

SHAPING DEVELOPMENT FUTURES: An African Roundtable on Extractives, Mega Infrastructure and Women's Right of Consent Report

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¹ Convened by WoMin and hosted by KeNRA (Natural Resources Alliance of Kenya).



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List of abbreviations and acronyms

ATAS	African Institute of Agrarian Studies
ACHPR	African Commission of Human and Peoples Rights
AfDB	African Development Bank
AU	African Union
CSR	Corporate Social Responsibility
ECOWAS	Economic Commission of West Africa States
EWC	Endorois Welfare Council
FAO	Food and Agriculture Organisation of the United Nations
FPIC	Free Prior Informed Consent
KeNRA	Natural Resources Alliance of Kenya
IANRA	International Alliance on Natural Resources in Africa
ILO	International Labour Organisation
LAMOSAS	Land Access Movement of South Africa
NETRIGHT	Network for Women's Rights in Ghana
RWA	Rural Women Assembly
SAHRC	South Africa Human Right Commission
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
WACAM	Wassa Association of Communities Affected by Mining
WB	World Bank

Executive Summary

For three days, WoMin (KenRa) convened 38 activists, development practitioners, human rights defenders and advocates from Africa and Latin America for an **African Roundtable on Extractives, Mega Infrastructure and Women's Rights of Consent**.

The objectives of the roundtable were to:

- Build a women's rights perspective on consent, its centrality to just development process, and begin to theorise a legal, moral, political and economic argument for consent which advances women's rights.
- Critically review and share different approaches and strategies – their strengths and limitations - to advance women's rights of consent/ development decision-making.
- Identify strong pathways to strengthen women's rights of consent to be further explored through partnership and collaboration.

Background

The world's peasants and indigenous people live on land and territories that are rich in natural resources such as gold, diamond, silver, copper, timber, gas, and oil. These resources are exploited by multinational corporations, in partnership with governments and ruling parties, for their own purposes and profit typically without the consent of those who have been living on and are sustained by the land, waterways and forests. These violent resource extractions have led to physical, cultural, spiritual and environmental damage to the communities, ecosystems and ultimately the planet.

Populations impacted by extractives and mega-infrastructure projects should be able to determine their own priorities and strategies for development, in accordance with their values, aspirations and needs. A commitment to consent may be expressed in multiple ways: the "right to decide", "community consent", "community agreement", "collection of expression" or 'community development agreement.'.

LILAK (Purple Action for Indigenous women in the Philippines) wrote as follows in 2013:
"Mining and violence against rural and indigenous women in the Philippines, companies' attitudes have not changed, they talk about their promises of benefits, and not about the extent and objective assessment of their projects, and consent are obtained through indigenous leaders they have handpicked. As women are not always recognised as leaders in the communities, it was not deemed necessary that they be informed, nor been given a chance to participate in any form of consultation leading to consent process, thus their ideas and their values are not considered in the whole process. Indigenous women are further marginalised with the lack of their voices in the entire process, even their rights to information is violated by the government and the mining companies and this make them even more invisible".

Consent is a well-established idea, grounded in moral theory and legal statute, in the medical field as well as feminist theory, which addresses the right of women to make decisions about their bodies, about reproduction, and about their sexuality and sexual choices. In more recent years, other sectors have borrowed from liberal theory and law to expand the notion of consent to the collective, to the right of indigenous groups and communities to make decisions about developments affecting their lands and natural resources. This notion of consent is enshrined in various frameworks, laws and protocols, such as the ILO 169 convention which provides for the Free Prior and Informed Consent (FPIC) of indigenous communities, the ECOWAS protocol in West Africa, and national laws in some countries. FPIC, which does not have a universally accepted definition in the legal

framework of international law, has emerged as a principle of International Law that derives from the collective rights of indigenous peoples to self-determination.

Understanding Consent from a Women's Rights Perspective

The Development Futures Roundtable interrogated the concept of consent, its expression in various tools and legal frameworks, its potential and limitations all read from a women's rights perspective, which has with a few exceptions, generally been lacking in debates on consent processes amongst civil society organisations and responsible governance institutions.

The roundtable was structured as a series of highly participatory conversations and panel presentations each grappling with a different question around consent, in theory, statute and practice. The meeting started with a highly participatory introductory session combining inputs and group discussions on consent –the concept, history, and ways in which it has been conceptualised and fought for. This was followed by a lively discussion on why consent is a women's rights issue, what we have learnt from women's struggles and our work with women in communities, and the major challenges and opportunities we perceive in advancing women's voice and right of consent in development decision-making?

The participants had robust questions and answers time; exploring various strategies that women's rights institutions can apply in lobbying for the rights of women nationally, regionally and at the grass roots level. Owing to the fact that in African societies have structures that hinders /prevent women from participating in decision making platforms such as the community bazaars and other social gathering that are men dominated. From the lessons learnt from Latin America is that communities have the capacity to resist invasion or any attempt by government / investors to their territories therefore community need to be informed of the existing laws that protects their rights

Day One concluded with a panel addressing how consent has been institutionalised and legislated in different contexts and through various mechanisms. In Colombia popular consultations with indigenous people are a constitutional requirement; while in West Africa the ECOWAS protocol and constitutional/policy provisions in the Ghana context have yielded effective tools for engagement. The panel also addressed the question of how customary law has been and can be used as a legal basis for customary communities to claim consent, with a final input considering the ways in which consent has been institutionalised, with its many flaws, in multilateral and World Bank Policies, the Ruggie framework and sub-regional and regional protocols.

On Day Two the roundtable opened with a second panel on consent, now addressing the theme of how consent is claimed in practice through social justice struggles. The cases here considered struggles for self-definition, drawing on customary law and practice (the Amadiba struggle against mining in South Africa); and the Endorois struggle for their land rights affirmed by the African Commission on Human and People's Rights ruling in 2010. This session also included input on the Guatemalan experience where indigenous peoples resist mining drawing on the ILO 169 provision, national law and municipal accords, which acknowledge the right of consultation; and the experience of building bio community protocols as a tool for mobilising communities and defining local development agendas as a basis for consent.

The rest of the day allowed participants to digest these cases, and relating them back to experiences in other contexts. On the final day, we explored the political economy of consent – essentially deepening our shared understanding of the power relations and interests that come around extractives and mega infrastructure projects and how this stymies community voice and the collective right of consent. A key conclusion emerging from this conversation

was that consent must be won through social struggle, with international and regional frameworks, and protocols, and constitutional and national laws drawn upon as tools of support and reinforcement. The last hours of the roundtable were spent in commissions building strategy and generating ideas for how to take forward conversations and build the needed responses collectively.

Looking Ahead

Together, participants agreed to collaborate on three main themes related to consent:

1. **Deriving consent from/in customary law**, with a specific focus on how to transform customary systems to advance women's rights in decision-making/consent. Specific actions proposed include (a) documenting cases where communities, and women in particular, have used customary law to claim consent rights and the strategies employed to achieve this; (b) training organisations to build a deeper understanding of customary law from a women's rights perspective; and (c) working together to build new practice such as community referendums.
2. **Researching women's land rights** – we discussed the deep link between the strength of tenure systems, communal tenure systems in particular, and consent rights. Since women are generally denied control over land under common property arrangements, they are excluded from decision-making. Potential actions with allied organisations working on women's land rights include: (a) support to women's organising including training on strategies for expanding and deepening women's land rights; and (b) empirical research and legal exploration to build a stronger concept of what we mean by women's land rights and how use rights to land could become a source of consent rights.
3. **Strengthening consent as opposed to consultation**, with a strong women's rights focus, through (a) mapping of community strategies regionally, (b) training/capacity building targeting community activists/organisers and (c) building country specific handbooks to inform and support actions

In 2017 and beyond, WoMin will work alongside allies and potential collaborators identified by the group to develop these core themes in praxis with deep grounded movement building processes, grassroots women-led research that will feed into learning, theoretical framing, mapping, strategy-sharing, action and advocacy at multiple levels.

The Development Futures Roundtable has offered an exciting opportunity to bring a sharp women's rights lens to consent processes and holds great potential for WoMin's work and that of our allies going forward.

Introduction

Extractives industries are central to the growing African economies sited by most foreign direct investment from the continent all in the mining sector. Many governments believe that mining will lead to growth or opportunities to develop and perhaps catch up with other countries but in reality, this large scale mining is a curse to economies especially in rural communities that have been affected by extractives. Despite the anxiety that comes with investments in rural areas it is contributing very little to improve the living conditions at the local level, instead the host communities face many impacts the groups that represent the affected communities are hardly recognised therefore their bargaining takes place terms at times define by actors external to the community. It is important power during engagements with Corporation among the stakeholders in the sector is poor.

Even today, in dozens of countries in Asia, the Middle East, and Sub-Saharan Africa, women do not have equal rights to own and inherit land. Women are often considered mere “guardians,” holding land in trust for their sons. It is no coincidence that in these same countries, women are often viewed as minors by the legal system – they can’t make a contract, open a bank account, or take out a loan. Likewise, a young Maasai man in Kenya named James once told a colleague that before he recognised women’s equal rights to own and inherit land, “I thought of my sister as a stranger living temporarily in my home.” Women in much of Africa and Asia move to their husband’s village when they get married and because of this often have the status of “outsider,” both in their birth home and their marital home. Outsiders, naturally, have weaker claims to the tribe, community, or family’s most important assets: land. Strengthening women’s rights to land changes this. When women have rights to the most valuable asset in a community or household, they are seen as belonging and entitled.

A comprehensive incorporation of the costs of mineral-based development for women, children and rural communities is missing in Minerals and Africa’s Development, which purports to be an updated strategic policy frame for developing Africa’s minerals. The Organisation of African Unity’s (now African Union) 1980 Lagos Plan of Action, the 2008 African Union Conference of Ministers Responsible for Mineral Resources Development all call for such frameworks, and the Africa Mining Vision has adopted some ideas in writing. Rural communities are the most affected by mining. Globally, Africa has the highest rural population at 59.6 per cent of total population versus 51.8 per cent for Asia, 26.2 percent for Central America, and 16.7 per cent for South America. More than 60 per cent of employed women in Africa work in agriculture, an area of production that is seriously thwarted by mineral development; and women are crucial to socio-economic development in that the caring and other productive labour they perform is foundational to human survival.

WoMin convened 38 participants from across Africa and from Latin America, including facilitators, drawn from organisations, movements, research institutes and universities engaged in organising, research and activism on a range of themes that relate to consent and democratised decision-making in development processes. Many of the participants had a strong background in women’s rights and the meeting brought in thinkers and organisers from Latin America. Structured as a conference, the roundtable used a variety of discussion methodologies to allow participants to grapple with a range of themes, advancing a women’s rights analysis and localised strategic thinking.

Participants Expectations

- How to understand how to handle women rights
- To learn from other experiences
- To learn more about WOMIN and networking
- How the rights of consent actually work in practice?
- To campaign for women and children from land grabbing
- How to strengthen women rights of consent and the roles of women in consent
- Want to hear experience about culture and relationship to women
- To understand how to mainstreaming consent in Burkina Faso as it is not mentioned in discourse
- The difference between public consultation and consent

Meeting Objectives

Across the African continent and around the world, transnational corporations are carrying out violent resource extraction, which has led to the degradation of the planet and its ecosystems as well as having a detrimental impact on communities, lives and livelihoods. This form of resource extraction has specific impacts on women because of the patriarchal division of labour and women's exclusion from decision-making in their own communities. Populations impacted by extractives should be able to determine their own priorities and strategies of development, in accordance with their values, aspirations and needs. For this reason, WoMin in partnership with KeNRA convened the Shaping Development Futures dialogue, an opportunity to focus on 'consent' as a critical strategy in defence of land, livelihoods and life, thus bringing to heart of the discourse the women rights perspective on Consent.

The objectives of the roundtable were to:

- To build women's rights perspective on consent, its centrality to just development process,
- To critically review and share different approaches and strategies, their strengths and limitations – to advance women's rights of consent/development decision-making
- To identify strong pathways to strengthen women's rights of consent to be further explore through partnership and collaboration

In this meeting participants had an opportunity to interrogate more on exploitative extraction of natural resources, the reasons to lobby for consent and what strategies to be used and challenges faced by different countries who are struggling with FPIC. The need to consult host communities and other stakeholders to strengthen women's voices to enable them take part in decision-making platforms. The meeting also discussed the importance of women's rights to consent as women are the most vulnerable in cases where evictions take places thus building the capacity of women's perspective on consent is paramount. Participants also shared different approaches and strategies, strengths and limitations to advance women's rights and alternative development model. They also identified strong pathways to strengthen women's rights of consent to be further explore partnership and collaborations.

Why FPIC? Introduction to Free, Prior and Informed Consent: discussing limits and possibilities

Consent is given permission for something to happen or agreement to do something. The externalised costs of 'development and accumulation of profits are usually paid by the poorest communities, and impact women disproportionately. Consent is not just about land, it also speaks to rights and economics. The current development paradigm is seen as a 'given' and consent as a democratic practise challenges that. FPIC can be an organising and mobilising process it is not just a right.

How did the rights and claims of FPIC emerge?

Initially applied in the context of medical experimentation at the Nuremberg trials after World War 2. It further evolved from human rights discussions on development through the application of rights to self-determination and right to participation found in the;

- Universal Declaration of Human Rights
- African Charter for Human and Peoples Rights
- State duty to consult – to get consent

Associated in the context of indigenous rights,

- International Labour Organisation's Convention on Indigenous and Tribal Peoples in Independent Countries - 169
- UN Declaration on the Rights of Indigenous Peoples

Regional Human Rights Jurisprudence

- The Inter-American Commission on Human Rights
- African Commission for Human and People's Rights

There was a discussion led by Mike allowed participants to understand the different dimensions of consent and FPIC through examining various definitions. Participants shared their own understanding of this definition, further elaborating their understanding based on community needs.

Five Definitions of FPIC participants analysed

- FPIC is based on principles of self-determination, it is the collective right of IPs to negotiate the terms
- FPIC is a form of decision-making to enables a community to say yes or no to proposed project or intervention
- Free, prior and informed consent (FPIC) Is a consent that is given freely by people fully informed of the consequences, prior to any decision being made and according to their own decision-making process
- FPIC is part of a consultation process that allows people to provide input into how their natural resources are managed
- FPIC is like knocking at someone door and asking to come in

Sources of FPIC

This depends on specific national, regional and international frameworks and processes

- International Treaty
- International Customary law
- National Legislation
- Regional and Sub-Regional Human Rights Instruments
- National constitution and Legislation
- Customary law
- Community mobilisation
- Lending institutions and industry/company mechanisms (CSR)

Exploring the idea of consent

Presentation, commissions with resource people, feeding some key reflections into plenary; the discussion was done in five groups and presented by the members and shared experiences country specifics

Questions

- What are experiences of consent (or lack of it) in general and women's consent (or lack of it) specifically?
- Does FPIC exist in Africa?

Answers to the questions presented by the group rapporteurs

- There were no policies/ legislations that protect women's rights over land especially in a communally own set up.
- The corrupt systems that allows violation of human rights, in situation where forceful evictions by the government is done supporting investors instead of respecting rule of law and other existing human rights treaties.
- Communities are not aware of their rights therefore states and investors take advantage of them; states use extractives industry to promise communities resources which are not equally shared for instance the Kenyan mining bill 2014 states that communities will get 10% of the resources they get from mining which is very little compared to the needs of these communities,
- Local governance structures influenced by the state to favour investors; chiefs are normally used by the State therefore they decide for communities. Signed up treaties are not implemented by the states
- Patriarchal nature of our societies marginalises women's rights which are still strong in Africa, customary law is inclined more in marriage issues and not land matters therefore it is not properly utilised by the people when seeking consent to the states and investors.
- Affirmative action in many countries has not been actualised to empower women fully, despite numerous lobbying by women for its implementation. Most laws are in paper thus requires women's rights institutions to compel their government to implement it as well educating our women on this existing legislations that protects them such as the property matrimonial act and the community land bill in Kenya
- Strong patriarchal nature of our societies; where women are perceived to be weak they can be influenced therefore matters land cannot be handled with a woman, they are mobile (they move after marriage), others communities value women as children therefore cannot be trusted in societal issues
- There are big gaps between rights and practice national law; many communities cannot differentiate between a right and what the other needs that the state must provide but they are really fulfilled by the state. Community land act, 2016 and in article 40 (1) of the constitution of Kenya has a provision for the protection of woman, it has an opportunity but in reality this constitution is yet to be implemented the land act again is not clear about women's rights over land. This gaps requires further engagement to ensure that we have a law in place that articulates women's issues on lands ownership and in decision making matters over consent on land.
- What concepts, issues or practices in FPIC generally and women consent specifically do you struggle or have problems with conceptual or practice; women have the capacity to engage in land matters all they need is the information and perhaps how and when to seek consent. Land rights advocates should empower rural women to know their rights as well as creating information on the existing laws that protects women's land rights.

Discussion: Women's rights and consent

Facilitated interview of four activists to address the critical question about why consent is so important from a women's rights perspective. In the panel were Norman Munyika; Women

and Land Zimbabwe, Christine Kandie; Endorois Welfare Council, Elyvin Nkonjera, Oxfam International Malawi and chaired by Samantha Hargreaves.

Why is consent important from a women's rights perspective?

Answers from the panellist; Women have the highest population than men, women play a major role in development in their special way therefore extractives affects their livelihoods, women in Africa are the majority of the populations in rural populations therefore extractive activities depletes rural livelihood such as water and land which they mostly depend on for farming and for domestic use, women are good listeners and always acts on issues affecting them, however lack of policies in place and even lack of consultation by the duty bearer make them more vulnerable for the cases of compensation where the head of the family are considered and at times do not reach women. However, women should be incorporated in all FPIC processes since women are normally worried of displacement and other effect that comes with it that may affect the family. Governments, CSOs, MNCs and donors should strongly advocate for laws that protect women's rights and ensure that all extractives manuals respect the rights of women.

What lessons learnt from our work with women in communities?

Christine mentioned that; Endorois women in Kenya as explained were not involved in the case process since inception but now they are taking part thanks to the community engagement done by EWC to empower women. she asserted a positive engagement of in various forums has made take up leaderships in decision making processes and represented in the committees that oversee the implementation processes with the government officials that was tasked to implement the ruling made in favour of Endorois community.

She also mentioned the challenges faced by women such as the retrogressive Cultural beliefs which marginalises women rights to participate in decision making platforms. The society perceives that women are weak and cannot be trusted with resources and that they belong to the kitchen and not to be heard. She proposed the need to push for governments to implement existing policies that advocates for the women's rights.

Norman from Zimbabwe shared reflections on how the patriarchal nature of the society marginalises women more than men. Men still dominate in decision-making meetings and even if women too own land, there is need for civic education to educate people and especially women on the rights of women and its importance for sustainable livelihoods especially in the rural areas. Most land agreements were made at the national level thus the need to engage rural women to attend these meetings to enable them make informed choices.

There is need to embrace bottom-up approach in land engagements; will enhance community ownerships in matters of land because the affected are normally the people living in rural areas. Policies and legislations are drafted at the national level therefore people need to be informed to enable them take part as well as to input on issues to be addressed by the duty bearers. Community land boards should incorporate women and involve them actively in the drafting and through to the implementation stage to strengthened women's land rights.

Elyvin mentioned the need to invest in training women on transformative leadership, decision –making structures from the village level up to the national level, this will enable women to take part and participate on issues that affect them especially where customary law is required. Land inheritance, compensation negotiations and also in land adjudication of Kenya where land is communally own. She also shared the experiences of Malawi where they have land laws that protects women rights over land but the struggles that women of Malawi are lobbying for land registrations which the law does not encourage joint registration of land. The control and ownership remains a challenge therefore there is a need to build the capacity of women at all levels to demand for their rights and lobbying for recognition and use of customary law.

What are the major challenges to women's participation in consent?

The feedback from the panel was that; When it comes to decision making in Africa women are not involved, getting women into a social group to discuss to speak about their issues is still a challenge; the cultural attachment that is very strong in our African societies are and still believed by many is a challenge though it requires patients and more civic education to change mind set ; women should be liberated from bad gender stereotypes where women are given second rights also the oppressive policies and cultures; there are no clear policies that defines or protects women's land rights nationally or locally apart from the customary law ;women are not given opportunity in private and in public sector to exercise their democratic rights its often faced with critiques from men despite the constitutional rights which are not fully implemented ;women are not aware of their rights and how best to champion for the existing opportunities such as the affirmative actions, community land bill in Kenya and laws in place.

What are the key opportunities to women rights of consent?

The implementation of the Endorois case has enable women to be taken in decision making, EWC has ensured that women seat in the committee's as well and ensured that women participate in meetings and are given opportunity to articulate issues that are affecting them without fear. In follow up with the Endorois case women are now taking part in the processes.

Imposed projects fail; it gets more expensive if there is no proper consent, and with experiences absence of consent encourages conflicts, forceful evictions, disruption of livelihoods and lack of trust between governments and citizens.

Existing policies and legislation, Treaties and independent institutions such as the community land act (Kenya /Zimbabwe), constitution (Zimbabwe /Kenya) affirmative action's provision, matrimonial property act (Kenya), ordinance act (Ghana) customary law (SA), commissions such as National Gender Commission(Kenya/Zimbabwe), Kenya national commission on human rights) (Zimbabwe/Kenya and also the national land commission which advocates for equality rights in Kenya. Furthermore, the recognition of alternative dispute resolution (ADP) mechanism in most African countries is an opportunity for women to champion for land rights.

Comments from Bernadette is that; Zambia constitution allows equal land ownership by both women and men at 50/50 in state own land and a minimum of 3 hectares for children, those living within the chiefdom are given land too. This is a practical success story where government legislations and customary land ownership has worked strengthening the rights of women in land ownership

Discussion: Consent in Practice

Institutionalising /legislating consent which addressed how consent has been institutionalised in different contexts, the results and some of the complexities to navigate.

Experiences from ECOWAS and the domestication of FPIC provisions from Ghana by Hanna Owusu, WACAM; experiences from Colombia signatory to ILO by Camilla Mendez; experiences from Akhona Mehlo on place and potential of customary law from a women's rights perspective, Legal Resource Centre and experience from the World Bank by Michael Koen on Multilateral and corporate mechanism – CSR, alternative dispute resolution mechanism – Panel chaired by Georgine Kengne

In Ghana women own land unlike in Kenya where majority of land owners are men, the government of Ghana has passed laws that protects women's (farming accountability act) which was passed thus strengthens the rights of women over land ownership. Land consent laws ordinance act gives more powers for land owners to seek compensations. Any development agency must seek consent from the land owner thanks to the existing laws, civic

education and also the organisation did a comprehensive assessment which has made people be aware of the constitution. Moreover, the organisation train media personnel for proper media engagements to enhance its community capacity building initiatives. ECOWAS also did a research, develop education strategies because there were gaps in these policies and this was also to inform their advocacy work more in strengthening women on land rights

In 2008, when mining activity started in Colombia, the movement began with few people working together the economic, political and social aspect. The organisation brings together CSOs and make them have a collective decision for the benefit of the society through workshop in collaborations with students, the social mobilisation work and marches down the streets and unique experience that encourages communities for collective actions. Then organisations mobilise communities by collecting signatures, public (engagement) thanks to the civic educations given on the effects of extractives to the environment to the indigenous livelihoods. Colombia is rich in natural resources therefore it has attracted many companies, most of them seeking mining consent, 150 consultations so far has been carried out, all have to do with oil mining. In 1991, the ministry of environment and sustainable development adopted law no. 169 approved by the ILO. This allows citizen participation that gave the communities power to champion for their rights as a unity. If these companies are allowed to mine it will destroy the eco-system (fauna and flora) and it will lead to displacement of Andeans more so disruption of livelihoods it is citizen led initiatives, where the use mass consultations meetings which enabled them to come up with strategies for communities to take actions.

Customary law is the single strongest source of substantive rights of rural communities (as community). It provides for rights that cannot be understood through the simplistic common law lens with source of proper decision making, community agency and organisation. It is most realistic measure of reparation and compensation (rights mirror membership) and it changes the parameters of the conversation. The connection established by the Commission between the right and implementation of FPIC and the customary law of the community concerned is of crucial importance in the African context. It has the potential of grounding FPIC in customary law and customary ownership rights as an alternative legal basis to the international law discourse on indigenous people's rights

There is a need to exhaust local courts and customary law because this avenue is available and cheap compared to the judicial where women often do not have access due to the expense to pay lawyers and follow the process to completion. The challenge however is how to ensure that customary law allows the full participation of women. Most African constitutions have provisions to integrate customary decisions but when it comes to consent, there is some work to be done to harness these as a tool.

Institutionalisation of FPIC. International Law and Instruments that mention FPIC both as a right and as a principle. The United Nations Guiding Principles on Business and Human Rights, Multilateral and corporate mechanisms.

Three major international instruments address the right to Free and Prior Informed Consent (FPIC): the ILO Convention 169; the Convention on Biological Diversity (CBD); and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In addition, the **International Covenant on Economic, Social and Cultural Rights** also has relevance. Between them, these instruments provide a strong foundation for indigenous and customary communities peoples to assert that their territories should be legally recognized by government and that their free, prior, and informed consent (FPIC) is necessary before development activities can take place on their territories. FPIC is also addressed in the United Nations Framework Convention on Climate Change (UNFCCC).

But Failure of a binding treaty on **Business and Human rights**, John Ruggie – Special representative develops the so called Ruggie principles – based on a framework which placed importance on extraterritoriality.

1. State duty to Protect
2. Business duty to Respect and
3. Access to remedy through grievance

There are distinct but complimentary responsibilities between states and companies. The framework elaborates on the implications for existing obligations and practices for states and businesses and maintains that there can be no human rights offset where by doing good elsewhere HR obligations are removed or abuses excused. The system is a mix of regulatory and voluntary approaches.

State Duty to protect

- Policies
- Regulation
- Adjudication

Extraterritorial jurisdiction over companies not a general requirement in IHRL, but reference is made to developments in international and national practice on ETJ

A standard of conduct – States are not responsible for human rights abuses by private actors, but must take the necessary steps to prevent, punish and redress. They have a duty to protect and promote the rule of law and they should ensure policy coherence between departments.

Business/Corporate responsibility to respect

- Act with due diligence to avoid infringement
- Address adverse impacts on human rights

With the Guiding Principles, United Nations member states have affirmed that business enterprises have an independent responsibility to respect human rights, distinct from obligations of states!

This sets up a due diligence requirement to identify and address impacts

Access to Remedy through grievance vs Access to Justice

Similar but there are differences

- Need to remove all barriers for access to justice
- Business and Human Rights looks for short cuts and to privatisation of justice
- Access via
 - Judicial mechanisms
 - Quasi-judicial mechanisms
 - Non judicial mechanisms

World Bank Group

These New Environmental and social safeguards have been added to the World Bank policies:

- Relocation of Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities from Lands and Natural Resources Subject to Traditional Ownership or Under Customary Use or Occupation; the Borrower will consider feasible alternative project designs to avoid the relocation of Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities from communally held or attached land and natural resources subject to traditional ownership or customary use or occupation. If such relocation is

unavoidable the Borrower will not proceed with the project unless FPIC has been obtained as described above;

In the same line, the International Finance Corporation (IFC) which is the multilateral Investment Guarantee Agency performance Standards are:

- Assessment and Management of Environmental and Social Risks and Impacts
- Labour and Working Conditions
- Resource Efficiency and pollution Prevention
- Community Health, Safety and Security
- Land Acquisition and involuntary Settlement
- Bio Diversity Conservation and sustainable management of living natural resources
- Indigenous people
- Cultural heritage

All these requirements should be taken in consideration before any loan is granted by the Bank.

DISCUSSION: Social justice struggles for consent:

Experiences from the Amadiba Community by Nonhle Mbuthuma, the Endorois Welfare Council (EWC) by Wilson Kipkazi, Claiming the right of Consent by Irma Velasquez and Experience of the Natural Justice promoting the Bio Community Protocol by Gino Cocchiaro.

People's sovereignty people's territory Amadiba struggles against mining for self-defined development, Nonhle Mbuthuma

The history of Amadiba a community in Pondoland east coast of South Africa (wild coast), their struggle came as a result of limited reliance on social grants or outside employment, long ties to land, their historical resistance to removal during colonial and apartheid era, the attachment that the Amadiba had with their land which is the only source of livelihood; land used for farming, fishing and for cultural activities. However, many mining companies have showed interest others come to do surveys using government projects to get access but the community has intensified resistance with the support of their own chief as opposed to the chief who was appointed by the government who is supporting the proposed mine, but most residence are in opposition.

While the residents of Umgungundlovu may not have formal legal title over land, the community contends that the households living in the land have rights over both the residential and agricultural land in terms of customary law. Under the mineral and petroleum, resources act any applicant for a mining rights needs to consult with interested parties as part of the application process. There is no requirement that an applicant needs to obtain the consent of a community rights in the land in order for the mining right to be granted.

Amadiba community is urging that, the grant of mining rights over their land constitutes a deprivation of the rights in the land and as a result, the provisions of IPILRA (and their customary law) must be complied with.

Reclaiming rights – the Endorois case by, Wilson Kipkazi(EWC)

The Endorois Human rights struggle was necessitated by the forced eviction from their ancestral lands around Lake Bogoria in the early 1970s, to pave way for the creation of a wildlife conservation. The community was promised alternative land, sharing of revenue

collected from the tourism enterprise, gain in employment opportunities; however, it failed to bear fruit when the beneficiaries were paid a paltry amount of KES 3,150 (\$31.50) as their final dues to every household. The community after several attempts failed to intervene through their Member of Parliament and provincial administration opted to engage with the media and other means to advocate for their rights, including demonstrations. With all this struggles, the community was branded opposition by sympathisers resulting to further marginalisation socially, political and economically.

In 1998, the Endorois Secretariat went to court, to seek redress; however, it took five years, after which the decision was ruled in favor of the government with reservations, and in 2003, the case was taken to ACHPR the Gambia, in 2009 it was ruled in favor of the Community and adopted by heads of state summit in Feb 2010. The African Commission found Kenya to be in breach of articles 8, 14, 17, 21 and 22 of the African charter.

Challenges to the implementation

Kipkazi mentioned that Kenyan government leadership were making positive statements regarding implementation of the case but no action or formal commitment was seen. The government is ignoring the ACHPR ruling to inscribe Lake Bogoria as a World Heritage Site (2011). The Endorois community continues to fight for decision-making power and self-determination.

Claiming the right of consent (Irma Velasquez)

The most important natural resource of Guatemala is its very fertile soil, so it is an agricultural country and livestock. But the land is rich in variety of metallic and non-metallic minerals, although the resource has not been taken advantage of properly. The most important natural resource of Guatemala is his very fertile soil, so it is an agricultural country and livestock. But the land is rich in variety of metallic and non-metallic minerals, but unfortunately this resource this is the source of massacres, the struggles because of disagreements with host communities'. Guatemala is a small but highly unequal country where over 60 percent of the population lives in conditions of poverty or extreme poverty, the numbers higher for indigenous communities. The country is run by eight families who control just over 250 companies, arable land, banks, and almost the entire economy. These small, historical elite, known as the G8, also controls the state for its own benefit.

Guatemala is an indigenous country, a fact that is often hidden by government officials and census data. It is also a country with acute ideological conflicts stemming from a 36-year armed conflict that lasted from 1960 to 1996 and cost the lives of an estimated 200,000 people. The United Nations Truth Commission Report published in 1999 estimated that 626 massacres took place during the war and that over 90 percent of these were committed by state security forces. Within this conflict, indigenous people and women bore the weight of the violence: an estimated 83 percent of the victims were indigenous. Indeed, the UN report concluded that acts of genocide were committed by the state against the indigenous population. Since the end of the war in 1996, survivors from all around the country have organised to demand justice for themselves and their communities.

Challenges in Guatemala

The government and investors take advantage of some gap in policies to manipulate communities.

The strong attachment that people have on the land and that the land belongs to them and that any decision made by the government is wrong thus making communities to reject the investors.

Investor influence started from colonial time, the people engaging with the investors were sons of influencers and decision-makers in the communities and often prevented citizens from meeting to make decisions about their rights and land.

Bio Community protocols – a women’s rights perspective, Natural Justice (Gino Cocchiaro)

Bio Community protocols are the interface between different legal systems and understandings of rights and responsibilities. Bio protocols supports dialogue and constructive collaboration between different rights -holders and duty-bearers – both inspirational and ‘defensive’. It also supports communities to take ownership over the law and decision-making processes that impact their ways of life and finally it helps provide clarity and legal certainty to governments, researchers, and other actors.

Processes of BCP development should be participatory to ensure that all community members take part in decision making process and their view are captured and articulated in the protocol, the protocol ensure that the community group decide on the issues of concern as well as giving recommendation of way forward which should be inclusive with both genders. The BCP have to be mindful of whom to involve giving consideration to all the stakeholders in that particular community such as the council of elders, youths, women groups, opinion leaders, elites, chiefs and religion members those that inform community developments. The protocol must prioritise issues basing on the needs of the community so that it can have more impact during engagement with external actors such the demands that community are seeking and of agency. The communities must identify champions who are passionate with their demand that means, the community must seat and select strong and articulate personalities who will represent grievances during consultations. However, communities must utilise various strategies including existing laws for instance the land acts, affirmative actions and the constitutions

Challenges of CP

- Community protocols are not necessarily appropriate for every situation or community
- There is potential for the process to be co-opted by NGOs, government, or local elites - inequities could be further entrenched
- How to ensure representation of different community voices particularly marginalised ones?
- Concurrently engaging in (legal) process. (Multiple strategies needed.)
- One community’s protocol should not interfere with or undermine other communities’ rights, values, or endogenous development plans
- Potential for standardisation of something that is inherently diverse. What are the pros and cons of developing guidelines or working towards legal recognition of community protocols?

Political economy of consent

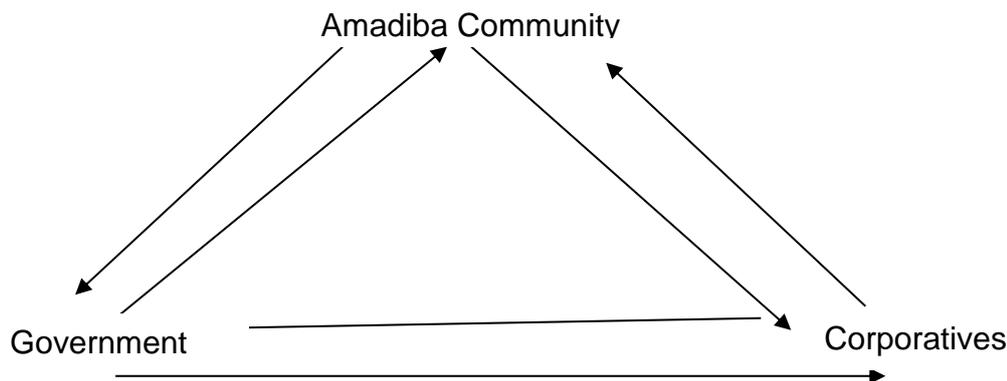
What is political economy?

Political economy is a study of philosophy and ideology that studies the evolution of political and economic ideas. Political economy is a mixture of politics, economics, sociology, philosophy, and history, which all bring together evidence to the study of how humans exist within societies. Political economists study political ideology, economic structure, human interaction, human nature, and theories in philosophical thought. It is a study that studies not

only the mechanics of a particular structure, but also the reasoning behind why a structure is regarded to be the best by various people with different beliefs.

The roundtable reflected on the **Political Economy of Consent**. Participants were called to look and critically analysed the case of Amadiba social struggle.

Exercise: The participants were put into five groups, to discuss the Amadiba case and depict it pictorially, identifying actors, naming their interests and putting on diagram as a way of understanding the meaning of the political economy of consent and how this plays out in communities.



Reflections on the Amadiba Case

Consent is paramount in political economy of every community; the participants were given an opportunity to read the Amadiba case and to understand why consent is important and how best communities can engage governments well to empower the host communities either positively or negatively to agree or reject the proposed project. For the community to be aware of the importance of this consent advocacy institutions and activists should use the tool of knowledge, educating communities of the existing laws and legislations that protects their rights i.e. customary laws, constitutions, treaties and conventions



The activists should profile the interest of the communities keeping in mind the elites, leaders who easily manipulate the communities. The communities must be well guided to make informed choices without coercion or intimidations because these elites make wrong decisions which serves their interests therefore compromises the interest of the host communities.

With consent, communities must develop strategies and tactics in order to increase their bargaining power and overcome the influence of the investor.

Digging Deeper on Land Rights, Customary Law and Consultation/Consent Process

On the last day of the dialogue, the group delved deeper on three core themes as a way to push the discussion and give WoMin key issues to follow-up on. Those themes were Customary Law, Land Rights and Consultations/Consent Processes.

Customary Law

In South Africa, customary law refers to a usually uncodified legal system developed and practiced by the indigenous communities. Customary law is as an evolving system of rules derived from the way of life and natural wants of the people or common knowledge. Given that customary law is not static and adapts over time, it opens up opportunity for its use as a strategy for communities to claim their rights.

- Communities have enormous potential to claim rights
- Communities have potential to build on democratic practices by making obvious laws
- Communities can support accountability to the concern authorities with the use of the constitution to strengthen customary laws

How would we action the above? What opportunities do we see in our work/struggles?

- Bringing it up to equal basis of the law intervention starting with communities and coming up with community monitors who monitors emerging issues
- Using the existing organisations continue with consultation to intervene on situation at hand
- Local participation to initiate the intervention ensuring that all the stakeholders are well informed

Opportunities

- Create safe spaces for women to meaningful engagement
- Communities, family and women's organisation should initiate programmes to empower women on land rights
- Work with men in different ways to create spaces for all to engage
- In educate systems integrate land rights to sensitise the younger generation on land rights
- Educate all especially women to understand the existing laws that support women's land rights

What challenges

- Customary systems are influenced by brothers, fathers, uncles' cases of inheritance where widows are inherited by brothers of the deceased or chased back to their parents
- Chiefs have corrupted customary and the traditional leaders were compromised by the government because chiefs were feared to be eyes of the state
- Customary law can work in different countries that depends on the leadership structures a good example of Zambia chieftaincy kingdom where chiefs can distribute land to his people

Proposals for cultural law to lobby for women's land rights

- Document specific examples where communities have successfully claimed using customary law considering the methodology and processes
- Share knowledge on how to support each other on on-going basis, in advocating for women's rights at regional plat form

- Educate lawyers, judges, council of elders, community opinion makers about the customary law and its importance in land adjudication matters
- Create and strengthen existing actions/functions/ activities where women can participate in any decision-making processes that affect their livelihoods
- Women need to know about the customary law, thus women's group lobby should empower them from the own family level first using every opportunity in churches, markets because most rural women don't know that CL is recognised and can be used in seeking justice at the society level
- Collaborating with other women's corporation's organisations regionally, nationally and those at the rural areas who concentrate on other women's rights to increase women's voices more for international feasibility
- Target traditional elders, council of elders' village heads in PFIC consent, bearing in mind the constitutionality of CL which is recognised in some countries constitution as an informal law
- Push for the publishing of customary law, to make a formal document which can be recognised in a national court of law, its civic education for all to know

Land rights

Indigenous land rights are the rights of indigenous peoples to land, either individually or collectively. Land and resource-related rights are of fundamental importance to indigenous peoples for a range of reasons, including: the religious significance of the land, self-determination, identity, and economic factors

How we do advance land rights within customary/communal /collective tenure system without going down the dangerous road of individual titling?

- There is need to have a meaningful participation of women's in key decision making spaces that pertain land such as in the land boards
- Sensitise all duty bearers in the community such as chiefs, district officers, policy makers on the importance of land rights
- Empower women on land rights for them to understand land rights safe spaces where they can speak on land matters without fear
- Use right based approaches to influence reverse of laws and practices for example Malawi law that protect women access on land rights
- Use women organisations to advance women's land rights and clarity on women's land rights by ensuring inheritance laws which can be realised by advocating for women's to own property experience from Uganda

What opportunities do we see to advance women's land rights in our work individually?

- Women's groups and assemblies of women should mobilise themselves by ensuring that those women, who have influence, plan and strategise for all
- Learning from best practices within region and elsewhere a case study of Zambia where 30 % of land are owned by women and the 70 % goes to men their constitution allow
- Availability of legislation which is advancing affirmative action (FAO articles on land tenure systems
- Peer learning and sharing of experience visits i.e. WOMIN round table meeting in Kenya, where it brought women and men advocates as well lessons learnt from Latin America
- Work with existing departments /ministries/commissions that advocate on women's land rights such
- Research, document and publish practical lessons that advocates women's land rights regionally and internationally

- Use FPIC to advance women's land rights as well as using men as champions for women's land rights

What challenges might we confront?

- Cultural and religion provide space which do not allow women not to safely participate in key decision making process spaces such as the women to chair in land boards, land committees, in community bazaars for the case pastoralist communities in Kenya where women are not allowed to address men gatherings
- Time and places where these meetings are held are not friendly owing the nature of work that women do at home especially in the evenings they are supposed to be home preparing meals and other chores, in cases of meetings that require travelling, women have to seek permission from their spouses which are times not positive thus frustrating and makes them to miss crucial spaces in decision-making meetings
- Women fear to break their families, in some societies empowered are perceive to be the worse therefore can influence others and such women are perceived to be a threat to the society
- Polygamy families is a challenge to women land rights, women are usually left out in key engagement such as compensation process where men are considered, first wives are often considered or at times last wife in a polygamy situation, husband upon compensation they leave their homes and others bring young wives.
- Customary law verses court laws favours men because they have resources to pay lawyers women are not able and not willing to engage in such matters therefore making men to liberate land matters. Lack of friend gender guest in most court rooms which listens and articulate women issues in different countries even at community level most land cases are handled by men.

What are your proposals for the work we could do together? Way forward

Strong advocacy rights to be used as the basis of women's rights; the group came up with the following proposals.

- Identify grassroots women's groups
- Use women who have already advance to have a group's advocacy for women's land rights, generation to continue women land rights case of South Africa land rights
- Capacity building at all levels to advance women's land rights, lobby for integration of programs that supports women's land rights in schools' curriculum also training of trainers at rural level to empower rural women
- Document stories of abuse /good practise of women's land rights in the region evidence based
- Sharing country experiences through exchange visits for learning purposes, a case of Ghana where they have strong laws that protects women's land rights and Amadiba struggles, the community resilience resistance against investors and government
- Research and
- engage in workshops, debates have clarity evidence to the meaning and practice women's land rights
- There is need to define what community needs are

Consultations/Consent process

What difference do we see between consultation and consent?

Consent is internal to community; it is claiming rights in a family situation a woman has to seek consent from husband, uncles in a situation of polygamy the father has to seek consent from all the wife's which goes up to the clan and even to village elders. While consultations are sharing of views and seeking information top down power in a balance/negotiate/obliged to what community had to say. Gender analysis that will assess gender needs disaggregation of

communities which deepens the analysis of their interests. It is necessary to have a deep education process for women to flourish and ensure that women participate in decision-making at all levels.

How do we envisage a consent process that supports women's decision-making?

- Using history to push for consent what has happened before; the Amadiba struggle; there were cases of killings (i.e. the chair of committee was shot dead by people who call themselves police) and some being poisoned. Even after writing a report to SAHRC saying we are not safe on the threats they received from gangsters with No response from the police. People could hear gunshots from houses, Women were forced to run away and hide in forests others giving birth in the forest because they cannot stay in their houses. The South Africa government is working hand in hand with the mining company to make sure it goes ahead.
- Educating communities and allowing them to exercise democratic rights to vote on projects and vote out companies that do not respect consent. Therefore, the need to create awareness on the existing laws such as customary law, land act, constitution, treaties and even using the political arena to champion for the rights of women's advices to ask for leaders who advances for rights to be voted in (manifesto of women's rights)
- Yes, there is always an element of coercion within the communities, therefore communities should be given a space and time to interrogate projects carefully looking at the long and short term effects such as loss of livelihoods, cultural attachment for land as well their choices to demand to be told and to be listened to by the state and companies
- Communities to have a veto power to say "NO" they can use media to expose the government as well the companies who are going against their will. The Maasai community members in Loliondo, Tanzania, have been trained to make their own videos to help them resist land-grabs by foreign investors. In 1992, a luxury hunting company from the United Arab Emirates occupied 1500 km² of village land in Loliondo to set up a private game reserve beside the Serengeti National Park. Since then, Maasai have been denied access to vital grazing land and water points for their herds. A mass eviction of Maasai villages within the disputed land took place in 2009. Participatory video training has strengthened the community's self-advocacy. Six community members made a video on the land grabbing

What decision-making standard would best further the interests of women?

- Taking interest of the minorities knowledge using key principle of FPIC which should come before any intervention
- Women should be given opportunity to make decisions in matters affecting them without intimidation or fear, therefore in any public community forums women should be given a chance to speak on the issues affecting them
- Existing policies and legislation must be implemented to the letter; this will give women a higher bargaining power to lobby for their rights in all level, such as the land acts, affirmative action, ILO 169 convention to countries that have signed into the treaty

Proposals to the consent /consultations

- Mapping, assessment and sharing information of best practice related to consent to ascertain what strategies for various community interest in projects
- Capacity building based on what people are already doing; such as movement building to raise awareness
- Developing shared platform, with WoMin members at regional and internationally to fosters solidarity of women's land rights as well documenting struggles that women go through and those that represents the rights of various communities

- Develop hand book with country specifics to be used as a training manual on women's land rights which will be used by paralegals at community level and at the national level
- Building networks, strategies and media education for checks and balances as well as having a team to check on community consent processes.
- Equipping communities with information on land use and consent, which are readily accessible
- Include international observer's status, international solidarity to enhance land rights globally

Agreed clear positions and core strategies for moving forward

The participants saw an opportunity in the formal and informal education systems in their various national education curriculums to address women's land rights issues. Research can also come in handy in unpacking several issues. Various emerging situations about women's land rights can be integrated in our national education curriculums and specific training of organisations on women's rights perspectives.

Using other regional /international organisation that support transforming women's land rights situation, we can integrate research on FPIC opportunities in a number of countries to support lobbying for women's right to consent. Regional universities forums in Africa and other developed countries i.e. Latin America who have advanced in consent can also intervene by sharing experiences.

The IANRA model mining law that captures issues of women consent should also be shared with all the stakeholders regionally and internationally to enhance FPIC engagements and accountability.

Identifying key strategies; building road map forward /points of actions

Identifying key strategies; building road map forward /points of actions

Actions	Partnerships/Donors	Organizations interested
Training/capacity building to inform, educate/raise awareness focus on rural women		<ul style="list-style-type: none"> • Rural women assembly • TARATRA • NETRIGHT • Access to justice Africa • ACC • Oxfam • EWC
Work together in concerted way to pilot/build new practice/reclaiming rules & practices community redress		<ul style="list-style-type: none"> • LUANAR • UGLA • CRC • AJA • RWA • LAMOSA • EWC
Sharing of country experiences through exchange visits/sharing information through platform		<ul style="list-style-type: none"> • LAMOSA • EWC • NETRIGHT • RWA

		<ul style="list-style-type: none"> • OXFAM
Document cases where communities have claimed consent through CL & where traditional leaders are acting outside our concept of CL		<ul style="list-style-type: none"> • Access to justice • ACC
Mapping in Africa & globally what strategies communities are using to claim consent		<ul style="list-style-type: none"> • WACA • OXFAM • EWC • AJA • WDRC • Women land in Zimbabwe
Needs to be done in specific communities ,empirical research in different contexts to define what we mean by women's land rights		<ul style="list-style-type: none"> • NETRIGHT • LUANAR • Green Justice • TOENapina Arcade • TEJE matungulu
Train organizations to build understanding of customary law rights perspective		<ul style="list-style-type: none"> • AJA • LRC • LUANAR • Green Africa justice • ACC • TOE Napina Arcade • FEJE
Develop country specific hand books too sensitise & train communities on rights ,obligations of different actors work with paralegals		<ul style="list-style-type: none"> • EWC • TARATRA • Access to justice • CPC • Green Africa justice

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<https://www.google.com/search?q=land+rights&ie=utf-8&oe=utf-8&client=firefox-b>
<http://www.celep.info/maasai-community-media-for-advocacy>
<http://farmlandgrab.org/26551>

Appendix

List of participants (attached)