitutionally recognized in the Constitution of Namibia. The Traditional Authorities Act No. 25 of 2000 establishes authority structures consisting of traditional community chiefs or heads and traditional councillors that are responsible for implementing customary law and settling disputes.[97] However, the authority to confer or deny recognition of traditional authorities lies with the government, which evaluates applications for recognition of said authorities. In 2009, it was noted that only two San chiefs elected by their people had

89 See, ILO/ACHPR, Overview report of the research project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries, International Labour Office.- Geneva, ILO, 2009 ["ILO/ACHPR Report 2009"], p. 47.

90 Constitution of Uganda, Art. 246(1).

91 ILO/ACHPR Report 2009, p. 48.

92 Constitution of the Democratic Republic of Congo 2005 (rev. 2011), Article, 207

93 ILO/ACHPR Report 2009, p. 48.

94 Constitution of the Republic of South Africa, 1996 - Ch. 12.

95 ILO/ACHPR Report 2009, p. 48.

96 Act No. 3 of 2019: Traditional and Khoi-San Leadership Act, 2019 (28 November 2019).

97 Sections, 2,4-6 of the Act, cited in ILO/ACHPR Report 2009, p. 49.

been officially recognized.[98] There has been concern from the U.N. CERD about the lack of clear criteria for the recognition of traditional authorities and the lack of an independent institution apart from government to assess applications.[99] The Traditional Authorities could present an opportunity for Indigenous Peoples' participation in decision-making processes, but challenges remain in terms of the administrative and leadership training required by the Act.[100]

As a response to the general lack of Indigenous Peoples' representatives in the traditional authority structures in southern African countries, the Working Group of Indigenous Minorities in Southern Africa set up the concept of San Councils. Although not traditional institutions, these National San Councils are a pragmatic response to the social and political circumstances in their respective countries.[101]

The constitutions of Zimbabwe and Zambia accord far-reaching decision-making powers to traditional authorities over communal lands. The Zimbabwean Constitution provides that "traditional leaders have the authority, jurisdiction and control over the Communal Land or other areas for which they have been appointed, and over persons within those Communal Lands or areas".[102] The Zambian Constitution confers significant decision-making powers on traditional chiefs over the lands and resources of their "subjects", which would include consent to development projects.[103]

It is worth noting an observation that the powers conferred on traditional chiefs in some African countries are based on a colonial narrative or practice of having one person as custodian of the land. This ignores other aspects of customary law, including consent as an element of individual and communal ownership and consultation and consensus within the community.[104] This shows the need for accountability from traditional leaders with regard to the other customary rights holders in their communities. As mentioned throughout this study, this type of legislative framework also presents problems for Indigenous Peoples with different authority and decision-making structures.

It has been noted that, under the statutory instruments of most of these countries, the traditional chiefs must make decisions "in terms of customary law" – a term generally not defined but which "provides a crucial opportunity of safeguarding the tenure rights – including the right to give or withhold consent – of the members of affected communities."[105] In that sense, there is a need to use the constitutional recognition of customary law found in these countries in a way that can ground both the procedural (consent) and substantive (property) rights of communities so that customary law is recognized as a system of law and not the will of the chief or practices that could result in the exclusion of community members. Consequently, a more positive recognition and application of customary law with regard to decisions on community lands must include and respect the individual and collective rights of members of the community, including men, women and children. This includes, for example, recognizing Indigenous women's ri-

98 ILO/ACHPR Report 2009, p. 49.

99 Ibid., p. 49, citing, CERD Concluding Observations: Namibia, August 2008, UN Doc. CERD/C/NAM/CO/12, para. 16.

100 ILO/ACHPR Report 2009, p. 49.

101 Ibid., p. 50.

102 Cited in, Legal Resource Centre, Free, Prior and Informed Consent in the Extractive Industries in Southern Africa: An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia, Oxfam America, 2018, p. 12, FN12.

103 Legal Resource Centre, Free, Prior and Informed Consent in the Extractive Industries in Southern Africa: An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia, Oxfam America, 2018, p. 12

104 Ibid., p. 14.

105 Ibid., p. 12. 106 Ibid., p. 15..

ghts to land tenure and their participation in consultation and traditional decision-making processes.[106]

ii.b. Forest and natural resource management rights

Another possible, although limited, entry point for the consultation and participation of Indigenous Peoples in various countries could be through legislation related to natural resource management, particularly forest resources. Although specific recognition of Indigenous Peoples' rights is not the norm, they could be considered a first step in addressing the role of Indigenous Peoples in land and resource management.[107]

The Forest Code of the Central African Republic (CAR) provides for the right of collectives to use forest resources in accordance with their customs. According to the law, collectives include regions, prefectures and communes. However, for Indigenous Peoples like the Aka, their villages are not recognized in their own right as they are generally recognized only as being part of other adjacent villages or communities. This inhibits direct management of their forest resources.[108] On the other hand, legislation related to the creation of territorial entities, municipal councils and farming communes in pastoral areas in the CAR presents possible entry points for some degree of self-management in the case of pastoralist Mbororo communities. Although the creation of communes with autonomous municipal councils has been intended to sedentarize the Mbororo, such autonomous councils could reinforce their participation in day-to-day management of their affairs. Pastoralist groups have created a National Federation of Pastoralists that provides some level of power in decisions concerning pastoralism.[109]

The Forest Law of the DRC provides that any contract for forestry concessions is to be preceded by a public inquiry, consisting of announcements and field visits. In practice, this provides little room for participation for Indigenous Peoples due to the exclusion and discrimination they face from neighbouring communities.[110] In other countries like Cameroon, the posting of notices regarding the classification of forests and protected areas is the established form for disseminating information under forestry legislation, in this case the 1994 Forestry, Wildlife and Fisheries Law. The Minister of Forests, Wildlife and Fisheries may, in consultation with the affected populations, suspend rights of usage for a limited period. However, government officials have been the sole arbiters regarding decisions to suspend usage rights, which has left Indigenous Batwa communities particularly vulnerable. Such was the case with the establishment of the Campo National Park, where the restrictions on the Batwa people's right to traditional natural resource use led to a deterioration in their living conditions.[111]

Another entry point for Indigenous Peoples' participation in environmental policy and programming action is provided in Rwanda's Organic Law on the modalities of protection, conservation and promotion of the environment. Under Article 63 of the Law, the population has the right to free access to information on the environment, to express their views, to representation in decision-making organs, and to training, sensitization and access to findings of research on the environment.[112] This framework could present an important opportunity for Indigenous Peoples to participate and contribute to the environmental management decision-making process on account of their deep knowledge regarding stewardship of the land.[113]

106 Ibid., p. 15.
107 ILO/ACHPR Report 2009, p. 53.
108 Ibid., p. 53.
109 Ibid., p. 54.
110 Ibid., p. 53.
111 Ibid., pp. 53-4.
112 Organic Law No. 04/2005 of 08/04/2005, art. 64
113 ILO/ACHPR Report 2009, p. 54.

Batwa community in Rwanda.
Credit: IWGIA

ii.c. Land, mining and customary law issues: South Africa

In South Africa, mining legislation does not require community consent in mining licence applications. Under the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA), a mining rights application must be submitted simultaneously with an environmental authorization at the office of the Regional Manager where the land is situated under the conditions and fees prescribed in the legislation.[114] Under the legislation, the applicant is to consult with the landowner, lawful occupier and any interested and affected party and include the results of the consultation in the relevant environmental reports.[115] Upon receiving the application, the Minister of Mineral Resources must grant the mining rights, if the requirements are met which include, inter alia, that: the mineral can be optimally mined; the applicant has access to financial and technical resources to undertake the mining activity; and it will not result in unacceptable environmental damage.[116] The Minister is only empowered to impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community.[117] However, there is no explicit requirement for an applicant to obtain community consent before a mining right is granted.

The South African Constitutional Court has addressed the question of whether, during a consultation, a mining applicant must obtain the consent of the landowner. In the case of Bengwenyama Minerals v. Genorah Resources, Genorah filed an application for prospecting over farms owned by the Bengwenya-

114 MPRDA Sec. 22, cited in Tshepo Sebola, The Case for Community Consent as a Requirement for the Award of Mining Licenses in South Africa, Thesis Submitted for Magister Legum (LLM) - Department of Public Law, Faculty of Law, University of Pretoria, October 2017, p. 21.

115 MPRDA, Section 22(4) (b), cited in Tshepo Sebola, supra, p. 22.

116 MPRDA, Section 23, cited in Tshepo Sebola, supra, p. 22.

117 MPRDA, Section 23(2A) cited in Tshepo Sebola, supra, p. 22.

ma-Ye-Maswati community. Genorah met only once with the leader of the community before the application was accepted. No further attempt was made to consult with the community afterwards. In its decision, the Court stated that the purpose of a consultation is to "ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land",[118] yet agreement and consent are not required under the Court's reasoning. In this case, however, the Court reasoned that even though agreement does not have to be reached, it does not mean that the consultation must not be in good faith.[119]

The MPRDA has seriously affected community land rights, particularly in the case of those communities that have had unrecognized and insecure land tenure rights due to past racial discriminatory practices in South Africa. Since Parliament had not enacted legislation to provide security to those persons and communities, the Interim Protection of Informal Land Rights Act 1996 (IPILRA) was enacted, which is still in force. IPILRA provides for consent requirements in cases where the rights of land rights holders are threatened. Under this framework, the Ministry of Rural Development and Land Reform has a fiduciary duty to ensure that there are effective community decision-making processes to ensure tenure security in the face of other claims on the relevant land, including infrastructure, mining or commercial development.[120]

Under the IPILRA, for a deprivation of customary or other informal land rights to be permissible, it is required that:

1. The living customary law of the community must be complied with.

2. The customary law is deemed to include, as a minimum, the following:

    2.1. a decision taken by the majority of land rights holders;

    2.2. taken at a meeting where there has been sufficient notice; and

    2.3 where land rights holders have been afforded a reasonable opportunity to participate.[121]

However, the IPILRA has not been implemented properly. This could be due to: the legislation being viewed as a temporary solution while the legislature enacted a permanent law to regulate communal property; regulations were never promulgated for it; and few departmental officials were educated about its existence, which also led to communities not being aware of their rights.[122]

Notwithstanding the above, IPILRA provides an important opportunity for communities to assert decision-making powers regarding their lands based on their customary law. Customary law itself enjoys strong constitutional and jurisprudential recognition. Under the South African Constitution, customary law is an independent and original source of law. This is further entrenched in Sections 30, 31, and 39 of the Constitution, which provide that: everyone has the right to use the language and participate in the cultural life of their choice; persons belonging to a cultural community may not be denied the right to enjoy their culture and form cultural associations; and the Bill of Rights does not deny the existence of any other rights or freedoms recognized or conferred by, inter alia, customary law, to the extent that they are consistent with the Bill.[123]

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118 See, Tshepo Sebola, supra, p. 23.

119 See, Ibid., supra, p. 23

120 Legal Resource Centre, Free, Prior and Informed Consent in the Extractive Industries in Southern Africa: An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia, Oxfam America, 2018, p. 56.

121 IPILRA, Section 2, cited in, Legal Resource Centre, supra, p. 56.

122 Legal Resource Centre, supra, p. 56.

123 See, Gongqose & others v Minister of Agriculture, Forestry & Fisheries and others; Gongqose & others v State & others (1340/16 & 287/17) [2018] ZASCA 87 (01 June 2018), para. 24

The Constitutional Court has stated that, as an independent source of norms within the legal system, customary law may give rise to rights, such as access to and use of resources. This would include: rights of communal land ownership under customary law, including use and occupation of the land; and the rights to use its water and exploit its natural resources above and beneath the surface.[124] These rights to lands and resources cannot be extinguished by legislation, subject only to the Constitution and the specific customary law itself.

iii. FPIC and Green Energy Projects – Kenya

In Kenya, the government has set the most ambitious agenda on the African continent for the transition to renewable energy. The President of Kenya set the goal of complete renewable energy transition by 2020 in order to promote business growth, attract investment and combat the effects of climate change. In 2008, the Government of Kenya launched its national development blueprint, Kenya Vision 2030, which accompanied significant reforms in its energy sector, under its National Energy and Petroleum Policy.[125]

As part of the Kenyan government's plans to transition completely by 2020, and provide power to all Kenyans, heavy investments have been made in wind energy and geothermal development. The dominant players in the energy sector are still largely State-controlled companies like the Kenya Electricity Generating Company (KenGen) and the Kenya Power and Lighting Company (KPLC). However, the role of the private sector has grown and, by 2019, accounted for 43% of Kenya's energy, which could have implications for the country's energy security.[126]

Geothermal energy production in Kenya.
Credit: IWGIA

124 See, Ibid., para. 25, citing, Alexkor Ltd & another v The Richtersveld Community & others 2004 (6) SA 460 (CC); [2003] ZACC 18 para 62.

125 Ilse Renkens, The Impact of Renewable Energy Projects on Indigenous Communities in Kenya, IWGIA: Denmark, December 2019 ["IWGIA Kenya Renewable Energy Report 2019"], pp. 9-10.

126 Ibid., p. 10, citing Kazimierczuk (2019), "Wind Energy in Kenya."

Both the Policy and Vision 2030 have raised serious concerns as to how human rights will be addressed before, during and after projects are initiated.[127] A matter of concern is that Kenya is among the African nations that do not officially recognize the application of the term of "Indigenous Peoples" despite various hunter-gatherer and pastoralist groups self-identifying as Indigenous. The State of Kenya is not a party to ILO 169 and abstained from voting on the UNDRIP.[128] Indigenous Peoples' lands are often seen as vacant by the State and business sectors, and have been targeted for oil, gas, wind and geothermal power projects and major infrastructure projects. Following constitutional and legislative reforms, most Indigenous lands fall under the category of community lands, whose recognition, protection and registration come under the 2016 Community Land Act. However, the registration of community lands has hardly begun and, as a result of that uncertainty, Indigenous lands have been subject to land dispossession to make way for development and infrastructure projects, and Indigenous Peoples have not benefited from the Act's protections against dispossession without fair compensation.[129]

One of the main flagship projects of the Government of Kenya's Vision 2030 is the Lamu Port South Sudan – Ethiopia Transport (LAPSSET) corridor. LAPSSET is a massive infrastructure project spanning Kenya and South Sudan and comprises seven main components that include a deep seaport, railway line, highway, crude oil pipeline, oil refinery, resort cities and airports. The purpose of this major infrastructure project is to create better linkages between Ethiopia and South Sudan. It is also part of a proposed equatorial land bridge running from Cameroon to Kenya.[130]

The Lake Turkana Wind Power Project (LTWP) is part of LAPSSET and is located in Marsabit County – an area characterized by inter-ethnic tension in the post-independence era, and inhabited by Indigenous pastoralist groups including the Samburu, Turkana, El Molo and Rendille. The LTWP consortium has leased an area of 150,000 acres in Marsabit County. However, the 365 wind turbine generators, substation, workers' camps and wind energy processing installations related to the project are actually located in just 40,000 acres of the leased area. The development phase of the project took eight years (between 2006 and 2014), followed by the construction phase until 2017, with full commercial operations beginning in March 2019.[131]

In 2014, the lease of the 150,000 acres for a period of 33 years, twice renewable, was legally contested due to it having been approved without proper consultation and without compensation. The LTWP consortium was criticized for not recognizing the affected pastoralist groups as Indigenous, only the El Molo groups. However, the El Molo were deemed to live too far from the project to be affected by it and hence the company claimed that its Indigenous Peoples' policy did not need to be invoked.[132]

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127 Ibid., p. 10, citing, Koissaba, B. R. Ole (2018), "Geothermal Energy and Indigenous Communities: The Olkaria Projects in Kenya," Report, Heinrich Böll Stiftung European Union, 12 March 2018.

128 Ibid, p. 14

129 Ibid, p. 17.

130 ACHPR, Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights: East, Central and Southern Africa, Adopted by the ACHPR at its 58th Ordinary Session (2017), p. 109.

131 IWGIA Kenya Renewable Energy Report 2019, pp. 20-21.

132 Ibid., p. 22.

The Lake Turkana Wind Power Project.
Credit: J.M. Ole Kaunga/IMPACT

In terms of environmental and social impacts, the assessment of the project, conducted in 2009 and updated in 2011, stated that the societal benefits would outweigh what were perceived to be limited social and environmental impacts. However, there have been reported impacts on the four pastoralist groups' ability to access their lands, particularly in the 40,000 acres occupied by the LTWP projects.[133] The Turkana village of Sarima was relocated and rebuilt to make way for the construction of the road to the projects without the right to compensation. In the rebuilt area, the population has tripled since workers from other parts of the country settled there, which has brought about problems in substance abuse, prostitution, increased conflict over scarce resources and lack of sanitation.[134] In addition, the affected communities have never benefited from the energy produced since they are not connected to the national grid, which is cost prohibitive. Local communities have also not benefited from employment opportunities, as the short-term low skilled jobs were taken up mainly by outsiders, and the higher-skilled jobs were almost exclusively given to outsiders.[135]

In 2014, a case was brought before the Kenyan Environment and Land Court on behalf of pastoralist communities in Marsabit County, including the Rendille, Samburu, El Molo and Turkana peoples. The claim was brought against LTWP Ltd., the Marsabit County government, and other government officials and it concerned the 150,000 acres leased for the project. The relief sought was cancellation and revocation of the titles awarded over that land for purposes of the project, as well as the nullification of the Wind Power Project.[136] After various delays and setbacks, the Kenyan Environment and Land Court in Meru issued a judgment in October 2021. The Court did not

133 Ibid, p. 25.

134 Ibid. pp. 25-28; IWGIA, The cost of ignoring human rights and Indigenous Peoples, 10 November 2021.

135 IWGIA, The cost of ignoring human rights and Indigenous Peoples, 10 November 2021.

136 Environment and Land Court – Meru, Kenya, ELC163.2014 – MERU, 19 October 2021, para. 2.

nullify the project, however it declared that the title deeds to the land on which the LTWP is sited were irregular, unlawful and unconstitutional. As per the judgement, the government authorities named in the suit have "a period of one year to strictly follow the laid down process on setting apart, failing which the titles will automatically stand cancelled and the suit land will revert to the community".[137]

This judgement is considered a victory not only for the affected El Molo, Turkana, Samburu and Rendille Indigenous communities but also other Kenyan communities facing serious threat of displacement and human rights violations from major projects.[138]

iv. Issues related to environmental impact assessments and FPIC

An important component of Indigenous consultation and consent standards is the availability of impact assessments in consultation processes so that Indigenous Peoples can be informed of the full range of impacts that a proposed measure, project or activity may have on their human rights. As indicated previously, both ILO 169 and the inter-American human rights system have addressed this important element with regard to natural resource development and investment projects affecting Indigenous land and natural resource rights. An important element emphasized by the IACHR is participation by Indigenous Peoples themselves in the identification of the impacts of a proposed activity.

Many African countries have laws and regulations regarding environmental impact assessments. From the information received for this study regarding experiences in Togo in the implementation of these types of regulations, there is a need to incorporate Indigenous traditional knowledge and to give serious consideration to the impacts on traditional economic subsistence activities, intricately tied to cultures and ecosystems.[139] These assessments so far have given more weight to Western-oriented technical knowledge and value systems. Attention should be given to including Indigenous communities in the analysis of environmental impacts, and even consider projects being drafted together with the communities to adequately consider their needs. This is an important element of the social licence to operate.[140]

On the other hand, current environmental impact assessments must also be understood as an integral part of, and promoting, Indigenous consultation and consent standards consistent with international human rights standards. In its report on Extractive Industries, the WGIP noted the situation of the Himba (or Ovahimba) in Kunene Region of Namibia affected by hydroelectric dams proposed by the government. At first, the Himba successfully undertook a campaign to halt a massive hydroelectric project on the Epupa River that had been promoted by the government since at least the 1990s. Said project would have flooded a 380-square-kilometre area, impacting some 1,000 permanent residents of the land and another 5,000 who also relied on the river, as well permanent dwellings and grave sites. However, a decade on, the government proposed a smaller dam downstream of the original Epupa site.

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137 Ibid., paras. 158, 161.

138 IWGIA, The cost of ignoring human rights and Indigenous Peoples, 10 November 2021.

139 Interview with Dimitri Pag-Yendu Yentchare, November 2021.

140 Ibid.

ba) in Kunene Region of Namibia affected by hydroelectric dams proposed by the government. At first, the Himba successfully undertook a campaign to halt a massive hydroelectric project on the Epupa River that had been promoted by the government since at least the 1990s. Said project would have flooded a 380-square-kilometre area, impacting some 1,000 permanent residents of the land and another 5,000 who also relied on the river, as well permanent dwellings and grave sites. However, a decade on, the government proposed a smaller dam downstream of the original Epupa site.

As noted by the WGIP Report, the new site at the Baynes Mountains area was much smaller (57 km2) and reduced the impacts on the Himba people. A publicly disclosed Environmental and Social Impact Assessment (ESIA) stated that the dam in the Baynes Mountains area would lead to loss of land and natural resources, social and cultural disruption, noise and dust pollution, and impacts on traditional fishing and economies.[141] However, based on that information, it asserted that while the consent of the community was attractive, it was not imperative for the progress of the project. It called for negotiations with the local Indigenous population that would lead to contractual agreements and free, prior and informed consent for the construction of the projects. The ESIA called for said agreement before involuntary resettlement would be considered, prior to the approval and implementation of mitigations measures related to the socio-economic impacts on the local Indigenous Peoples.[142]

The Himba have had to again voice their opposition to the proposed Baynes project, stating that the affected communities and traditional leaders have not been consulted, nor been included in the planning and decision-making processes related to the dam. They have stated that they would not consent to impacts on their traditional rivers, environmental destruction and loss of lands, graveyards and sacred places. The WGIP Report expressed concern that the project could likely lead to the involuntary resettlement of the Himba despite these objections. [143]

In Tanzania, the East African Crude Oil Pipeline (EACOP) – a project promoted by the governments of Tanzania and Uganda (see, infra Ch. 3.b.vi) – is also indicative of some of the challenges of ensuring that environmental impact assessments adequately reflect the particular impacts of major infrastructure projects on Indigenous Peoples as well as the necessary mitigation measures. In line with Tanzanian law, the EACOP partners conducted an Environmental and Social Impact Assessment that was approved by the National Environmental Management Council in 2020. The ESIA aimed to identify, describe and assess the potential stresses the project would have on the local communities and the environment and propose mitigation plans. The ESIA included categories of impacts and planned mitigation related to: ground and surface water, waste management, air quality, noise, health, safety, land use, archaeology and cultural heritage, biodiversity and marine environment. In Kiteto district, one of the districts in Tanzania where the project would be implemented, the impact assessment process identified potential impacts that included loss of breeding and forage habitat for animals of conservation importance; loss of grazing land, private land and physical structures due to land acquisition related to

141 ACHPR, Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights: East, Central and Southern Africa, Adopted by the ACHPR at its 58th Ordinary Session (2017), p. 99.

142 Ibid., p. 100, citing ERM (2013) ESIA Non-technical Summary, ERM, Windhoek, Namibia, p. xxi-xxii.

143 ACHPR, Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights: East, Central and Southern Africa, Adopted by the ACHPR at its 58th Ordinary Session (2017), p. 100, citing Various (2012) Declaration by the Traditional Leaders of Kaokoland in Namibia, Opuwo, Namibia.

the project; loss of access to artisanal mining; and potential new disputes and intensification of existing conflicts over land and property.[144]

With regard to the findings of this ESIA, a study by the organization Pilot Light Development Organization (PILIDO) observed that due consideration needed to be given to the particular context in Kiteto district and the real long-lasting implication of the risks identified in the study. As pointed out by the PILIDO study, Kiteto district is mostly inhabited by pastoral and agro-pastoral communities that depend on land and natural resources for their livelihoods. These communities have already faced four decades of loss of land and natural resources and are therefore already particularly vulnerable to further depletion of natural resources and loss of access to land, and their ability to have sustainable livelihoods.[145] These are human rights challenges that need to be properly assessed.

In the Talamai Open Area, one of the areas used by the pastoralist communities in Kiteto district for grazing and temporary homesteads, the ESIA considered that the impacts of project-related infrastructure such as roads, pressure reduction stations, camps and pipes, would be of medium magnitude. The PILIDO study observed that although the ESIA does recognize that the above-mentioned facilities may be the focus of development with long-term impacts, it seems to have viewed the habitat and natural resources that would be impacted as something that could easily be reinstated or replaced.[146] The ESIA outlined mitigation measures that were of a generic or temporary nature, such as management plans on biodiversity, reinstatement of land used for project activities, decommissioning of closed work camps, and so on. The PILIDO study highlighted the lack of in-depth knowledge of the project area, the communities and their livelihoods. Furthermore, "[w]ithout more tailored mitigation measures, based on the realities and specific contexts of the local communities, the EACOP will cause significant losses of livelihood assets in indigenous communities that depend heavily on these natural resources and lands and who cannot easily diversify their livelihood strategies".[147]

According to the ESIA, the EACOP project manager is responsible for monitoring on-site project activities, planning and engaging with stakeholders, which the ESIA itself defines as persons or groups directly or indirectly affected by a project, as well as those that have an interest in the project or who may influence its outcome, either positively or negatively. [148] EACOP personnel and district officials undertook a series of seminars in Kiteto over three months in 2017 with village leaders and communities. The topics covered in those seminars consisted of general information about the route of the pipeline, temporary employment opportunities, the project's contribution to the national interest, national land policies, and brief information on compensation modalities for people whose land would be acquired. However, those informative sessions were not followed up in a consistent and systematic manner to provide more specific information about the impacts of the project, compensation, grievance mechanisms and to address the affected Indigenous communities' concerns.[149] The PILIDO study conducted interviews

144 See, PILIDO, "Impact of the East African Crude Oil Pipeline (EACOP) on Human Rights and Environment of Agro-Pastoral Communities in Kiteto District, Manyara, Tanzania (August 2020), in AJISO, FEMAPO, et al, Voices from Tanzania – case studies on Business and Human Rights (Volume 3): "Human Rights Impact of Large-Scale Infrastructure Projects", Antwerp/Arusha/Moshi/Mwanza, February 2021, ["PILIDO, Impact of EACOP/ Voices from Tanzania "], p. 21.

145 Ibid., p. 22.

146 Ibid., p. 29.

147 Ibid., pp.29, 32.

148 Ibid., p. 28, citing EACOP.ESIA, "Stakeholder Engagement", Table 10.6.5.

149 PILIDO, Impact of EACOP/Voices from Tanzania, pp. 28-32.

and questionnaires with communities in Kiteto district that evidenced the significant lack of community participation in the projects, in addition to the unaddressed concerns the communities had regarding the impacts on their lands, naturals resources and livelihoods; impacts on sacred places and cultural practices; health and safety concerns related to environmental factors, pollution, as well as sexual and communicable diseases brough in by a migrating workforce; and the issue of compensation for lands.[150]

Community meeting on the EACOP issue.
Credit: PAICODEO

Community meeting on the EACOP issue.
Credit: PAICODEO

150 Ibid., pp. 25-31.

As will be seen in infra, Ch. 3.b.vi, the EACOP project presents serious problems as there has been no observance of international standards or prior consultation and FPIC. The Indigenous communities in the project area have been given no opportunity to voice their opinion and views as to whether the project should be executed or not before its approval. Various concerns are present regarding compensation and land rights of affected Indigenous communities under the domestic legal regime. A process of consultation regarding the resettlement process has been active since 2020. In this context, the development of an Engagement Framework between the affected Indigenous communities and EACOP is still an ongoing process.

v. National FPIC Guidelines for REDD+

The implementation of REDD+ in African countries has provided another entry point for incorporating FPIC into State policies and programmes. The international legal framework for REDD+ establishes a regime for forest conservation with safeguards for the respect of human rights. Countries are granted flexibility to enforce these safeguards at the national level. The U.N. Framework Convention on Climate Change (UNFCC) Conference of the Parties' (COP) decisions on REDD+ have stated that REDD+ must ensure these safeguards and has called for "[r]espect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations", expressly referencing the UNDRIP.[151]

In this context, the Government of Cameroon proceeded to develop its "Operational Guidelines for Obtaining Free, Prior and Informed Consent for REDD+ Initiatives in Cameroon" with the objective of "set[ting] up, in a participatory manner, an operational framework that REDD+ project developers and promoters in Cameroon will use in seeking FPIC with indigenous and local communities around a potential REDD+ activity or project area before and during the implementation of a REDD+ activity or project".[152] In addition, the Guidelines state that they can also be used for other non-REDD+ projects such as land-use planning and natural resource management.

The development of these Guidelines was a multi-stakeholder collaborative process, led by the Ministry of the Environment, Protection of Nature and Sustainable Development (MINEPDED), and which included 40 government agencies, community-based organizations, national and international NGOs, and development partners. Five Indigenous Peoples participated, the Baka, Mbororo, Bagyeli, Bedzang and Bakola.[153] According to the Guidelines, the elaboration process included field missions to undertake consultations with local and Indigenous populations in the five agro-ecological zones as part of the participatory process for the development of FPIC principles, criteria and indicators.[154]

Under these Guidelines, the process for seeking FPIC for REDD+ programmes and projects would be undertaken in three phases: field preparations; field implementation; and monitoring and evaluation. Ten guiding steps would be observed:

1. Establishment of a technical team for FPIC implementation
2. Analysis of the physical, socio-economic and legal context

151 Sophia Carodenuto and Kalame Fobissie, Operationalizing Free, Prior and Informed Consent (FPIC) for REDD+: Insights from the National FPIC Guidelines of Cameroon, CCLR 2|2015, p. 157, FN 2, citing FCC/CP/2010/7/Add., Appendix 1 2 (c).

152 MINEPDED – Cameroon, Operational Guidelines for Obtaining Free, Prior and Informed Consent in REDD+ Initiatives in Cameroon, WWF, GIZ, CED (2015) ["Cameroon REDD+ FPIC Guidelines"], p. 12.

153 Sophia Carodenuto and Kalame Fobissie, Operationalizing Free, Prior and Informed Consent (FPIC) for REDD+: Insights from the National FPIC Guidelines of Cameroon, CCLR 2|2015, p. 163.

154 Cameroon REDD+ FPIC Guidelines, p. 13.

3. Development of an information and communication strategy
4. Making appointments
5. Holding information and sensitization meetings
6. Negotiating with stakeholders
7. Formalizing agreement between parties
8. Developing a roadmap
9. Monitoring
10. Verification and evaluation.[155]

Four principles with criteria and indicators are also set out to guide FPIC implementation: 1) The absence of force, pressure, unwanted obligation, manipulation and intimidation; 2) Provision of information regarding REDD+ activities sufficiently in advance; 3) Disclosure of the full information about the REDD+ activity; and 4) Community agreement or approval of proposed REDD+ activity.[156]

The Kenyan government has also developed FPIC Guidelines for REDD+ projects. Its National Guidelines have the stated goal of providing concrete guidance to government ministries, the private sector, project developers and development partners on how stakeholders will be included in national REDD+ efforts, and how FPIC is to be applied and respected in the context of project development and implementation among forest-dependent communities.[157]

Within the Kenyan National Guidelines, FPIC is "understood to be the collective right of [indigenous peoples and local communities] to participate in decision-making and give or withhold consent to activities that impact on their land, territories and resources, livelihoods, social cohesion and future well-being. Consent must be freely given, obtained prior to implementation of activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question".[158] According to these Guidelines, FPIC would apply to forest carbon and REDD+ discussions prior to: a) relocation of an Indigenous community from their land; b) taking cultural, intellectual, religious and spiritual property; c) causing damages, takings, occupation, confiscation and uses of their land, territories and resources; d) adopting and implementing legislative or administrative measures, and e) approving any project affecting their land or territories and other resources, in connection with the development, utilization or exploitation of natural resources.[159]

Each of the elements that constitutes FPIC is described, and it states that an "FPIC process concerns a specific community, and that consent is given or withheld collectively by the community, FPIC is applied at the community level."[160] Along with its reference to international and regional standards on Indigenous Peoples, the Guidelines refer to domestic legislation on participation, including the Kenyan Constitution's provisions on representation of "marginalized groups" at all levels of government and other affirmative action on behalf of said groups.[161] In this case, the Constitution does not explicitly recognize Indigenous Peoples but does recognize the rights of marginalized and disadvantaged communities in a way that could be considered consistent with the elements and characteristics of Indigenous Peoples that the ACHPR has emphasized.

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155 Ibid., pp. 9, 15-28.

156 Ibid., pp. 9, 30-37.

157 Ministry of Environment and Natural Resources, National Guidelines for Free, Prior and Informed Consent (FPIC) for REDD+ in Kenya, UN-REDD Programme, UNDP ["Kenya REDD+ FPIC Guidelines"], p.1

158 Ibid., p. 1.

159 Ibid., p. 2.

160 Ibid., p. 7.

161 Ibid., p. 7.

In this same vein, the Guidelines are premised on a recognition of the need for FPIC to be respected due to concerns over potential adverse implications of REDD+ actions on Indigenous Peoples, as they may be subject to different risks and severity of impacts due to their identities, cultures, lands and natural resource-based livelihoods.[162] It therefore sees FPIC as a safeguard measure for ensuring that potential negative social and environmental impacts from the perspectives of Indigenous Peoples are considered and addressed.[163]

According to the Kenyan National Guidelines, REDD+ related projects need to take into account: rights to land and natural resources; livelihoods, traditional knowledge and forestry customary practices; risks, costs and benefit distribution; accountability and transparency; the full and effective participation of Indigenous Peoples and local communities; and capacity-building. It also proposes an Oversight and Compliance Committee to promote the application and compliance of REDD+ safeguards.[164]

The National REDD+ Guidelines developed in Cameroon and Kenya represent important steps in incorporating FPIC and, by extension, international Indigenous rights standards in domestic policies and programmes. However, certain limitations or areas that could use more clarity have been identified. As was observed in the case of Cameroon, it bears pointing out "the non-binding nature of the FPIC Guidelines, a lack of clarity with regards to the stakeholders targeted by the Guidelines (i.e. the givers and receivers of FPIC), and the lack of a clear and operational definition of 'consent'".[165] As is the case in Kenya, these type of Guideline espouse important principles for respect of Indigenous Peoples but more information in the field would be needed to know how this plays out in concrete situations, how each of the elements of FPIC are observed, and how the consent of Indigenous Peoples is actually respected.

The above demonstrates the need for Indigenous Peoples' respective decision-making processes and related timelines, representative authority structures, and their own conceptions of consultation and consent to be emphasized in each individual FPIC process related to REDD+. This is one of the important voids that Indigenous Peoples' initiatives such as the FPIC protocols can help fill with regard to REDD+ or other types of activities or projects.

vi. Trends and patterns identified in the online consultations and individual meetings

During the online consultations and individual meetings undertaken for this study, representatives from Indigenous communities and organizations and NGOs shared their views on the status of recognition and implementation of FPIC in their respective countries. The information and experiences shared confirmed the problematic trends and patterns previously discussed in this study, and which derive from a lack of recognition of Indigenous Peoples in most countries, their lands rights and the lack of specific legal recognition of FPIC.

Additionally, the participants pointed out problems related to: the lack of recognition of land ownership rights; lack of respect for Indigenous Peoples' own representative structures and decision-making structures; lack of adequate information on proposed activities in interactions between State, companies and Indigenous Peoples; the need for further

162 Ibid., p. 14.

163 Ibid., p. 16.

164 Ibid., p. 17-22.

165 Sophia Carodenuto and Kalame Fobissie, Operationalizing Free, Prior and Informed Consent (FPIC) for REDD+: Insights from the National FPIC Guidelines of Cameroon, CCLR 2|2015, p. 163.

capacity-building and rights-empowerment for Indigenous Peoples; and a clear practice of approaching any type of interaction or "consultation" with Indigenous Peoples after decisions have already been made about proposed activities, to the point of constituting mere procedures to mitigate and compensate impacts. The latter is particularly grave given that most of the activities spoken of by participants relate to national conservation areas or extractive, energy and infrastructure projects that result in the displacement and involuntary resettlement of Indigenous populations.

As recounted by participants, Indigenous traditional land tenure ownership is not adequately considered in government land management decisions, which leads to the eviction of Indigenous Peoples for conservation areas, as well as land management policies that favour settled agriculture to the detriment of Indigenous nomadic and semi-nomadic pastoralist practices. Consequently, the imposition of these agricultural policies jeopardizes the traditional pastoralist Indigenous Peoples that rely on mobility and on keeping livestock on their traditional lands. Governments are reluctant to go back to the drawing board regarding land management and economic development practices, and thus perpetuate the exclusion of Indigenous Peoples. As one Botswanan representative noted, Indigenous Peoples are waiting to be asked: "What are your worldviews, what do you want for development?". They would then be able to respond that they want the rights to their lands and resources lost through assimilation.[166]

A major factor in the exclusion of Indigenous Peoples is the lack of awareness of their rights, of what the law can do for them, and of their rights to self-identification and self-determination. Representatives from southern African countries explained that many Indigenous communities are struggling with identity and awareness of their rights due to the legacy of assimilation and colonialism.[167] Efforts to empower and build the capacity of Indigenous Peoples in this regard have been undertaken with regard to oil and gas exploration in the Okavango Basin in Namibia, undertaken by the company ReconAfrica.[168] It was pointed out that, in this case, specific and differentiated consultation and consent processes were not carried out in accordance with Indigenous rights standards. Indigenous Peoples and their rights were bypassed in the permit approval process and traditional lands were given away.

A process of public consultations was implemented by the oil company without specifying how the public were to be defined. Only community authorities recognized by the Traditional Authorities Act were given information under this general consultation process. However, the content of the information was not publicly available, and no apparent framework guided the process. It was seemingly carried out as a mere formality for the application for an environmental licence.[169]

Aside from the question of how the process conformed to international standards on Indigenous consultation and FPIC, a major problem pointed out regarding the public consultation was that Khwe customary leadership structures were being completely disregarded. The Traditional Authorities Act imposes a leadership structure centred around one chief, or singular authority, whereas the affected Khwe communities have a more collective representative and decision-making structure. They are thus forced to assimilate to the Act, which has caused them great frustration and diminishes their self-determination.[170]

166 Gakemotho Satau (Botswana), Regional consultation with southern African representatives, October 2021.

167 Resource Africa, Southern African Consultations for IWGIA Consultations on FPIC with Indigenous Peoples of Africa (Post Webinar Report), 14 October 2021, p. 5.

168 Corinna van Wyk, LEAD (Namibia), Regional consultation with southern African representatives, October 2021.

169 Ibid.

170 Ibid.

Similar challenges in the recognition and implementation of FPIC are present in Tanzania. Conservation and Green Climate Fund projects are being designed and implemented without FPIC despite cutting across Indigenous lands. Agricultural projects implemented on Indigenous territories have created conflicts between farmers and pastoralists.[171]

One example of the impacts of conservation policies and lack of FPIC processes in Tanzania is that of the Maasai in Loliondo. Around 70,000 Maasai inhabiting an area of 1,500 km2 of their ancestral land in the Loliondo division of Ngorongoro district have, for three decades, been facing constant threat of eviction due to the government's permitting of hunting activities in the Loliondo Game Controlled Area for the benefit of the Otterlo Business Corporation (OBC) owned by the Dubai Royals. The land in question is legally recognized as village land as per the 1999 Village Land Act and the Maasai therefore have formalized land tenure rights. The government has continually attempted to change the legal status of the land from village land to a game reserve or wildlife management area. Under the Village Land Act, evictions or transfers of village land to general public or reserve land require consultation procedures with the village authorities, and procedures for full, fair and prompt compensation. The Maasai have continuously opposed their eviction since the government neither sought nor received their FPIC. In July 2009, police and OBC personnel violently entered the community, destroying and setting fire to homes and valuables, and there were reported incidents of rape, beatings and other human rights violations. In January 2022, the government again announced its decision to remove the Maasai people any time in 2022. Since 2017, affected Maasai village councils have lodged legal complaints against these actions, including before the East African Court of Justice, with a decision still pending.[172]

Forced eviction of the Maasai people in Loliondo in June 2022.

171 Interview with Edward Porokwa, PINGOs Forum (Tanzania), December 2021.

172 IPRI, IWGIA, Urgent Alert: Around 70,000 Masaai in Loliondo, Tanzania, face another forceful eviction, gross violation of human rights and breach of Rule of Law (27 January 2022).

Major concerns regarding a lack of consultation and FPIC are also present with regard to the East African Crude Oil Pipeline – a project promoted by the governments of Tanzania and Uganda.[173] In Tanzania, the project will cross more than 150 km of Indigenous territory. Discussions on recognizing the existence of Indigenous Peoples and FPIC came about as conditions required by the international financial institutions backing the projects. Hence, it was the need of the governments concerned to obtain more funding that prompted a process of consultation with affected Indigenous communities at the resettlement stage. Said consultation was obviously not carried out with regard to the design or approval of the project.

The consultation process related to the EACOP started in 2020 and is being undertaken by the project partnership since the government has not been visible in this process. An engagement framework was developed and presented to the affected Indigenous communities. However, not all community representatives have signed and agreed to the terms of the framework. One noted problem is that the content of the framework is not entirely clear to the affected communities. This framework is thus still in a negotiation process.[174]

Several other conceptual problems are present regarding the EACOP. The government does not recognize Indigenous land ownership. Only three types of land ownership are recognized: general lands, reserve lands and village lands. Only traditional authorities pertaining to village lands are recognized for the purposes of consultation, not traditional Indigenous pastoralist authorities. Indigenous traditional forms of collective land ownership are not factored into consultation processes or resettlement plans. Discussions on compensation are also problematic since it is not just the monetary value of the land that must be considered but also its cultural and spiritual value. A question arises as to whether a method of compensating for the spiritual value of lands is possible. In any case, the issue of resettlement is already considered a given fact by all parties concerned. The consultation process at this point is only from the standpoint of how best to mitigate the harmful effects of the project.[175] The elements of free and prior, under FPIC, are therefore clearly not present.

Notwithstanding the above, a collective of NGOs comprising the Pastoralist and Indigenous Peoples Organisation (PINGOs Forum), the Parakuiyo Indigenous Community Development Organisation (PAICODEO) and Ujaama Community Resource Team (UCRT) are supporting the affected communities in the process of developing the aforementioned Engagement Framework. This includes capacity-building of the affected Indigenous Peoples and facilitating and seeking ways to improve their engagement with EACOP. A Memorandum of Understanding between PINGOs Forum and the EACOP Project was developed to affirm this role played by said NGOs and to facilitate monitoring of the implementation of the Framework on Indigenous lands in the Handeni, Kilindi, Kiteto, Simanjiro and Hanang districts. EACOP has also agreed to incorporate comments and other inputs from the NGOs as well as their role in monitoring the impact of the project and assisting the communities in having their grievances addressed.[176]

Participants in the online consultations and meetings also discussed their own initiatives for implementing international standards on

173 According to the project website, the project partners include the Uganda National Oil Company (UNOC), the Tanzania Petroleum Development Corporation (TPDC) and three oil companies – TotalEnergies, CNOOC Limited, and TULLOW PLC. See, http://eacop.com/our-partners/.

174 Interview with Edward Porokwa, PINGOs Forum (Tanzania), December 2021.

175 Ibid.

176 Information Update from PINGOs Forum (Tanzania), March 2022.

FPIC, particularly through Biocultural Community Protocols (see, infra Ch. 3.c.i). In South Africa, other efforts have included articulating FPIC through codes of ethics related to access to research conducted in Indigenous communities. One problem identified was that of researchers and academics who extracted knowledge from Indigenous communities, including images and information that reveal traditional and sacred knowledge that should remain within the community. This has led to commercial exploitation of Indigenous knowledge, often prompted by the undue influence of researchers caused by the poverty faced by the communities and their lack of knowledge of their own rights. Consequently, communities have experienced "research fatigue" or "research trauma" and distrust of researcher and academics.[177] The San Councils of South Africa, Botswana and Namibia developed a research Code of Ethics aimed at regulating the activities of researchers and academics. The code requires researchers that intend to engage with San communities to adhere to four principles of respect, honesty, justice and fairness and comply with the community's approval process.[178] It is hoped that, through these efforts, researchers, academics and other external actors will be able to work with Indigenous communities as equals, in a way that is respectful of Indigenous Peoples' rights.

Among the main conclusions that can be derived from the consultations with southern African representatives, it was noted that for FPIC to be realized, governments need to incorporate this right into domestic laws and implement it in a gender-sensitive way. Through legal protection and implementation, FPIC can ensure that lands and resources are governed responsibly and that development projects benefit the planet and the communities that protect it. It was observed that the way in which FPIC is translated on the ground depends on political views, government interests, and local government's understanding of FPIC. FPIC needs to be framed as a human right within domestic regulations and through institutional support for its implementation. [179]

In addition, priority must be given to internal mobilization and organizing by Indigenous community members as a means of strengthening internal cohesion, self-empowerment, and awareness of their rights. This includes ways of promoting internal accountability mechanisms inherent in customary law and ensuring that customary law evolves to serve the community's needs and not just that of the traditional community authorities recognized by law. It is important for governments and developers to respect communities' customary law, land tenure systems and decision-making processes. [180]

vii. FPIC within specific Indigenous rights legislation – Republic of Congo

The previous UN Special Rapporteur on the rights of indigenous peoples noted important advances in the development of a solid legal framework for Indigenous Peoples' rights in the Republic of Congo – one of the very few African countries that specifically recognizes Indigenous Peoples. Law No. 5-2011 on promoting and protecting the rights of Indigenous Peoples sets the legal foundations for In-

177 Resource Africa, Southern African Consultations for IWGIA Consultations on FPIC with Indigenous Peoples of Africa (Post Webinar Report), 14 October 2021, p. 4.

178 Ivan Vaalboi (South Africa), Regional consultation with southern African representatives, October 2021; Resource Africa, Southern African Consultations for IWGIA Consultations on FPIC with Indigenous Peoples of Africa (Post Webinar Report), 14 October 2021, p. 4.

179 Resource Africa, Southern African Consultations for IWGIA Consultations on FPIC with Indigenous Peoples of Africa (Post Webinar Report), 14 October 2021, p. 7.

180 Ibid., 14 October 2021, p. 7.

digenous Peoples to claim their rights, protect their culture and livelihood, access basic social services and protect their civil and political rights. The Special Rapporteur also noted the 2015 constitutional recognition of the need to promote and protect Indigenous Peoples' rights.[181]

However, it was observed that there was a generalized lack of awareness, including among Indigenous Peoples, of the existence of the legal and constitutional protections afforded to them. There was no comprehensive nationwide campaign by the government to raise Indigenous Peoples' awareness of their rights and how to exercise them and seek remedy when they are not observed.[182] It was also noted that there is a need to harmonize other legislation with the rights recognized in Law No. 5-2011. The Special Rapporteur's Congo report noted a Forest Code that had been in the drafting process since 2012 and which established the rights of Indigenous Peoples and local communities to forest management. However, as of March 2019, the drafts had not reflected the rights recognized in Law No. 5-2011 and did not expressly provide for Indigenous Peoples' right to FPIC regarding decisions affecting their traditional lands.[183]

In 2019, a series of decrees were adopted to implement the provisions of Law No. 5-2011, which also included guidance on holding consultations with a view to obtaining FPIC in the context of development programmes and to protect protected Indigenous cultural, intellectual, spiritual and religious property and knowledge.[184] However, civil society organizations pointed out that Decree No. 2019-201 on consultation and participation of Indigenous Peoples regarding social and economic development programmes limits the time for carrying out consultations to only three months. It was also pointed out that the decree needed to provide more concrete guidance on how to obtain FPIC in a way that respects Indigenous Peoples' rights.[185]

The above-mentioned consultations were to be led by a consultative commission established by the Minister for Justice, Human Rights and Promotion of Indigenous Peoples. The commission would be composed of representatives of four ministries, one local administration official, a local elected official, a representative of the project proponent and a representative from civil society. However, there is no requirement that any member of the commission be Indigenous.[186] Said commission is to engage with different constituents of the Indigenous Peoples concerned through their representative structures. Concrete ways to engage with the communities are set out in the Decree but it is not clear that these are the most culturally-appropriate ways to communicate with the Indigenous Peoples concerned. Although obtaining their FPIC is the stated goal of the consultation, there is no complaints procedure that could be used by Indigenous Peoples should they consider the consultation process flawed or that an agreement resulting from the consultation was not respected.[187]

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181 See, Report of the Special Rapporteur on the rights of indigenous peoples. Victoria Tauli-Corpuz: Visit to the Congo, A/HRC/45/34/Add.1 (10 July 2010)["UNSR-IP Report on Congo"], para. 8.

182 Ibid., para. 12.

183 Ibid., para. 79.

184 Ibid., para. 8.

185 Ibid., para. 69.

186 Ibid., para. 70.

187 Ibid., paras. 71-72.

Indigenous community in the Republic of Congo.
Credit: IWGIA

The Special Rapporteur's report concluded that, despite the legislative and institutional framework in the Congo, much work remained to be done to end the exclusion and marginalization of Indigenous Peoples and to fully recognize and protect their distinct identities, cultural practices and ways of life. There is still a lack of adequate policies to enable the concrete realization of Indigenous Peoples' right to self-determination "an essential part of which lies both in the demarcation of their traditional collective lands and in State recognition of their autonomous governance structures." [188] The social programmes instituted by the government to benefit Indigenous Peoples are an important step but would benefit from the meaningful participation of Indigenous Peoples in their design and implementation, and ensuring effective consultation processes and respect of FPIC in decisions affecting them.[189]

c. Experiences in the use of Indigenous Peoples' Protocols

i. FPIC in the context of Biocultural Community Protocols and the Nagoya Protocol

Given the sparse presence of legal frameworks consistent with international law standards on FPIC throughout the African continent, it should be noted that FPIC has figured most prominently in the context of the implementation by African countries of the Convention on Biological Diversity (CBD) and the Nagoya Protocol. There are notable examples of the incorporation of language relating to consultation and consent. In South Africa, the National Environmental and Management Biodiversity Act (Biodiversity Act), which is the national framework established to implement the Nagoya Protocol, provides for general community consultation rights.[190] In addition, the 2018

188 Ibid., paras. 104-105.

189 Ibid., para. 105.

190 IWGIA, Baseline Study on Indigenous Peoples' Community Protocols in Africa, 2020 (Unpublished).

Indigenous Knowledge Systems Act of South Africa provides for community consultations around their Indigenous knowledge systems. Both the Biodiversity Act and the Indigenous Knowledge Systems Act recognize community protocols as valid community legal tools for consent.[191]

It is in this context that Indigenous Peoples have developed Biocultural Community Protocols (BCPs). In South Africa, the Indigenous Khoikhoi and San peoples developed the Khoikhoi Peoples Rhooibos Biocultural Community Protocol. This BCP was launched in 2020 and is focused on access and benefit-sharing relating to the commercial use of the rooibos plant. It states the benefits that are to be derived from the use of the Khoikhoi and San peoples' traditional knowledge of this plant. The BCP addresses the identity and history of these Indigenous Peoples, and articulates their rights and the provisions of policy guidance to gain FPIC for the use of their knowledge and resources. It provides for the recognition of the Khoikhoi and San as the original inventors of its "first knowledge" and that the South African rooibos industry is to pay an annual traditional knowledge levy for the use of this knowledge. The BCP explains the process of how external actors may gain consent to the use of the knowledge, how community entry is to occur, and sets out the basis for future internal community regulatory measures for external actors.[192] Fishing communities in South Africa have also been involved in BCP processes as a way of affirming their customary law practices.[193]

In Botswana, following the Nagoya Protocol, a Strategic Plan was implemented for the country in general. There was interest among women in receiving training with regard to a Biocultural Protocol. However, the Botswanan government's approach to implementation of the CBD has been geared towards the national population in general, with no differentiated process for Indigenous and marginalized communities. This has led to their exclusion as they are made to conform or assimilate to general consultation processes, thus precluding their effective participation.[194]

In Namibia, the Khwe (San) people living inside the Bwabwate National Park have also developed a BCP as part of their struggle for recognition as a cultural community on a par with other cultural communities, and due to the loss of their ancestral lands and resources inside the park. The BCP was a response to the challenges the Khwe community faced living inside the park, despite the existence of a co-management agreement in place. It was an effort to protect and valorize their Indigenous knowledge, intimately linked with the rich biodiversity located in the park.[195]

The development of this BCP was done in the framework of the Namibian "Access to Biological and Genetic Resources and Associated Traditional Knowledge Act" (2017). This Act recognizes community protocols as "a broad range of practices and procedures, both written and unwritten, developed by local communities in relation to their genetic resources and associated traditional knowledge which cover a range of matters, including how local communities expect external actors to engage with them". The Act also protects traditional knowledge through the recognition of customary law. It adds that "the State must recognize and protect the community intellectual property rights as they are enshrined and protected under the norms, practices and customary law found in, and recognized by, the con-

191 Ibid.

192 Ibid.

193 Lesle Jansen, Regional consultation with southern African representatives, October 2021.

194 Gakemotho Satau (Botswana), Regional consultation with southern African representatives, October 2021.

195 Barbara Lassen, Lesle Jansen, et al, Community Protocols in Africa: Lessons Learned for ABS Implementation, Natural Justice and ABS Capacity Development Initiative, 2018 ["Community Protocols in Africa"], p. 36.

cerned local communities, whether such law is written or not".[196]

The content of the Protocol aims to describe:

- Their identity as a community living inside the park
- Their intimate connection with the local resources and wildlife, including their traditional knowledge associated with these resources
- Their vision and priorities
- Their organization and decision-making structures, including procedures for prior, informed consent
- The barriers and challenges of living inside the park
- Their rights under national law.[197]

The community also included a biodiversity register of its traditional resources, when access is needed to the resources, and a community map in the BCP.[198]

The development of the BCP had a significant outcome for the Khwe peoples as it helped unite the community and avoid past practices whereby only individuals approached by commercial users would benefit from the pool of traditional knowledge. With the BCP, "the community has a common understanding of their traditional knowledge as a valuable and shared resource, only to be shared with their consent".[199] The BCP process also helped articulate the importance of land and traditional authority. It is clear for them that, without rights and access to their customary land, the continuation of their traditional culture and knowledge and truly equitable benefit-sharing would not be possible.[200]

Workshop conducted with the Nsefu community in eastern Zambia to help the community understand and develop Biocultural Community Protocols (BCPs).
Credit: Resource Africa

196 See, Ibid., p. 35.
197 See, Ibid., p. 36.
198 See, Ibid., p. 36.
199 See, Ibid., p. 37.
200 See, Ibid., p. 38.

As mentioned earlier, the Endorois people in Kenya won an important case before the African Commission with regard to their ancestral land rights in the Lake Bogoria National Park. Subsequently, and notwithstanding ongoing challenges in the implementation of the Endorois decision, they undertook the task of developing a BCP within the framework of discussions in Kenya on the development of Access and Benefit-sharing (ABS) agreements. The Endorois intend for the BCP to form the basis for their participation in other government policy, planning and decision-making processes.[201]

Some provisions in Kenyan legislation have been favourable to this end. The Protection of Traditional Knowledge and Cultural Expressions Act 2016 includes criteria for the protection of Traditional Knowledge and specifies the rights of communities in this regard. These include the right to prior, informed consent, to govern the use of their Traditional Knowledge in accordance with their own rules, and rights to benefit-sharing related to, but not limited, to the traditional knowledge associated with genetic resources.[202]

The Endorois BCP was launched in 2019. It contains information on the legal framework supporting the existence of the BCP; their customs, culture and traditions; cultural and religious practices and sacred areas; traditional knowledge; social organization; traditional systems of governance and decision-making; rules on access and use of natural resources; and their challenges and main concerns. The latter includes threats to culture, biopiracy, failure to implement the Endorois decision of the ACHPR, deforestation, climate, change, and insecurity, among others.

The BCP was developed with the stated objective of "articulate[ing] community determined values, procedures and priorities under customary, state and international law as the basis for engaging with external actors such as governments, companies, academia and other interested parties on the utilization of community resources."[203]

The BCP itself states that the development process was carried out through a participatory process that involved planning meetings with key stakeholders. This process included:

> "More than 30 meetings in seventeen (17) locations, that sought to include traditional leaders, men, women, youth, KWS, and government officials over the one year it took to collect data to prepare the community protocol were held. Over 1,000 community members gave accounts of their traditional and cultural practices that they believe are important for their way of life. Subsequent steps involving consultative meetings and working groups saw involvement of over 2,000 people culminating into the information contained in this BCP. [Ultimately leading to its validation by the Endorois Full Council meeting on 10th August 2019]".[204]

It is worth noting that the Endorois BCP contains a specific provision on Prior, Informed Consent that encompasses activities beyond access to genetic resources, and states how it is to be arrived at and its durability:

> "Any project within the Endorois community's lands, be it access to genetic resources, mining of among others precious stones, minerals, infrastructure or other development must be accompanied by prior informed consent (PIC) and no agreements shall be entered into on behalf of the community without their prior consultation and participation in decision-making. Such consent must be given, without manipulation or

201 See, Ibid., pp. 20-21.

202 See, Ibid., p. 20.

203 Endorois Peoples' Biocultural Protocol: Sustainable Biodiversity Resource Management for Access and Benefit-Sharing and Protection from Threats to Culture, (2019), p. 14

204 Ibid., p. 11.

any other form of intimidation or inducement failing which any discussion leading to any concessions or agreements will be null and void. The community must have been fully informed about the project, and have a clear understanding of the purpose, methodology, and intended outcomes of the proposed project, including potential risks, uses and possible commercialization options.

Adequate opportunities and time frames have been provided for community to make their own decisions about the proposed project. This will be through their community governance structures. The consent given is an ongoing engagement between the community and the project proponent. Subject to local circumstances, it can be suspended or withdrawn should the commitments made in the Prior Informed Consent and the Mutually Agreed Terms (MAT) or any other contracts entered into as a result fail. Prior Informed Consent (PIC) shall apply to all State and Non-State Actors."[205]

The Endorois have also developed other self-determined initiatives along with the BCP. These include efforts to promote traditional medicines and knowledge to address COVID-19, initiatives to tackle climate change, and the promotion of alternative livelihoods, agroecology, food security and sovereignty.[206] The Ogiek in Kenya also developed their own Biocultural Protocol, having launched its third edition in 2021. The Ogiek's BCP hast the stated objective of safeguarding their rights, traditional knowledge and resources and providing clear terms and conditions to regulate access to their assets and benefit-sharing. It is also intended as a negotiation tool to guide interaction with stakeholders and partners regarding Ogiek resources. Through this BCP, the Ogiek explain "who we are; where we live; our relationship with the Mau Forest Complex and our land, and associated traditional knowledge; rights over natural resources in the Mau and our responsibility to protect and conserve the Mau Forest."[207] The BCP was developed through community consultations in different parts of the Mau Forest Complex, with technical assistance provided by the Ogiek Peoples' Development Program (OPDP).[208]

The Ogiek Community Bio-Cultural Protocol.
Credit: Ogiek Peoples' Development Programme (OPDP)

205 Ibid., p. 27.

206 Interview with Christine Kandie, Endorois Indigenous Women Empowerment Network, November 2021.

207 Ogiek Bio-Cultural Community Protocol: Safeguarding Rights and Managing Resources to Improve Livelihoods, 3d Edition 2021, p. 1.

208 Ogiek Bio-Community Protocol 2021, p. 2.

The reasons why members of the Ogiek developed the BCP include, inter alia: as a negotiation and advocacy tool for engagement between the Ogiek and government institutions such as the Ministry of Environment and Forestry, Ministry of Lands, and other authorities in order to secure Ogiek land tenure rights and protect the Mau Ecological unit; to promote due recognition of the Ogiek as a distinct ethnic group; to secure benefit-sharing of genetic resources and traditional knowledge; to revive, promote and preserve Ogiek culture, language, heritage and naming of places, trees, birds, etc.; to promote community organization, coordination, engagement and capacity to negotiate with external stakeholders; to protect and promote their own intellectual property rights; and to control exploitation of natural resources by research institutions, government agencies, pharmaceutical companies and others without due consideration of FPIC.[209]

The BCP provides information on the Ogiek traditional system of governance and decision-making. It explains the role of councils of elders at the local level and a greater Council of Elders that represents the Ogiek's interests before the national government.[210] It is the Council of Elders, along with other traditional leaders (seers, rainmakers, spiritual leaders, etc.) who are recognized as the representatives of the Ogiek at the local, national, regional and international level.[211]

The BCP presents the challenges the Ogiek people face. These include limited access to basic services such as health and education. Impoverishment has resulted due to the marginalization, land grabbing and constant evictions faced by the Ogiek. Their ancestral lands are deemed government land and they have no legal land ownership. The loss of lands has led to cultural loss, including threats to the preservation of knowledge of traditional medicines and traditional conservation methods, loss of economic livelihoods and traditional natural resources, spiritual sites and water resources.[212]

The BCP asserts the right of the Ogiek to be consulted and to negotiate FPIC and access and benefit-sharing arrangements with State and non-state agencies with regard to: mining concessions, diversion of water resources from the Mau complex to cities; extraction of construction materials; forest resources; research by academic institutions involving traditional cultural knowledge; extraction of traditional medicines by pharmaceutical industries; as well as for use of their traditional knowledge on media channels such as YouTube.[213]

The established governance structure set out in the Ogiek BCP is to dictate any negotiation and communication with outsiders. Therefore, "state actors shall not be allowed to enter into any agreement with individuals/companies on behalf of the community without the knowledge and permission from the community leadership" and a Memorandum of Understanding (MOU) with community leadership is required for any activity by non-state actors to carry out any project in Ogiek lands. MOUs between the Ogiek and government, investors or researchers would also be required with regard to the benefit-sharing of proceeds from natural resources in their ancestral lands. Community consent is required in cases of the media or any other actor using information derived from the community.[214]

209 Ibid., pp. 1, 2.

210 Ibid., p. 12.

211 Ibid., p. 18.

212 Ibid., pp. 13-14.

213 Ibid., pp. 15-16.

214 Ibid., p. 17.

The Ogiek BCP also has a section seeking to link it to national development and planning programmes. It states that the BCP shall inform district planning by counties and other State corporations in collaboration with the communities. It points out that the BCP's provisions on FPIC, access and benefit-sharing and other provisions that have a bearing on traditional economic and land management activities also indirectly address poverty alleviation and should therefore be used as a reference for planning any poverty reduction strategies. The Ogiek also see their BCP as an important guide for State and non-state actors in the realization of the goals established in the Kenyan government's Vision 2030 for the improvement of the quality of life for all citizens. In addition, it is a guide to the implementation of Kenya's obligations under international and regional human rights and conservation-related treaties and conventions, as well as its commitments under the Sustainable Development Goals.[215]

ii. FPIC Protocol initiatives: Ogiek in Kenya

Beyond the Nagoya Protocol and related BCPs, there has been little experience in developing Indigenous Peoples' own FPIC protocols. However, it is likely this may change in the coming years, as more spaces for interaction between African Indigenous Peoples and Indigenous Peoples in other continents is leading to exchanges in experiences and practices with regard to FPIC, self-determination and other matters.

Aside from the previously mentioned BCP, the Ogiek people in Kenya are now in the process of developing a separate FPIC Protocol as a tool to help in the process of implementing the African Court's ruling in the Ogiek case. According to the Ogiek Peoples Development Program, there is a need to develop this specific FPIC Protocol because it is foreseeable that the Kenyan government will want to negotiate various aspects of the Court's ruling. Consequently, it will be necessary for the Ogiek to have a specific procedural document to refer to. It is also necessary in the context of extractive, development or other projects promoted by the government.[216]

It is likely that the government will not accept or recognize the FPIC Protocol. As was the case with their BCP, the government does not accept the principle of "free" in FPIC, therefore limiting itself to recognition of simply "PIC". This initiative of developing a specific Indigenous Peoples FPIC Protocol would be the first of its kind in Kenya and likely in Africa as a whole. Aside from the BCPs developed by the Endorois and Ogiek peoples, the other area where FPIC has been addressed in relation to Indigenous Peoples in Kenya is in the government's national guidelines for the implementation of REDD.[217]

The Ogiek have been working with the Kichwa Indigenous People of Ecuador, who are also developing their own FPIC Protocol. This is part of an exchange facilitated by the organization Land is Life.[218] The Ogiek Council of Elders has a major role in the process of developing the Protocols. Within this process, there is also the active participation of Ogiek women and youth.[219]

Through the development and use of the FPIC Protocol, the Ogiek are seeking to address many of the challenges they have encountered in the negotiation process with the go-

215 Ibid., pp. 27-29.

216 Interview with Daniel Kobei, Ogiek Peoples Development Program, February 2022.

217 Ibid

218 See, Land is Life, Co-Development of FPIC Protocols: From the Ecuadorian Amazon to the Forests of Kenya, 20 September 2021.

219 Interview with Daniel Kobei, Ogiek Peoples Development Program, February 2022.

vernment in the four years since the African Court's ruling. This has included efforts by the government to negotiate the terms of the Ogiek's rights to the Mau Forest in a manner that would be inconsistent with the rights and standards affirmed by the African Court in the Ogiek Case. Since the Mau Forest has been officially designated a conservation area, the government has presented various proposals for co-management between the government and the Ogiek. However, the proposed co-management proposal implied recognition of access to the Mau Forest but no ownership rights. Under this proposal, the government will still have total control. There was no understanding of the Ogiek as equal partners in the management of the Mau Forest. Such proposals have therefore been unacceptable to the Ogiek.[220]

The Ogiek are also contending official notions that what they seek is a "piece of land" just like any individual. The Ogiek are seeking to ensure that discussions related to the implementation of the ruling have as their starting point the recognition of collective rights to Ogiek territory. To that end, they have undertaken a process of community mapping whereby 10 areas would have collective titling as part of the Ogiek Territory.[221] The community mapping was seen as necessary, as they could not rely on the government to do it since it considers the lands to be part of the national conservation area. It is evident that the implementation process of the Ogiek ruling still faces challenges in ensuring that the regional and international standards on Indigenous land, consultation and other rights are adequately understood, recognized and respected.

In this context, the Ogiek are seeking to ensure that, in the negotiations related to implementation of the ruling and in the activities proposed by the government and outsiders, there are clear procedures for their own decision-making processes. This is necessary to ensure they have greater control over decisions that affect them and to ensure proposed activities or other measures safeguard their rights and respects their cultures, norms and traditions.[222]

4. Conclusions and recommendations

The information gathered during the study clearly shows that the right to prior consultation and free, prior and informed consent as specific human rights and principles that apply to populations in Africa that identify as Indigenous is, for the most part, non-existent in domestic legislation, let alone applied adequately in African countries. Mention was made of decrees in the Republic of Congo for the implementation of FPIC in specific matters but there are still various inconsistencies with international standards that need to be addressed. Some examples in the recognition of FPIC could also be argued with regard to legislation developed in the framework of national-level implementation of the Nagoya Protocol, which has led to various experiences with the development of Biocultural Community Protocols. However, further studies and time is needed to see how the principles and components of FPIC are respected in the context of protecting traditional knowledge, biocultural and genetic resources. The same would apply to National Guidelines on FPIC for REDD+ projects developed in some countries, which specifically provide for the FPIC of Indigenous Peoples.

A more difficult challenge lies in the recognition and respect of FPIC in the context of extractive, energy, and major infrastructure projects, as well as the establishment of conservation areas. This is where the reality on the ground for many

220 Ibid.

221 Ibid.

222 Ibid.

Indigenous populations and communities, whose ancestral lands and natural resources face threats from State and other outside interests, could not be further from what international and regional human standards call for. It is a situation where grave human rights violations are occurring, such as forced dispossession and displacement, which threaten the physical and cultural survival of Indigenous Peoples. These factors are accentuated where Indigenous Peoples are also affected by general political instability and armed conflicts in some countries.

The above activities and projects form part of major policy agendas which, for the most part, are unilaterally developed and implemented by State governments. Many African countries face a lack of civic space for the population in general to be able to effectively participate and deliberate about major law and policy decisions regarding economic development, conservation and other activities. This has especially negative consequences for Indigenous Peoples, who form part of non-dominant cultural populations that have been discriminated and marginalized in their respective countries. This makes for a situation where there is little regard for the specific and differentiated impacts these policies, projects and activities have on Indigenous Peoples' lands and distinct identities and cultures. This is further evidenced by the fact that most, albeit not all, African governments refuse to recognize the application of the term "Indigenous Peoples" in their respective countries and the continent in general. The application of international standards on Indigenous rights, especially FPIC, thus faces serious conceptual and practical obstacles from the outset.

On the other hand, the African Human Rights System has, in recent years, taken significant steps to affirm and incorporate international standards on Indigenous Peoples' land, consultation and FPIC rights. Recent decisions by the African Commission and the African Court on Human and Peoples' Rights have incorporated the standards contained in the U.N. Declaration on the Rights of Indigenous Peoples, as well the jurisprudence of universal and inter-American human rights bodies dealing with Indigenous Peoples' rights. Through case decisions, as well as specific official resolutions and thematic reports, the African Regional System, and the African Commission in particular, is consolidating a body of regional doctrine and jurisprudence consistent with international standards on Indigenous Peoples. This presents an important opportunity throughout the continent for the promotion of Indigenous rights standards, although there is still reluctance among State governments, es evidenced by the lack of significant progress in the implementation of the Endorois and Ogiek decisions. At the least, it shows government and national populations that the concepts, principles, and rights relating to Indigenous Peoples, including FPIC and even self-determination (as recognized in the UNDRIP), can and should apply to the African context. The analysis and guidance that the ACHPR has provided on international Indigenous rights standards, especially on the right to self-determination, must be an important basis for addressing the recognition and implementation of FPIC in Africa. It is apparent that this requires significant time for governments and other actors to understand, and to dispel notions that these rights are a threat to national unity, instead understanding them as important tools for building inclusive and multicultural democratic societies.

With that in mind, important lessons can also be drawn from experiences in other regions and continents of the implementation of international standards on FPIC and Indigenous Peoples. Throughout the Latin America region, there have been important legislative, policy and jurisprudential developments regarding consultation. This has been prompted by the ratification by most Latin American countries of ILO Convention 169 on Indigenous and Tribal Peoples. However, the UNDRIP, as well as the approval of an American Declaration on Indigenous Peoples and the development of a solid body of jurisprudence, have also been influential in the discussion of consultation and consent.

One of the important lessons is whether domestic legislation on consultation is desirable or necessary. There has been considerable frustration among Indigenous Peoples throughout Latin America as to how consultation and consent standards are reduced or undermined in the process of developing and adopting this type of legislation. A fundamental problem with said government initiatives is that they are not consulted with Indigenous Peoples. Consequently, an important alternative promoted by Indigenous Peoples themselves has been the development of autonomous consultation protocols or third-party engagement protocols. There have been significant developments in countries such as Brazil and Colombia, where the courts have also issued decisions calling for the recognition and implementation of Indigenous consultation protocols. In addition, these developments also present an opportunity for exchanges between Indigenous Peoples in Africa and Latin America, as shown in the case of the Sarayaku in Ecuador and the Ogiek in Kenya.

In Africa, there has been no apparent discussion of specific legislation on Indigenous consultation apart from inclusion of the topic in decrees to implement general legislation on Indigenous Peoples in the Republic of Congo. On the other hand, general land and mining laws in various countries offer possible entry points through provisions related to consultation and, in some cases, consent of local communities affected by development or extractive projects. However, it is evident that said provisions do not meet the requirements under UNDRIP and other Indigenous rights standards and, in any case, implementation of said domestic legislation falls short when there are competing extractive, energy, or other interests. As was also noted in this report, government guidelines for the implementation of REDD+ in some countries have presented an important entry point for the inclusion of FPIC standards with regard to Indigenous Peoples. However, time is needed to see how they are implemented on the ground.

In other countries, constitutional and legislative recognition of customary law presents another opportunity for requiring consultation and consent for activities affecting communal lands. However, a major setback is the role given to individual chiefs or authorities (a practice promoted during the colonial era), which can lead to unilateral decisions for consent, thus undermining notions of collective participatory decision-making processes in communities. The interpretation of customary law must therefore be based on an understanding of a more participatory and inclusive decision-making process in line with each Indigenous people's distinctive representative and decision-making structures, as well as ensuring the participation of women, youth, elders and other population sectors in a given community. Customary law should also be understood as a living body of law, adapting to new circumstances.

With the above understanding in mind, domestic provisions on customary law could form the basis for recognition of Indigenous communities' and populations' own decision-making mechanisms, which could conceivably include their BCPs and FPIC Protocols. These Protocols could be interpreted and understood as expressions of customary law. True participatory and inclusive processes in the development and implementation of said protocols would be necessary for the effectiveness of this course of action. The development of BCP and FPIC Protocols offers an important opportunity for Indigenous Peoples themselves to define and strengthen their traditional decision-making processes for undertaking consultation and FPIC processes and the roles of their respective authorities and representatives in that regard. This presents an advantage over general laws and policies on FPIC, which run the risk of overlooking these specific features and imposing a one-size-fits-all approach.

Another important problem identified in the discussion of consultation and FPIC in Africa is the lack of adequate information on the possi-

ble impacts of proposed activities or projects. These impact assessments are fundamental for ensuring Indigenous Peoples can make informed decisions on whether to consent to said activities or not. According to international standards, these assessments must be undertaken and available prior to a decision that could affect Indigenous Peoples' rights. Indigenous Peoples' knowledge and participation is also necessary in the preparation of these assessments.

Ultimately, beyond the specifics of how FPIC is legally recognized or incorporated into domestic legislation, its effective implementation requires the existence of actual spaces and opportunities for participation by Indigenous Peoples in the formulation of policies on development, conservation, renewable energy or any other areas in the territories and regions they inhabit. The concerns of Indigenous Peoples need to be incorporated into the design of policies and programmes in these areas. These policies and programmes must recognize, as a starting point, Indigenous Peoples' distinct identities, cultures and connections with their ancestral lands and territories. The ability to influence decision-making in these areas and to undertake their own development or other priorities are important constituent elements of self-determination, as previously pointed out by the African Commission.

Recommendations

It is important to recall the recommendations made by the ACHPR WGIP Report on Extractive Industries to African States, business enterprises, International Financial Institutions, Civil Society Organizations, National Human Rights Institutions, and Indigenous Populations/ Communities. All these different actors have important roles to play in the recognition and promotion of Indigenous Peoples' rights, particularly with regard to lands, consultation and FPIC in the context of extractive, energy and other similar projects.[223] It is important for all these actors to build on these recommendations in order to ensure effective recognition of the application of FPIC and, in that sense, strengthen and empower Indigenous Peoples in the realization of their rights.

In that vein, this study presents the following recommendations:

To States

1) As the primary duty-bearers under international human rights law, States have the responsibility to put in place constitutional, legislative, policy, institutional and other necessary frameworks to recognize and give practical effect to the rights of Indigenous Peoples. This is particularly necessary in the areas of recognition of customary land ownership, traditional representative structures, management of natural resources, consultation and free, prior and informed consent. These measures should be done in consultation with the Indigenous Peoples themselves through their respective representative institutions.

2) The above efforts should be guided by international standards set out in the United Nations Declaration on the Rights of Indigenous Peoples, ILO Convention 169 on Indigenous and Tribal Peoples, and African regional instruments and resolutions, including the African Charter on Human and Peoples' Rights and the interpretive jurisprudence highlighted in this study. To this end, States could consider, where applicable, the ratification or express endorsement of international instruments relevant to the rights of Indigenous Peoples.

3) In addition, said efforts should be accompanied by educational and awareness-rai-

223 ACHPR, Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights: East, Central and Southern Africa, adopted by the ACHPR at its 58th Ordinary Session (2017), pp. 132-140.

sing campaigns within their respective national populations regarding the existence of Indigenous Peoples, their rights, issues and concerns, and their relevance and importance in their respective countries.

4) Indigenous Peoples should participate, through their representative structures, in national, regional and local decision-making processes related to the design and implementation of social, economic, cultural, environmental and development programmes and policies. These forms of participation should be based on the recognition of Indigenous Peoples' distinct identities, cultures, ways of life, and their special connection with their ancestral lands, territories and natural resources. Respect for Indigenous Peoples' rights as well as their cultures and knowledge need to be also considered in the development of policies and programmes related to environmental conservation, climate change mitigation measures and other measures to address regional and global problems, for example, the COVID-19 pandemic.

5) Respect and recognition must be given to the development priorities defined by the Indigenous Peoples themselves within their own lands and territories, especially economic alternatives to extractive and other industries commonly promoted by State, business and other actors.[224]

6) Current legislation and policy on extractive, energy, conservation, infrastructure and other similar types of development and investment – including frameworks for the granting of concessions, licences and permits – must include provisions for the respect of FPIC, in line with international standards. This would also include recognition of Indigenous Peoples' own initiatives in exercising this right, including their own FPIC protocols or other self-determined mechanisms.

7) Indigenous Peoples must have access to timely and complete information on the impacts that proposed projects or activities may have on their lands in order to make informed decisions during consultation processes and truly reflect their free, prior and informed consent. To that end, domestic legislation should require that social, cultural and human rights assessments be undertaken for extractive, energy, conservation, infrastructure and other similar types of development and investment projects that could affect their lands and other human rights.[225]

8) States should ensure the existence of adequate mechanisms to guarantee Indigenous Peoples' rights to access to justice and reparations for human rights violations arising out of extractive, energy, conservation, infrastructure and other similar types of development and investment projects and activities. To that end, States should reinforce the capacity of judges, lawyers and prosecutors to address grievances brought by Indigenous Peoples and communities related to violations of their human rights. This should include training in international standards on Indigenous Peoples' human rights and business and human rights.[226]

9) States should devote adequate human, financial and technical resources to national human rights institutions in order to increase their capacity to monitor and address Indigenous Peoples' human rights issues and concerns.[227] This should also in-

224 See in general, Ibid., pp. 132-3.

225 See, Ibid., p. 133.

226 See, Ibid., p. 133.

227 Ibid., p. 134.

clude State institutions with specific mandates relevant to the protection of Indigenous Peoples' rights.

To business enterprises

1) FPIC and other Indigenous rights standards need to be incorporated into business practices. In line with the Guiding Principles on Business and Human Rights, FPIC and international Indigenous land rights standards need to be key components of policies and practices regarding due diligence and overall responsibility to respect human rights. Business enterprises must incorporate these into their own policies and practices, irrespective of State legislation or lack thereof in this regard.[228]

2) Business enterprises should ensure there are efficient grievance mechanisms to address and remedy concerns Indigenous Peoples may have regarding business activities that impact their human rights from the standpoint of international human rights standards on Indigenous Peoples. Additionally, business enterprises should ensure cooperation with State judicial and other authorities when they address and investigate grievances brought by Indigenous Peoples regarding impacts on their human rights deriving from business enterprises.

3) Along with the States, business enterprises must also respect the rights of Indigenous Peoples, their development priorities, customary laws, and decision-making process. This includes the mechanisms developed by Indigenous Peoples themselves with regard to FPIC, including Protocols and other initiatives they may propose or develop.

4) As part of operational policy, business enterprises should provide the capital for a global Indigenous populations'/communities' fund that can be accessed by Indigenous Peoples affected by extractive, energy and other similar industries who need to retain services of lawyers, geologists, economics, engineers, doctors, etc.[229]

To Indigenous Peoples

1) Indigenous Peoples are encouraged to keep developing and strengthening their own representative structures in order to assert their FPIC and other rights in the context of legislative and administrative measures and development and investment projects that could affect their rights. This includes the representative structures necessary to participate in consultation processes, evaluate the information given on impacts, and to make and follow through with agreements or other decisions resulting from consultation and consent processes.

2) Continue working towards capacity-building in asserting their rights before domestic tribunals and other bodies, as well as the African regional and universal human rights mechanisms. To this end, strategic alliances with national civil society and international non-governmental organizations or academic institutions should be sought to address this need.

3) Discuss and design their self-determined development strategies and priorities for their lands, territories, natural resources and their livelihoods and culture. Identify the role of extractive, energy and other similar industries, if any.[230] This could be in the form of Indigenous Peoples' own development or "Life Plans"(see Ch. 2.d) or other governance instruments. Make efforts to make these strategies and plans publicly known to State, business and other external actors.

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228 See, in general, Ibid., p. 134.
229 See in general, Ibid., p. 135.
230 Ibid., pp. 137-8.

4) In addition, participate in spaces of communication and exchange with Indigenous Peoples from other countries, regions and continents regarding FPIC processes. Consideration could be given to exchanges regarding the design and implementation of FPIC protocols in the context of extractive, energy, conservation or other activities that could affect their rights, as well as other self-determined governance instruments.

To international institutions, cooperation agencies and conservation organizations

1) International cooperation and donor agencies need to prioritize Indigenous rights issues and help build bridges with State, business and other actors in order to facilitate discussion on promotion of FPIC and Indigenous Peoples' rights standards. This would also include promoting Indigenous Peoples' own development priorities and self-determined development plans and Protocols for the implementation of FPIC, as well as funding for these self-determined initiatives. Indigenous Peoples' rights, cultural and traditional knowledge should be respected and promoted in the design of policies and programmes that address environmental protection, climate change and other regional and global problems like the COVID-19 pandemic.

2) Conservation agencies and international donors concerned with the environment and biodiversity preservation should promote and fund Indigenous-led conservation initiatives. Restrictive measures need to focus on the threats posed by non-indigenous sources, including criminal poaching networks, corruption and unsustainable forest exploitation.[231]

3) Conservation organizations should adopt human rights policies and monitor the application of human rights-based conservation programmes, and ensure that culturally-appropriate and independent complaints mechanisms are made available for Indigenous Peoples to voice their concerns over conservation initiatives. Additionally, they should support Indigenous Peoples' right to remedy in cases where conservation activities negatively affect their rights.[232]

4) In-country United Nations agencies should, with guidance from the Office of the United Nations High Commissioner for Human Rights, assist governments and Indigenous Peoples to carry out training and peer-to-peer exchanges to promote greater knowledge of international human rights standards and good practices regarding Indigenous Peoples' rights.[233]

To the African Commission on Human and Peoples' Rights and its Working Group on Indigenous Populations/Communities and Minorities in Africa

1) In line with the above, the ACHPR and the Working Group should create spaces for dialogue between States and Indigenous Peoples regarding the realization of international standards on Indigenous Peoples' rights, their development priorities, and their initiatives in this regard. This would include their own proposals for the realization of their rights including, if applicable or desirable, FPIC Protocols.

2) Help facilitate contacts between Indigenous Peoples and potential allies, such as regional and international institutions, cooperation

231 See, UNSRIP-IP Report on Congo, para. 108(f).
232 See, Ibid., paras. 108(g).
233 See, Ibid., paras. 108(g).

agencies, NGOs that could support Indigenous Peoples' development priorities, initiatives for implementing FPIC-like autonomous protocols, Life Plans or other similar self-determined initiatives.

3) Help facilitate and/or participate in capacity-building efforts to empower Indigenous Peoples to assert their rights before national and international bodies.

4) Develop guidance materials and provide training for Indigenous Peoples on how they can use the ACHPR to seek redress for human rights violations in relation to extractive, energy, conservation, infrastructure and other similar types of development and investment projects.[234]

5) Develop guidance materials and training for States and business enterprises on their duties and responsibilities under international law with respect to the rights of Indigenous Peoples, including in the context of extractive, energy, conservation, infrastructure and other similar types of development and investment projects.[235]

6) Promote the development and implementation of stand-alone Indigenous Peoples' human rights policies by the African Development Bank (AfDB)[236] and other relevant financial institutions with regard to their operations in African countries.

7) Continue monitoring the human rights situation of Indigenous Peoples with regard to the implementation of FPIC and other rights in the context of extractive, energy, conservation, infrastructure and other similar types of development and investment projects. In this vein, ensure continuous communication with State governments regarding situations of concern, make public statements or pronouncements on human rights issues and concerns related to Indigenous Peoples, and continue to receive and process complaints brought by Indigenous people regarding specific cases.

8) In line with the above, continue working towards the strengthening and consolidation of African regional jurisprudence on Indigenous Peoples' rights, including through cases brought before the African Court on Human and Peoples' Rights.

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234 See, ACHPR, Extractive Industries, Land Rights and Indigenous Populations'/Communities' Rights, supra, p. 139.

235 See, Ibid., p. 139.

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The right to Free, Prior and Informed Consent (FPIC) is a fundamental right for Indigenous Peoples worldwide. However, there are serious global challenges in its implementation, including across the African continent. This study examines human rights standards related to FPIC in Africa and the experiences and challenges of implementing FPIC for Indigenous Peoples in a number of African countries, including experiences with Biocultural Community Protocols (BCPs) as provided by the Nagoya Protocol.

The study also provides a comparative overview of experiences and developments in the implementation of FPIC in other regions, primarily Latin America, with a focus on Indigenous Peoples' own initiatives, particularly through autonomous consultation protocols. It is hoped that this international and comparative perspective can provide inspiration and avenues to address the challenges of implementing FPIC and other rights of Indigenous Peoples in Africa.

The study was commissioned by IWGIA and carried out by Leonardo J. Alvarado, an Indigenous human rights lawyer and expert on Indigenous Peoples' rights issues. The study was carried out in consultation with expert members of the Working Group on Indigenous Populations/ Communities and Minorities in Africa of the African Commission on Human and Peoples' Rights.

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