

The story of a legal transplant: The right to free, prior and informed consent in sub-Saharan Africa

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Summary

Land grabs in sub-Saharan Africa have in the recent past attracted considerable attention. Different strategies for confronting the problem are being discussed; one of them is the right to free, prior and informed consent (FPIC). This right seeks to balance power asymmetries between foreign corporations or the state and local communities by ensuring their participation in matters concerning their land. The article argues that FPIC is still in the vertical legal transplantation process in sub-Saharan Africa. Legal transplantation has two components: appropriation and translation. It is a multi-pronged process, in which FPIC is transplanted from the global to the (sub)-regional or national level, mostly by states. This is either the basis for the transplantation to the local level or the norm is directly transferred from the global to the local level. The examination of the legal transplantation process includes an analysis of the current state of recognition in sub-Saharan Africa. Besides that, it will be assessed whether diverging understandings have been developed. Moreover, the practical and structural limits of FPIC, which could constitute an obstacle to the full transplantation of FPIC, will be assessed. These include power inequalities within communities as well as the structural inequalities of the global order. Whether the legal transplantation will succeed ultimately depends on the communities in question.

Key words: *free, prior and informed consent; land rights; participation; legal transplants*

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1 Introduction

During colonialism, 'human and natural resources were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves ... alienating them from their land'.¹ According to the African Commission on Human and Peoples' Rights (African Commission), 'Africa's precious resources and people [are] still vulnerable to foreign misappropriation'² today. Local communities are those who benefit the least from extractive industry projects and are regularly confronted with human rights abuses and environmental degradation. Consequently, the phenomenon of land grabs has become a pressing concern in many African regions. This arises when government authorities lease or sell land to investors even though it is already being occupied and used by communities or when the foreign use has negative effects on their wellbeing.³

It is increasingly argued that the right to free, prior and informed consent (FPIC) could be the panacea to empower local communities. It is the right of communities 'to give or withhold their free, prior and informed consent to actions that affect their lands, territories and natural resources'⁴ and can assist them to 'renegotiate their relations with states'⁵ and also companies. FPIC is primarily rooted in the right to self-determination and also related to property and cultural rights, as well as to the principle of non-discrimination. It goes beyond the principles of consultation and participation.⁶ It has been recognised by a growing number of international human rights documents⁷ and applied by regional and national institutions.⁸ Even though its acceptance in sub-Saharan Africa has been growing in the last 15 years, its implementation turns out to be difficult. This may be explained by the fact that FPIC is still in the middle of a vertical legal transplantation process.

1 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*) para 56.

2 As above.

3 R Hall 'Land grabbing in Southern Africa: The many faces of the investor rush' (2011) 38 *Review of African Political Economy* 193 194.

4 M Colchester & MF Ferrari 'Making FPIC work: Challenges and prospects for indigenous peoples' 2007 1 <http://www.forestpeoples.org/topics/civil-political-rights/publication/2010/making-fpic-free-prior-and-informed-consent-work-chal> (accessed 5 February 2015).

5 'Standard-setting: Legal commentary on the concept of free, prior and informed consent' (14 July 2005) UN Doc E/CN.4/Sub.2/AC.4/2005/WP.1 para 5.

6 T Ward 'The right to free, prior and informed consent: Indigenous peoples' participation rights within international law' (2011) 10 *Northwestern Journal of International Human Rights* 54 55-56; A Xanthaki 'Rights of indigenous peoples under the light of energy exploitation' (2013) 56 *German Yearbook of International Law* 315 321.

7 ILO Indigenous and Tribal Populations Convention (1957) 107 art 12; ILO Indigenous and Tribal Peoples Convention (1989) 169 art 13; Declaration on the Rights of Indigenous Peoples' (2007) UN Doc A/61/L.67 and Add.1 art 10.

8 HRCCom (n 5 above) paras 16ff.

Legal transplantation consists of two components: appropriation and translation.⁹ Appropriation entails taking ideas developed in one setting and transplanting them into another one, while translation is the process in which the concept is adapted to varying degrees.¹⁰

As FPIC is a relatively new right, examples of programmes and 'best practice' are still lacking. Consequently, its transplantation is not necessarily a one-step process. Instead, FPIC is likely to be transplanted in a multi-pronged process on different levels: It is transplanted from the global to the (sub)-regional or national level, mostly by states. This is either the basis for the transplantation to the local level or the norm is directly transferred from the global to the local level. The intermediate step to the (sub)-regional or national level can facilitate the localisation of the right.

In the first section, the origin of FPIC is examined in order to determine whether it is a legal transplant in sub-Saharan Africa. This is followed by an exploration of the degree of appropriation of FPIC in sub-Saharan Africa based on its legal status. Second, it will be assessed where the translation process currently stands and whether diverging understandings of FPIC have been developed in sub-Saharan Africa. This includes an analysis of the rights holders, duty bearers and the content of FPIC. Due to the lack of (data on) local translations, this section focuses on (sub)-regional and national sources. It will be shown that, even though some of these pursue quite a progressive and comprehensive approach, incoherencies and gaps persist. In the third section, the practical and structural limits of FPIC in sub-Saharan Africa will be assessed. These could constitute an obstacle to the full transplantation of FPIC.

2 Appropriation: (Legal) status of free, prior and informed consent

The origin of FPIC is relevant as the transfer of legal norms from a different geographical and 'cultural' context raises particular socio-legal and practical questions.¹¹ In a second step, the appropriation of FPIC in sub-Saharan Africa will be analysed.

2.1 Origin of free, prior and informed consent

The origin of FPIC is somewhat controversial. While it is sometimes argued that FPIC originates from the field of medicine, the concept of

9 S Engle Merry *Human rights and gender violence* (2006) 135.

10 As above.

11 See P Legrand 'The impossibility of legal "transplants"' (1997) 4 *Maastricht Journal of European and Comparative Law* 111; W Menski *Comparative law in a global context: The legal systems of Africa and Asia* (2006) 51.

'indigenous consent' is much older and possibly even pre-dates colonialism.¹² It became strongly intertwined with the Europeans' civilising mission and early land grabs.¹³ From the mid-1980s onwards, indigenous rights activists increasingly appropriated it and used it as a tool to protect their land from unwanted interference.¹⁴ Particularly in the Americas FPIC has been claimed by indigenous groups. Consequently, many strategies for the implementation of FPIC have their origin in South America, and American human rights institutions have developed a broad body of jurisprudence on FPIC.¹⁵

In the past years, FPIC has been taken up by international organisations, have strongly contributing to its global dissemination. The indigenous-led organisation First Peoples Worldwide criticises that only 25 per cent of all FPIC-related materials is produced by indigenous organisations.¹⁶ Western non-governmental and international organisations, where the global North has a strong influence, have appropriated FPIC and shaped the international understanding(s) of FPIC. The fact that African institutions, when calling for the implementation of participatory mechanisms, make reference to institutions such as the World Bank, adds to the assumption that FPIC has been transplanted vertically.¹⁷

2.2 Recognition of free, prior and informed consent in sub-Saharan Africa

Appropriation is the first step in the legal transplantation process and describes the way in which states or other actors transfer a norm from one setting to another. From the early 2000s onwards, FPIC has increasingly been discussed and recognised in sub-Saharan Africa. Selected examples provide a general idea about the current state of appropriation.

12 See RR Faden et al *A history and theory of informed consent* (1986); C Doyle *Indigenous peoples, title to territory, rights and resources: The transformative role of the right to free, prior and informed consent* (2015) 16.

13 Doyle (n 12 above) 14.

14 Colchester & Ferrari (n 4 above) 2.

15 S Boyd 'Tambogrande has domino effect' 16 July 2002 <http://www.cipamericas.org/archives/1162> (accessed 31 August 2015); A Page 'Indigenous peoples' free prior and informed consent in the Inter-American human rights system' (2004) 4 *Sustainable Development Law and Policy* 16.

16 First Peoples Worldwide 'FPIC 101: An introduction to FPIC' <http://firstpeoples.org/wp/fpic-101-an-introduction-to-free-prior-and-informed-consent/> (accessed 18 November 2014).

17 UNECA & AU 'Minerals and Africa's development: The international study group report on Africa's mineral regimes 2011' 2011 55 <http://www.uneca.org/publications/minerals-and-africas-development> (accessed 10 March 2016).

2.2.1 (Sub)-regional organisations

While the 1990 African Charter for Popular Participation in Development and Transformation¹⁸ only recognises the importance of public consultations, the 2003 African Convention on the Conservation of Nature and Natural Resources, which has not yet entered into force, requires the 'prior informed consent of the concerned communities' with regard to indigenous knowledge and the preservation of 'the traditional rights and property'.¹⁹

The African Charter on Human and Peoples' Rights (African Charter)²⁰ does not contain any specific reference to FPIC, but it could be derived from the African Charter's collective rights or from the individual right to property. The African Commission on Human and Peoples' Rights (African Commission) has so far dealt with participation rights of local communities in two cases: the 2001 *SERAC*²¹ and the 2010 *Endorois* decisions.²² The *SERAC* case was situated in the conflict over oil spills caused by Shell Nigeria. The African Commission found that the collective right to a satisfactory environment required that the government conduct environmental and social impact assessments, provide information to the population and grant access to regulatory and decision-making bodies.²³ The Commission did not explicitly mention FPIC.

In the *Endorois* case, the African Commission confirmed the right to FPIC. The Endorois people had been expelled by the Kenyan government for the purposes of creating a natural reserve without proper prior consultation and adequate compensation.²⁴ The Commission found that, derived from the right to development, the government was under a duty to obtain the FPIC of the whole community as the project had major implications on their lives.²⁵

Another case is currently pending before the African Court on Human and Peoples' Rights (African Court). The Ogiek community had received a notice of eviction from the government for conservation reasons. In 2013, the Court issued an order of provisional measures as the eviction was of sufficient gravity and

18 African Charter for Popular Participation in Development and Transformation (1990) <http://repository.uneca.org/handle/10855/5673> (accessed 10 March 2016) para 13.

19 Art 17 African Convention on the Conservation of Nature and Natural Resources (adopted 11 June 2003) <http://faolex.fao.org/docs/pdf/mul45449.pdf> (accessed 26 January 2015).

20 African Charter on Human and Peoples' Rights adopted 27 June 1981, entered into force 21 October 1986 OAU Doc CAB/LEG/67/3 rev 5; reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2016) 29.

21 *SERAC* (n 1 above).

22 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* decision).

23 *SERAC* (n 1 above) Appeal to the government.

24 *Endorois* decision (n 22 above) para 2.

25 *Endorois* paras 277, 283 & 290.

constituted, amongst others, a possible violation of the Ogiek people's right to property and the right to development.²⁶ The final ruling could provide further clarification.

Moreover, FPIC has been included in a number of non-binding documents. In 2012 the Pan-African Parliament expressed its concern about large-scale farm land acquisitions and the impact of development projects on land, water and related natural resources. It called on member states to ensure that 'any investment is approved through free, prior and informed consent of affected communities'.²⁷ FPIC was also discussed in the context of the Africa Mining Vision (AMV) adopted by the African Union (AU) heads of state.²⁸ It demands the 'broad-based, active and visible involvement of affected communities'²⁹ and calls for the mainstreaming of public participation policies.³⁰ Another example is the AU Model Law for the Rights of Local Communities, Farmers and Breeders, adopted by the AU Ministerial Conference in order to establish a common position with regard to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Convention on Biological Diversity.³¹ It stipulates that decisions concerning access to biological resources, traditional knowledge and technologies of local communities are invalid without their consent.³²

The participation of local communities is also foreseen in a number of sub-regional documents. For instance, the Guidelines on the Participation of Local Communities and Indigenous Peoples and NGOs in Sustainable Forest Management in Central Africa, which are mainly based on recommendations of the international community, feature FPIC.³³ The Mining Code of the West African Economic and Monetary Union (WAEMU), which groups together eight West African states, and the Protocol on Mining of the Southern African Development

26 *African Commission on Human and Peoples' Rights v Republic of Kenya* (Provisional Measures) App 006/2012 (15 March 2013) para 20.

27 Pan-African Parliament 'Recommendations and resolutions, Sixth ordinary session' (16-20 January 2012) OAU Doc PAP2/RECOMS/VI 6.

28 <http://www.africaminingvision.org/about.html> (accessed 26 January 2015).

29 http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf (accessed 22 October 2015) 34.

30 Africa Mining Vision (n 28 above) 35.

31 P Munyi et al 'A gap analysis report on the African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources' (February 2012) http://www.abs-initiative.info/uploads/media/GAP_Analysis_and_Revison_African_Model_Law_FINAL_2902_01.pdf (accessed 23 November 2015) 9.

32 African Union 'African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources' 2000 <http://www.wipo.int/edocs/lexdocs/laws/en/oau/oau001.en.pdf> (accessed 27 January 2015) art 5 (AU Model Law).

33 The Guidelines were adopted by the Central African Forest Commission which seeks to protect the Congo Basin rainforest by harmonising the environmental policies of its member states; 5 Assembe-Mvondo 'Local communities' and indigenous peoples' rights to forests in Central Africa: From hope to challenges' (2013) 48 *Africa Spectrum* 25 26.

Community (SADC) prescribe only environmental impact assessments.³⁴ The directive on mining of the Economic Community of West African States (ECOWAS) states that 'companies shall obtain the free, prior and informed consent of local communities'.³⁵ More than 50 West African civil society organisations were involved in the drafting process.³⁶ Member states are obliged to implement the directive by adapting their national legislative framework by July 2014 while having a choice of form and method.³⁷ ECOWAS plans to adopt a regional mining code in order to ensure the coherent implementation of the directive. However, not much progress has been made so far.³⁸

Even though many of the aforementioned materials are not legally binding, the influence of such soft law must not be underestimated. The growing recognition of FPIC is a noteworthy development, indicating that the problem of land grabs has come to the attention of the African international community. A transfer from the global to the (sub)-regional level has thus taken place.

2.2.2 National legislation

Many sub-Saharan African states are obliged to respect FPIC under international law.³⁹ Still, the number of countries where FPIC has been incorporated into national law is low. The Forest Lands Act of Liberia stipulates that the FPIC of the local population has to be obtained if the status or use of forest resources is to be changed.⁴⁰ In the Democratic Republic of the Congo, FPIC for development projects has been codified for indigenous groups.⁴¹ Expropriation and

34 *Réglement 18/2003/CM/UEMOA portant adoption du code minier communautaire de l'UEMOA* art 18; Protocol on Mining in the Southern African Development Community (2006) art 8.

35 Economic Community of West African States 'Harmonisation of guiding principles and policies in the mining sector' (2009) Directive C/DIR. 3/05/09 art 16(3).

36 Oxfam America 'West African states endorse regional mining sector policy' 22 April 2009 <http://www.oxfamamerica.org/press/west-african-countries-endorse-regional-mining-sector-policy/> (accessed 3 November 2015).

37 E Greenspan 'Free, prior and informed consent in Africa: An emerging standard for extractive industry projects' 2013 <http://www.oxfamamerica.org/static/media/files/community-consent-in-africa-jan-2014-oxfam-americaAA.PDF> (accessed 26 January 2015) 10.

38 L Ruso 'ECOWAS urged to finalise regional mining code' 2013 <http://www.oxfamamerica.org/press/ecowas-urged-to-finalize-regional-mining-code/> (accessed 2 December 2014).

39 Besides the regional law, 31 sub-Saharan African states have voted in favour of the Declaration on the Rights of Indigenous Peoples. The Central African Republic has ratified the ILO Convention 169; 43 sub-Saharan African states are parties to the ICESCR from which FPIC has been derived.

40 An Act to establish the community rights law of 2009 for forest lands (16 October 2009) <http://www.fda.gov.lr/wp-content/uploads/2015/07/Community-Rights-Law-of-2009-with-Respect-to-Forest-Lands.pdf> (accessed 10 March 2016) sec 2.2.

41 Loi du 25 Février 2011, Journal Officiel de la République du Congo <http://faolex.fao.org/docs/pdf/con105791.pdf> (accessed 3 December 2015) art 3.

resettlement in the public interest are, however, still possible.⁴² Other examples of progressive legislation can be found in Ghana and Zambia, where customary decision-making institutions can refuse land alienation.⁴³ Nevertheless, in Ghana conflicts over natural resources frequently occur.⁴⁴ Additionally, the newly-adopted mining code of Burkina Faso requires the consent of a community in cases where there is a well on the land, a cemetery or a holy place.⁴⁵

In South Africa, the Supreme Court strengthened the land rights of communities that were dispossessed during colonialism in the case of *Alexkor v Richtersveld*.⁴⁶ Even though FPIC was not mentioned in the judgment, it is often cited as a positive example for the recognition of land rights and FPIC.⁴⁷ The 2004 Communal Land Act stated that new order rights in communal land should not be granted without the 'prior consent' of the community or the land administration committee.⁴⁸ This, however, was declared unconstitutional in 2010.⁴⁹ Therefore, while consultations are taking place,⁵⁰ FPIC is not legally required in South Africa.⁵¹

Local participation as an element of environmental and social impact assessments is more widely recognised than FPIC.⁵² For instance, in Botswana, the competent authority is obliged to 'consider' the objections raised by affected communities.⁵³ In Uganda, affected populations have the right to be heard.⁵⁴ The 2002 Environment Protection Act of Mauritius merely allows for the public

42 Loi du 25 Février 2011 (n 41 above) arts 32 & 35.

43 GC Schoneveld 'Governing large-scale farmland investments in sub-Saharan Africa' (2014) *Centre for International Forestry Research* Infobrief 1 3.

44 USAid 'Property rights and resource governance: Ghana' 2013 http://www.usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Ghana_Profile_0.pdf (accessed 22 December 2015).

45 Loi no 036-2015/CNT portant Code Minier du Burkina Faso, adopted 26 June 2015, art 120.

46 *Alexkor Ltd & Republic of South Africa v The Richtersveld Community & Others* 2003 (12) BCLR 1301 (CC) paras 8 & 19.

47 See HRCOM (n 5 above) para 32.

48 Art 41(b) Act 11 of 2004.

49 *Tongoane & Others v National Minister for Agriculture and Land Affairs & Others* 2010 (8) BCLR 741 (CC).

50 See K Hite 'Towards consent: Case studies and insights on company-community agreements in forest landscapes' 2014 42ff http://www.profor.info/sites/profor.info/files/docs/TFD_FPIC%20Report_Towards%20Consent_EN_Web.pdf (accessed 11 January 2016).

51 See Mineral and Petroleum Resources Development Act 28 of 2002; Centre for Research on Multinational Corporations 'South African communities speak out: Free, prior and informed consent' 4 June 2009 <http://www.somo.nl/news-en/south-african-communities-speak-out-free-prior-and-informed-consent> (accessed 11 January 2016); Centre for Environmental Rights and Lawyers for Human Rights 'Mining and your community: know your environmental rights' <http://cer.org.za/wp-content/uploads/2014/03/CER-Mining-and-your-Community-Final-web.pdf> (accessed 11 January 2016) 6-7.

52 UNECA & AU (n 17 above) 198.

53 As above.

54 UNECA & AU (n 17 above) 54.

to 'inspect' environmental impact assessments.⁵⁵ Cameroonian environmental legislation and the 2011 Land Law call for local consultations.⁵⁶ These provisions do not sufficiently accommodate the needs of local communities.

It may be summarised that national implementation in sub-Saharan Africa to date has been poor. Moreover, many of the corresponding institutions are weak.⁵⁷ A study on large-scale farm land investments that compared different sub-Saharan African countries confirms that the participation of the local population does not even work in those countries with the most progressive legislation.⁵⁸ Vermeulen and Cotula similarly assert that FPIC has not effectively been integrated in any national policy.⁵⁹

2.2.3 Local appropriation

The situations in which FPIC may be useful in sub-Saharan Africa are characterised by a strong heterogeneity. Consequently, local appropriation processes indicate whether FPIC has actually arrived on the ground.

In Liberia, the Jogbahn clan called for the assistance of a national non-governmental organisation (NGO) in order to take action against land clearing by an oil palm company without their consent. The case was brought before the Roundtable on Sustainable Palm Oil.⁶⁰ In 2016, a memorandum of understanding between the community and the company was signed.⁶¹ Moreover, the REDD+ programme, which seeks to combat deforestation and forest degradation, contributes to the recognition of FPIC on the ground in sub-Saharan African countries.⁶² This, however, faces many problems. The recommendations are strongly influenced by Western concepts of

55 Environment Protection Act 19 of 2002 para 20.

56 S Carodenuto & K Eobissie 'Development of national FPIC guidelines for REDD+: Experiences from Cameroon' 2014 6 https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0ahUKEwjQ1Nmv2v7jAhXCGA8KHcjTCUcQFggwMAI&url=http%3A%2F%2Fwww.researchgate.net%2Fprofile%2FSophia_Carodenuto%2Fpublication%2F271487110_Development_of_national_FPIC_guidelines_for_REDD_Experiences_from_Cameroon%2Flinks%2F54c8da520cf289f0ced0feb3&usq=AFQjCNGGn7vRnOyqOCU3StPUjPFPubgZVQ&sig2=MZS8bvd19yE5pS02g0GgCQ (accessed 28 December 2016).

57 Schonefeld (n 43 above) 4.

58 Schonefeld 5.

59 S Vermeulen & L Cotula 'Over the heads of local people: Consultation, consent, and recompense in large-scale land deals for biofuel projects in Africa' (2010) 37 *Journal of Peasant Studies* 899 907.

60 Sustainable Development Institute 'Winning the battle' 2015 <https://investigations.sdiliberia.org/story/?id=20> (accessed 18 November 2016).

61 Sustainable Development Institute 'Letter to the Roundtable on sustainable palm oil' 2016 https://www.google.de/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0ahUKEwigxljX5rLQAhULECwKHTfXAWgQFgg3MAM&url=http%3A%2F%2Fwww.rspo.org%2Ffiles%2Fdownload%2Fc5471446bf56466&usq=AFQjCNGUafazT1rlthmBagp5LiuJ3jkelA&sig2=ae-_zhcG--EhmNdocbfog (accessed 18 November 2016).

62 Carodenuto & Eobissie (n 56 above) 6.

property rights, which can render implementation difficult, and the voices of local communities play only a subsidiary role.⁶³

Additionally, a clear line has to be drawn between local appropriation and legal mobilisation processes. Legal mobilisation entails the raising of legal consciousness. This has occurred more often: In Cameroon, four villages joined forces with the Forest Peoples' Programme, as they were concerned about the lack of information about an oil palm concession granted to an international firm in order to build up political pressure.⁶⁴ Other examples for legal mobilisation may be found in Nigeria and Kenya.⁶⁵ Even though FPIC is not required under national law, these communities were aware of their rights and felt that these had been violated. This could indicate that local communities are willing to make use of international human rights, such as FPIC, when it serves their cause. However, they are in need of intermediaries such as NGOs, who frame the injustice in legal terms and play a crucial role in the legal mobilisation process.⁶⁶

To summarise, except for Liberia, no cases could be found where FPIC was actually implemented. Therefore, while the appropriation from the global to the (sub)-regional has progressed, national and particularly local appropriation is still in its infancy.

3 Translation: Conceptualising free, prior and informed consent in sub-Saharan Africa

It has been shown that FPIC is a legal transplant to Africa, which has been recognised to varying degrees. Menski stresses that 'local concerns continue to shape how universal categories or rights are implemented, resisted and transformed'.⁶⁷ The appropriated norms may thus move away from the international conception(s) in a way that corresponds better to the situation on the ground. The underlying process is called translation. In its course a concept is framed into cultural narratives, adjusted 'to the structural conditions in which it operates'⁶⁸ and the target population is redefined.⁶⁹ Intermediaries such as NGOs play an important role in this, as they

63 K Foster & D Ouya 'How is REDD+ doing in Africa?' 2012 <http://www.worldagroforestry.org/news/how-redd-doing-africa> (accessed 18 November 2016).

64 A Perram 'Behind the veil: Transparency, access to information and community rights in Cameroon's forestry sector' 2016 9 <http://www.forestpeoples.org/topics/environmental-governance/publication/2016/behind-veil-transparency-access-information-and-com> (accessed 24 October 2016).

65 SERAC (n 1 above); *Endorois* decision (n 22 above).

66 See J Nelson & T Lomax 'They want to take our bush' 2013 <http://www.forestpeoples.org/sites/fpp/files/publication/2013/07/fpp-fpic-herakles-final-july-18-web.pdf> (accessed 18 November 2016).

67 Menski (n 11 above) 41.

68 Engle Merry (n 9 above) 136.

69 Engle Merry 136-137.

ideally have both an understanding of the global norm as well as of the culture on the ground and move between the different layers.⁷⁰

In this section, translations from the global to the regional or national will be explored. While translation is not necessarily required for transplanting legal norms, it enhances the potential effectiveness and also the legitimacy. It may facilitate the appropriation of the concept by local actors in the future. In the following section, the most problematic aspects of the global understanding of FPIC from an African (governmental) perspective will be illuminated as well as the responses of the different African legal documents to date.

With regard to an actual localisation, Liberia is probably the only African country where FPIC has been transplanted by companies to the local level.⁷¹ However, little information on the concrete localised form of FPIC is available. In the case of Golden Veroleum Liberia, the roadmaps are redolent of the international recommendations on FPIC and the communities have no significant influence on the process.⁷² Consequently, at best a very superficial translation based on the judgment of outsiders has taken place.

3.1 Marginalised communities as right holders

It is not uncommon that the target group is redefined in the course of transplanting a programme or a legal concept.⁷³ A core issue of FPIC in sub-Saharan Africa is that it traditionally applies to indigenous peoples. Despite the absence of a static definition of indigenous peoples, it was widely accepted that indigenous groups have a pre-colonial or pre-occupational history.⁷⁴ However, in sub-Saharan Africa the situation is different, as many states are characterised by multiculturalism without any majoritarian ethnic group and no settlers threatened the existence of the original population.⁷⁵ In order to render FPIC workable in Africa, marginalised local communities need to be recognised as right holders. This could occur by either broadening the traditional understanding of indigeneness or by extending the scope of FPIC to non-indigenous groups.

70 Engle Merry 210.

71 Eg Sime Darby 'Sime Darby plantation in Liberia' 1 http://www.simedarby.com/upload/Sime_Darby_in_Liberia.pdf (accessed 21 November 2016); Golden Veroleum Liberia 'Free, prior and informed consent: GVL-FPIC roadmap' 2013 http://goldenveroleumliberia.com/upload/gvl_fpic_principles_and_roadmap_description.pdf (accessed 21 November 2016).

72 Golden Veroleum Liberia (n 71 above).

73 Engle Merry (n 9 above) 137.

74 RL Barsh 'Indigenous peoples: An emerging subject of international law' (1986) 80 *American Journal of International Law* 369-374.

75 R Murray & S Wheatley 'Groups and the African Charter on Human and Peoples' Rights' (2003) 25 *Human Rights Quarterly* 213-215.

3.1.1 Indigenousness in sub-Saharan Africa

The indigenous movement has its origin in the Americas and has subsequently been universalised by non-governmental and international organisations.⁷⁶ The African experiences were for a long time neglected in the international organisations and the indigenous movements.⁷⁷ Many sub-Saharan African governments rejected the notion of indigenousness, fearing that the recognition of indigenous groups could facilitate secessionist movements and lead to civil unrest by privileging indigenous communities over other groups.⁷⁸ However, after initial reluctance, many states and African NGOs have participated in the work of the UN Working Group on Indigenous Populations and pushed towards the adoption of a clause in the Preamble stating that indigenousness depends on the regional context⁷⁹.

The African Commission set up a Working Group on Indigenous Populations/ Communities in Africa (Working Group) in 2000. The Working Group rejects the viewpoint that indigenous rights are not relevant in sub-Saharan Africa and emphasises the particular vulnerability of many communities.⁸⁰ Even though, according to the African Commission, every 'African can legitimately consider him/herself as indigene to the continent',⁸¹ it identifies three main criteria for identifying indigenous communities in the absence of a definition, namely,⁸² (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; and (c) a state of subjugation, marginalisation, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or modes of production than the national hegemonic or dominant model.⁸³

76 F Mukwiza Ndahinda *Indigenousness in Africa: A contested legal framework for marginalised communities in Africa* (2011) 62.

77 Mukwiza Ndahinda (n 76 above) 350.

78 M Davis 'Indigenous struggles in standard-setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law* 2 18-19.

79 DL Hodgson 'Introduction: Comparative perspectives on the indigenous rights movement in Africa and the Americas' (2002) 104 *American Anthropologist* 1037 1039-1040; Davis (n 78 above) 20.

80 'Report of the African Commission's Working Group on Indigenous Populations/ Communities' (2000) AU Doc DOC/OS(XXXIV)/345 88.

81 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples' 2007 para 13 <http://www.achpr.org/mechanisms/indigenous-populations/un-advisory-opinion/> (accessed 30 October 2014).

82 *Endorois* decision (n 22 above) para 149.

83 Advisory Opinion (n 81 above) para 12.

The most important feature of the definition is the 'link between people, their land and their culture' and the principle of self-identification.⁸⁴ Indigenous groups have to perceive themselves as a distinct, indigene community.⁸⁵ In some countries, local communities have embraced the concept of indigenes in order to garner international support.⁸⁶ In past years, the African experiences of indigenes have been increasingly acknowledged and the AU and activists have embraced it as a tool to address 'the root causes of subordination'.⁸⁷

On the other hand, there has been criticism that the characteristics of indigenes are a 'foreign test'⁸⁸ and that the AU institutions have failed to develop a truly African concept of indigenes.⁸⁹ African indigenous groups are also still heavily influenced by foreign indigenous movements, their strategies vary largely and no common understanding of indigenes has thus far been developed.⁹⁰ The Department of Human Resources, Science and Development of the African Commission declared that indigenous food systems produce 90 per cent of all agricultural products in Africa, which also seems to blur the line between local and indigenous communities.⁹¹

Additionally, the concept of indigenes gives rise to controversies on the ground: Communities sometimes are reluctant to self-identify as indigenous. Especially in some Francophone countries, 'indigene' has a negative connotation as 'it has been used in derogatory ways during European colonialism and ... by some post-colonial African governments'.⁹² In Cameroon, the distinction between recognised indigenous and other local communities causes tensions.⁹³

84 *Endorois* decision (n 22 above) paras 151, 154 & 157.

85 African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs 'Indigenous peoples in Africa: The forgotten peoples' (2006) 11 http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf (accessed 29 January 2015).

86 Hodgson (n 79 above) 1042-1043.

87 African Commission and International Work Group for Indigenous Affairs (n 85 above) 23.

88 RK Ako & O Oluduru 'Identifying beneficiaries of UN Indigenous Peoples' Partnership (UNIPP): The case for the indigenes in Niger's Delta region' (2014) 22 *African Journal of International and Comparative Law* 369 382.

89 World Bank 'Operational Manual 4.10 indigenous peoples' 2005 para 4a; EIA Daes 'An overview of the history of indigenous peoples: Self-determination and the United Nations' (2008) 21 *Cambridge Review of International Affairs* 7 10.

90 Hodgson (n 79 above) 1042-1043.

91 Munyi (n 31 above) 10.

92 African Commission on Human and Peoples' Rights 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities' (2005) 86; African Commission on Human and Peoples' Rights and International Work Group for Indigenous Affairs 'Report of the African Commission's Working Group on Indigenous Populations/Communities: Mission to the Republic of Niger 14-24 February 2006' 2008 paras 88-90 & 92 http://www1.chr.up.ac.za/chr_old/indigenous/acwg/Niger%20Rapport_UK68_v4.pdf (accessed 5 October 2015).

93 Carodenuto & Eobissie (n 56 above) 11.

Hence, the usefulness of indigenoussness remains controversial. Besides that, the survival of local communities often also depends on the fertile land that has been in their possession for generations and the cultivation whereof they have brought to perfection. FPIC could better enfold its emancipatory potential if indigenoussness were not established as a precondition for its applicability.

3.1.2 Non-indigenous groups as rights holders

At the international level, the applicability of FPIC to non-indigenous groups is increasingly being discussed. Oxfam applies a streamlined version of FPIC to non-indigenous groups by demanding consultations governed by the principle of FPIC.⁹⁴ The Forest Stewardship Council states that local communities only have a right to FPIC when this is based on 'long-established use',⁹⁵ and the Forest Peoples Programme when they 'have collective tenure systems governed fully or partly by customary law'.⁹⁶ In 2013, the Human Rights Council Advisory Committee issued a draft declaration on the rights of peasants according to which FPIC is applicable to a 'man or woman of the land, who has a direct and special relationship with the land and nature through the production of food or other agricultural products', including landless persons.⁹⁷ According to the Committee on the Elimination of Discrimination Against Women (CEDAW Committee), rural development projects may only be implemented with the FPIC of rural women.⁹⁸ Therefore, even though a certain tendency to broaden the scope of FPIC can be observed, as yet no consensus on the conditions for its application and its content exists. Consequently, Manirakiza, the former Chairperson of the AU Working Group on Extractive Industries, Environment and Human Rights Violations, raises the criticism that local communities are still disempowered due to their inadequate legal definition.⁹⁹

In the African human rights system, the concept of 'peoples' might help to bridge the gap between marginalised minorities and

94 C Hill et al 'Guide to free, prior and informed consent' 2010 8 https://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf (accessed 21 September 2015).

95 L van der Vlist & W Richert 'FSC guidelines for the implementation of free, prior and informed consent' 30 October 2012 22 <https://ca.fsc.org/preview.fsc-guidelines-for-fpic.a-505.pdf> (accessed 11 December 2015).

96 Forest Peoples' Programme 'The rights of non-indigenous forest peoples with a focus on land and related rights: Existing international legal mechanisms and strategic options' 2013 <http://www.forestpeoples.org/topics/rights-land-natural-resources/publication/2013/rights-non-indigenous-forest-peoples-focus-land> (accessed 4 February 2015).

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

98 CEDAW Committee General Recommendation 34 on the Rights of Rural Women' (2016) UN Doc CEDAW/C/GC/34 54(e).

99 P Manirakiza 'Loyola University Chicago international law symposium keynote address towards an African human rights perspective on the extractive industry' (2013) 11 *Loyola University Chicago International Law Review* 1 4.

indigenes. The African Charter recognises collective rights, the beneficiaries whereof are 'peoples', for instance the right to freely dispose of wealth and natural resources, the right to development and the right to self-determination.¹⁰⁰ There is no definition of 'peoples' in the African Charter, and it may even be described as a 'chameleon-like term'.¹⁰¹ Groups can be (i) persons living in the territory of a not as yet independent entity; (ii) groups possessing common characteristics within an entity; (iii) a synonym for the state; or (iv) all persons within a state.¹⁰² The applicable definition depends on the right being invoked and the context. The African Commission and the Working Group have confirmed the applicability of collective rights to groups within a state and the potential importance for indigenous groups.¹⁰³ Peoples also need a common identity, which is softened by the principle of self-identification.¹⁰⁴ Consequently, there is a strong overlap between the concepts of indigenous groups and peoples. While the Working Group understands the group rights as a way of enforcing the rights of indigenous peoples, they could also be used for deriving FPIC for non-indigenous groups.¹⁰⁵

The *SERAC* decision is not illuminating, as the African Commission did not provide any clarification on their status, which is generally the subject of some controversy.¹⁰⁶ In the *Endorois* case, the African Commission concluded that the Endorois were both an indigenous community and a group. Therefore, it remains unclear whether FPIC is applicable to non-indigenous peoples.

While the African Commission has not taken a clear a position, some (sub)-regional documents are more straightforward. The African Parliament takes the view that 'affected communities' need to give their consent to large-scale investments.¹⁰⁷ The AMV's action plan calls for the domestic implementation of the Protocol of FPIC with regard to mining-affected communities.¹⁰⁸ Moreover, the AU Model Law and the COMIFAC guidelines strengthen the rights of local

100 Arts 20, 21, 22 & 24 African Charter.

101 F Ougougou *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 211.

102 RN Kiwanuka 'The meaning of people in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80 100-101.

103 African Commission (n 80 above) 79.

104 Communication 270/03-296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) para 220; *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 179.

105 African Commission on Human and Peoples' Rights 'Manual on the promotion and protection of the rights of indigenous populations/communities through the African human rights system' http://www.achpr.org/files/special-mechanisms/indigenous-populations/idp_manual_eng.pdf (accessed 25 May 2015) 25.

106 Manirakiza (n 99 above) 6; Mukwiza Ndahinda (n 76 above) 81.

107 Pan-African Parliament (n 27 above).

108 African Union Commission et al 'Action plan for implementing the AMV' 2011 25 <http://aamig.com/wp-content/uploads/2012/08/Action-Plan-for-AMV-Final-Version-Jan-2012.pdf> (accessed 20 May 2015).

communities.¹⁰⁹ Similarly, the ECOWAS directive directly designates the local population.¹¹⁰ The Liberian community land law also applies to non-indigenous communities, as well as the FPIC roadmap of the oil palm corporation Golden Veroleum Liberia.¹¹¹ In the Democratic Republic of the Congo, however, FPIC remains a right of indigenous groups.¹¹²

In conclusion, it may be observed that it is difficult to grasp indigeneness as a concept in sub-Saharan Africa. While not all local communities are eager to label themselves as indigenous, the AU institutions seem to adhere to the concept of indigeneness without clarifying the implications for FPIC. Consequently, the approach adopted by the different sub-regional instruments seems to be more promising. However, the African Charter and its group rights also certainly have a notable potential for extending the scope of FPIC.

3.2 Duty bearers

Many international organisations and NGOs stress the fact that the duty to provide for FPIC is incumbent only on the state.¹¹³ This is also the approach adopted by the African Commission.¹¹⁴ The Congolese and Liberian laws do not clarify whether the FPIC procedure could be delegated to non-state actors.¹¹⁵ The AU Model Law requires the competent national authority to consult with the local population in order to ensure that their consent has been obtained.¹¹⁶ A noteworthy exception is the ECOWAS directive. Companies are obliged to obtain the FPIC of the local population.¹¹⁷ States should, among other things, provide capacity-building measures for the local population.¹¹⁸ Allowing companies to conduct FPIC procedures comes with certain risks: Power asymmetries between companies and local communities can make it difficult to establish a meaningful dialogue. Particularly, differences with regard to access to information, legal expertise and skills can prevent a fair FPIC procedure.¹¹⁹

109 AU Model Law (n 32 above) art 3; Assemble-Mvondo (n 33 above) 35.

110 ECOWAS directive (n 35 above) art 16(3).

111 Community Lands Act (n 40 above) sec 2.2.c.; Golden Veroleum Liberia (n 71 above) 1.

112 Loi du 25 Février 2011 (n 41 above).

113 Eg Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador UN Doc E/C.12/1/Add.100 (7 June 2004) para 35; HRC 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya' (15 July 2009) UN Doc A/HRC/12/34 para 38.

114 SERAC (n 1 above) para 53; *Endorois* decision (n 22 above) para 281.

115 Congolese indigenous law (n 41 above) art 3.

116 AU Model Law (n 32 above) art 5.

117 n 35 above, art 16(3).

118 n 35 above, arts 11, 15 & 16.

119 L Cotula *Legal empowerment for local resource control: Securing local resource rights within foreign investment projects in Africa* (2007) 26-27.

Moreover, a top-down understanding of FPIC denudes it of its empowering potential.

In some cases, a FPIC procedure organised by a company may still be a lesser evil. Due to their limited administrative capacity and the non-existence of the rule of law, states are sometimes simply incapable of defending their populations' interests. Simultaneously, corporations seem to be increasingly willing to accept their duty to consult with the local population. The UN Global Compact, the world's largest corporate social responsibility network with a large number of corporate members, has adopted several documents featuring FPIC.¹²⁰ Moreover, the International Council for Mining and Metals (ICMM) recommends companies to 'work to obtain consent'.¹²¹ The Roundtable on Sustainable Palm Oil, of which many Africa-based oil palm companies are members, has accepted FPIC as one of their key principles.¹²² Companies in Liberia seem to share this viewpoint.¹²³

According to Oxfam's Community Consent Index,¹²⁴ since 2012 the number of companies with a public commitment to FPIC has increased from 13 to 37 per cent, while more companies refer to FPIC-relevant human rights treaties and instruments.¹²⁵ Unfortunately, none of the companies extended their definition of FPIC to cover local communities.¹²⁶

Strong institutions for redress are needed in order to ensure company compliance. When the host state lacks the financial or personal capacities for a lengthy FPIC procedure, the state could oblige the company to obtain the FPIC of the population and monitor it. If it fails to do so, regional institutions, such as ECOWAS and the AU, could step in. In the African human rights system, states are

120 Eg UN Global Compact 'Indigenous peoples' right and the role of free, prior and informed consent' 2014 https://www.unglobalcompact.org/docs/issues_doc/human_rights/Human_Rights_Working_Group/FPIC_Indigenous_Peoples_GPN.pdf (accessed 23 November 2016).

121 International Council on Mining and Minerals 'Indigenous peoples and mining' 2013 2 <http://www.icmm.com/publications/pdfs/position-statements/5433.pdf> (accessed 23 November 2016).

122 Roundtable on Sustainable Palm Oil 'RSPO principles and criteria for sustainable palm oil production' 2007 <http://www.rspo.org/file/RSPO%20Principles%20&%20Criteria%20Document.pdf> (accessed 24 November 2016).

123 Eg Friends of the Earth International 'Sime Darby and land grabs in Liberia' 2013 http://www.foei.org/wp-content/uploads/2014/03/Factsheet_Sime_Darby_Liberia.pdf (accessed 23 November 2016).

124 Oxfam 'Community consent index 2015' 23 July 2015 https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp207-community-consent-index-230715-en.pdf (accessed 4 January 2016). Oxfam examined the recognition of community rights and community engagement of 38 major mining, gas and oil companies.

125 Oxfam (n 124 above) 14 26.

126 Oxfam 15.

obliged to protect their population against human rights abuses by non-state actors.¹²⁷ The future will show whether the ECOWAS approach to FPIC turns out to be ground-breaking or whether the traditional construction as an exclusive state duty is more adequate.

3.3 Consent

Another core question is what FPIC actually entails: What does consent mean and do communities have a veto right? What is the timely dimension of a FPIC procedure, and what about the relation to substantive rights?

3.3.1 Localising consent

One problem of FPIC is that the understanding of a state or NGO of consent and its consequences does not necessarily correspond to that of local communities. In Central Africa, consent is understood as a 'transactional social relationship based on ongoing verbal and material exchange'.¹²⁸ Thus, if these communities enter into direct negotiations with companies, this may lead to serious misunderstanding and endanger the whole FPIC process.

The African Commission acknowledges the problem and emphasises that consultations must be conducted according to the group's customs and traditions and information about the nature and consequences of the process must be provided.¹²⁹ The Congolese indigenous law, similarly, emphasises that indigenous customs and decision-making structures must be respected.¹³⁰ In Cameroon, multi-stakeholder efforts have been undertaken for developing a culturally-appropriate FPIC process.¹³¹

It has to be kept in mind that the development of national FPIC policies is particularly problematic in sub-Saharan Africa, as local customs and societal structures may differ greatly even within a particular country. Therefore, it might be reasonable to first establish processes for developing a common terminology with affected communities. FPIC can only be empowering if it is understood as a bottom-up project that gives voice to marginalised communities on their own terms.

127 *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 22; *SERAC* (n 1 above) paras 46, 57 & 69.

128 J Lewis et al 'Free, prior and informed consent and sustainable forest management in the Congo basin: A feasibility study conducted in the Democratic Republic of Congo, Republic of Congo and Gabon regarding the operationalisation of FSC principles 2 and 3 in the Congo Basin' 2008 22 http://assets.gfbv.ch/downloads/fpic_congo_report_english.pdf (accessed 5 February 2015).

129 *Endorois* decision (n 22 above) paras 289 & 290.

130 n 41 above, art 3.

131 Carodenuto & Eobissie (n 56 above)

3.3.2 A right to veto?

Another controversy revolves around the question of whether FPIC vests communities with a right to veto. Companies and political elites tend to interpret the 'C' in FPIC not as 'consent', but rather as meaningful consultations.¹³² In the *SERAC* decision, the African Commission stated that the state was obliged to provide both information to affected communities and 'meaningful opportunities for individuals to be heard and to participate in development decisions affecting their communities'.¹³³ However, the Commission did not define whether the community's consent was necessary. This terminology resembles the World Bank's concept of 'free, prior and informed consultations'.¹³⁴ In the *Endorois* decision, the Commission declared that consultations alone did not meet the requirements of article 22.¹³⁵ The AU Model Law emphasises that FPIC also includes the right to refuse access to biological resources.¹³⁶ It has been shown above that, at the national level, most provisions only provide for consultations and not for consent. The roadmap of Golden Veroleum Liberia, the company which has allegedly implemented FPIC in Liberia, asserts the communities' right to say no and states that it will only continue the project if a mutual agreement has been reached.¹³⁷

Manirakiza stresses that FPIC should not be construed as a right to veto, but rather as a meaningful dialogue in which local populations can affect the outcome.¹³⁸ While it is certainly true that interpreting FPIC as a simple 'yes or no' question is not productive, it remains important that local communities, participating as equal partners in a negotiation process, can ultimately decide to withhold their consent. Denying communities this right runs the danger of FPIC being used to legitimise projects implemented against the wishes of the local population. This would degrade it to a tool that possibly helps to avoid social unrest, but fails to substantially mitigate the power imbalances between vulnerable communities and powerful corporations.

132 See E Greenspan et al 'Community consent index 2015: Oil, gas and mining company public positions on free prior and informed consent' 23 July 2015 3 https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp207-comm-unity-consent-index-230715-en.pdf (accessed 10 December 2015); Manirakiza (n 99 above) 6.

133 *SERAC* (n 1 above) para 53.

134 World Bank 'Indigenous peoples' 2005 <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:205503653~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184~isCURL:Y,00.html> (accessed 9 November 2015).

135 *Endorois* decision (n 22 above) 291.

136 n 32 above, paras 19 & 20.

137 n 71 above, 1.

138 n 99 above, 6.

3.3.3 Duration of the free, prior and informed consent process

Another challenge facing the realisation of FPIC is that it can give states or companies the impression that their obligations *vis-à-vis* the local population are fulfilled once their consent has been obtained.¹³⁹ Understanding FPIC as a one-off procedure would limit its emancipatory potential. In the *Endorois* decision, the African Commission unfortunately did not clarify at what stage the participation must take place.¹⁴⁰ According to the AMV, communities have the right to participate 'in the approval, planning, implementation and monitoring of mining projects'.¹⁴¹ A broad understanding of the duration of FPIC is also promoted by the ECOWAS directive, according to which consent must be obtained 'before exploration begins and prior to each subsequent phase of mining and post-mining operations'.¹⁴² At the national level, consultations and consent are sometimes perceived as a one-off procedure. In Mozambique, consultations must take place before the allocation of land use rights, but investor land applications must be processed within 90 days.¹⁴³ In practice this prevents meaningful consultations. These examples indicate that the duration of the FPIC obligation remains controversial and further clarification is necessary.

3.3.4 Substantive rights

Moreover, FPIC is strongly linked to substantive rights, particularly land rights. FPIC alone is not enough if other rights, such as the right to land and to benefit sharing, are not respected.¹⁴⁴

Because of the duality of the legal and also the land rights system in the majority of African states, this can be particularly complex. The individualistic tradition of human rights and the diversity of African legal systems impede the power of FPIC as collective customary land rights are often not sufficiently recognised. This mainly can be traced back to colonialism: When the colonisers imposed a legal system, they also attempted to codify pre-colonial usufructuary land rights.¹⁴⁵ Customary land rights were, however, often very narrowly interpreted and the colonising powers were eager to declare land vacant in order to transform it into public land and, like in Kenya, assign it to foreign settlers.¹⁴⁶ Local populations could then either remain on their land

139 Xanthaki (n 6 above) 330.

140 n 22 above.

141 http://www.africaminingvision.org/amv_resources/AMV/Africa_Mining_Vision_English.pdf (accessed 22 October 2015) 34.

142 n 35 above, art 16(3).

143 n 59 above, 909.

144 Xanthaki (n 6 above) 330.

145 E Colson 'The impact of the colonial period on the definition of land rights' in V Turner et al (eds) *Colonialism in Africa 1870-1960, profiles of change: African society and colonial rule* (1971) 193 196.

146 Colson (n 145 above) 196-197.

'illegally' or move to a 'native reserve'.¹⁴⁷ In Gabon, the French were reluctant to grant permanent land titles to locals because of their supposedly backward mode of production.¹⁴⁸ The introduction of a new tenure system thus fundamentally changed societal relations and also had a gendered dimension, as only men were entitled to land.¹⁴⁹ Since their independence, many sub-Saharan African countries have struggled to reform their land laws and to deal with the colonial legal heritage that has in many cases caused – and continues to cause – social tensions. The colonial legal systems often remain in place with codified Western-style land rights co-existing in conflict with oversimplified customary rights.¹⁵⁰ Many newly-independent nations adopted the colonisers' point of view on the inferiority of indigenous law, with the result that a decolonisation of the law did not take place.¹⁵¹ In some countries, such as Ethiopia, Tanzania and Mozambique, the government owns all land and natural resources within the territory of the state, while the local population can only have long-term rights of use.¹⁵² In other countries, such as Sudan and Cameroon, private land ownership is legally possible but in practice highly uncommon.¹⁵³ In both cases, it is not difficult for the state to limit the rights of the local population.¹⁵⁴ In Senegal, local communities have full ownership of land, and the government cannot only seize the land in the public interest, but also for 'productive resource use'.¹⁵⁵

Nevertheless, in several African countries a tendency to recognise customary land rights and the adoption of land acts can be observed.¹⁵⁶ However, because of poor implementation and stringent requirements for the recognition of such rights, their impact has at best been mixed.¹⁵⁷ In West Africa, the mapping of land rights has contributed to the marginalisation of certain groups.¹⁵⁸ A static understanding of land ownership and use can produce unfair results, for instance for pastoralists who use the land only sporadically yet still

147 AK Barume *Land rights of indigenous peoples in Africa: With special focus on Central, Eastern and Southern Africa* (2010) 106–108.

148 L Alden Wiley *Land rights in Gabon: Facing up to the past – and present* (2012) 98.

149 Colson (n 145 above) 194.

150 W Wicomb & H Smith 'Customary communities as "peoples" and their customary tenure as "culture": What can we do with the *Endorois* decision?' (2011) 11 *African Human Rights Law Journal* 422–425.

151 S Assembe-Mvondo (n 33 above) 32.

152 Cotula (n 175 above) 62.

153 Vermeulen & Cotula (n 59 above) 905.

154 Cotula (n 175 above) 64.

155 As above.

156 See L Krantz 'Securing customary land rights in sub-Saharan Africa: Learning from new approaches to land tenure reform' 2015 https://gupea.ub.gu.se/bitstream/2077/38215/1/gupea_2077_38215_1.pdf (accessed 11 January 2016).

157 Greenspan (n 37 above) 40.

158 D Roe et al (eds) 'Community management of natural resources in Africa: Impacts, experiences and future directions' 2009 58–59 <http://pubs.iied.org/pdfs/17503IIED.pdf> (accessed 11 January 2016).

depend on it.¹⁵⁹ For women, problems arise when indirect forms of tenure in societies with a patrilineal inheritance tradition are not codified.¹⁶⁰ Hence, as land rights are still a controversial issue in many sub-Saharan African countries, it may be worth a thought to detach FPIC from land ownership or other forms of registered land use.

Another crucial issue is the right to benefit sharing. While many new-generation mining codes define in detail the participation of the host state,¹⁶¹ benefit sharing with the local population is often not prescribed. However, the regional and sub-regional documents examined above tend to regard FPIC in conjunction with other substantive rights. The African Commission argues that article 22 encompasses the right to be present in the decision-making structures concerning the management of one's land.¹⁶² Moreover, it requires the state to ensure 'mutually-acceptable benefit sharing'.¹⁶³

The AU Model Law links FPIC to benefit sharing and the state should ensure that communities participate in and approve the agreement on benefit sharing.¹⁶⁴ Moreover, the consent to access biological resources can be withdrawn where there are negative socio-economic consequences for the community.¹⁶⁵ The Congolese indigenous law foresees benefit sharing, and the Liberian Forest Land Act even stipulates that local populations have the right to at least 55 per cent of the revenues generated by large-scale contracts.¹⁶⁶ In countries where the land is owned by the national government, it is common that extremely low land lease fees are often paid to the national authorities. There are a few positive exceptions, like Madagascar and Ghana, where land rental fees are shared at the regional or local level.¹⁶⁷

Consequently, the criticism that FPIC contributes to the ignoring of substantive rights falls short in the sub-Saharan African context. While it certainly is true that implementation on the ground is very difficult, most regional documents have adopted a comprehensive approach. Particularly the African Charter with its group rights shows great potential, as the right to FPIC can be derived from its collective rights. It is thus not mandatory to see it in conjunction with the right to property and land rights, and it would be desirable for the African Commission to further elaborate on the concept.

159 Cotula (n 119 above) 76.

160 Roe et al (n 158 above) 59.

161 Eg S Brabant 'Current trends in mining law and regulation in West Africa' 28 October 2014 31-32 <http://www.mineafrika.com/documents/Workshop%201%20-%20Herbert%20Smith%20Freehills%20-%20Stephane%20Brabant1.pdf> (accessed 3 December 2015).

162 *Endorois* decision (n 22 above) 280.

163 *Endorois* decision 296.

164 AU Model Law (n 32 above) para 22.

165 AU Model Law paras 19 & 20.

166 Liberian Forest Lands Act (n 40 above) sec 3.1; Congolese indigenous law (n 41 above) art 41.

167 Vermeulen & Cotula (n 59 above) 910; Schonefeld (n 43 above) 3.

3.4 Obstacles to the full transplantation of free, prior and informed consent

While the appropriation of FPIC has taken place, particularly on the (sub)-regional level and to some extent also nationally and locally, translation processes are still lacking. Moreover, poor implementation is quite noteworthy. In order to give an outlook with regard to the prospects of FPIC in sub-Saharan Africa and its potential for communities, the conceptual, practical as well as structural limits of FPIC will be reviewed, which present an obstacle to the full transplantation of FPIC.

3.5 Practical limit: Issue of non-implementation

Scholars and NGOs seem to agree that the implementation of FPIC in sub-Saharan Africa is poor. There are either (i) no applicable national legal provisions, or (ii) these are not applied, or (iii) the national legislation is fragmented, or (iv) communities are not recognised as rights holders. In Cameroon, for instance, there are conflicts between the mining code and the nature and wildlife legislation.¹⁶⁸ The African Commission's decisions on participative rights have also been ignored, and the recognition of indigenous rights is generally poor.¹⁶⁹ In Nigeria, the elites used the non-recognition of indigenous groups to contest their rights.¹⁷⁰ In Kenya and Namibia, indigenous groups were also deprived of their rights due to the non-recognition of their representatives.¹⁷¹ Due to the controversy surrounding indigeneness in sub-Saharan Africa, recognising local communities as rights holders would put an end to the highly-politicised discussion on their status and make FPIC more powerful.

In view of the widespread non-implementation, it is tempting to find that FPIC has failed. However, Okafor rightly stresses that state compliance (and implementation) should not be the standard for evaluating the impact of the African human rights system. The same is true for the other legal sources. Instead, it should be taken into consideration how it contributes to normative change, for instance by means of its incorporation in local activists' strategies.¹⁷² While the legal uncertainty makes it more difficult to fully transplant FPIC, favourable governmental institutions and policies increase the likelihood of local communities making use of foreign rights.¹⁷³ The

168 B Schwartz et al 'Emerging trends in land-use conflicts in Cameroon' (2012) 12-3 <http://d2ouvy59p0dg6k.cloudfront.net/downloads/cameroonminingenglish.pdf> (accessed 30 December 2015).

169 Both the Nigerian and Kenyan governments have ignored the African Commission's recommendations; NGOs report that human rights abuses are ongoing.

170 See Ako & Oluduru (n 89 above) 373.

171 *Endorois* decision (n 22 above) para 20; African Commission (n 92 above) 46.

172 OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 296.

173 Engle Merry (n 9 above) 223.

legal mobilisation, which can be increasingly observed in sub-Saharan Africa, indicates that there is still room for localising FPIC.

3.6 Structural limits

The non-implementation of FPIC can, to a large extent, be explained by structural problems, namely, the limits imposed by internal and external hierarchies. The *raison d'être* of FPIC is to resist and overcome power imbalances. However, these power asymmetries can also prevent the full and meaningful transplantation of FPIC.

3.6.1 Internal versus external empowerment

FPIC should be a tool for balancing power imbalances between communities and the state or corporations and can, thus, in theory improve the external standing of groups. At the same time, empowerment has an internal component and raises questions of representation and identity. Empowerment needs to take place both internally and externally in order to provide substantial justice to the group and its members.

In some cases, different groups use the same piece of land or the same natural resources.¹⁷⁴ In other cases, intersectional discrimination based on criteria such as class, gender or religion within groups makes it very difficult to achieve substantive equality for everybody. This conflict is exemplified by the discussions surrounding customary decision-making structures. In Ghana, land rights can only be transferred with the consent of principal elders who must act in the best interests of the community. Research has shown that some chiefs abuse their power by appropriating land for themselves or concluding dubious land deals.¹⁷⁵ Community members are often powerless against these practices.¹⁷⁶

In this context, it also must be explored what customary law actually is. In many cases, it is the law that was documented by the colonisers that reflected their own patriarchal and racist understanding of culture. Consequently, they created hierarchies that did not previously exist and which changed both society and law.¹⁷⁷ The negative implications to date on the rights of women and other marginalised subgroups cannot be ignored. Large-scale mining can, for instance, be more positive for men as it creates employment for them, while women, who in many societies are responsible for subsistence agriculture, suffer disproportionately from negative side

174 Cotula (n 119 above) 69.

175 Cotula 60.

176 J Ubink 'Struggles for land in peri-urban Kumasi and their effect on popular perceptions of chiefs and chieftaincy' in JM Ubink & KS Amanor (eds) *Contesting land and custom in Ghana: State, chief and the citizen* (2008) 155.

177 See JL Parpart 'Women and the state in Africa' 1986 http://pdf.usaid.gov/pdf_docs/PNAAX586.pdf (accessed 30 December 2015).

effects.¹⁷⁸ Therefore, it is crucial that women's voices are heard in the decision-making process. The indigenous rights legislation in the Democratic Republic of the Congo acknowledges this problem by demanding that FPIC procedures need to be both gender-sensitive and conducted in accordance with customary law.¹⁷⁹ In feminist legal studies and political science, different approaches to ensuring the compatibility of customary law and women's rights are discussed.¹⁸⁰ While these discussions extend beyond the scope of the article, it cannot be stressed enough that internal empowerment is a crucial component of FPIC.

3.6.2 Free, prior and informed consent in the global order

In the widespread modernist development paradigm, investment-friendly narratives prevail which emphasise the importance of foreign development projects and their potential benefits without demanding a 'just international order'.¹⁸¹ The unequal distribution of power between transnational corporations and international institutions and Third World states, and the power relations between Third World states and local communities impair the effectiveness of FPIC. Many governments depend on the revenues originating from foreign investors and prioritise development over environmental and social concerns. Therefore, they are hesitant to grant participatory rights to local communities and fail to share the benefits of the exploitation with them. They fear that lengthy consultation processes with open outcomes will hinder foreign investment.¹⁸² This behaviour can also be traced back to the pressure exercised by international institutions: Until the 1990s, most African countries pursued a neoliberal approach to natural resource management.¹⁸³ Later, the negative impact of this mining policy became obvious and many countries started to adapt their mining codes by including provisions requiring environmental impact assessments, although to date consultations are usually only recommended.¹⁸⁴ Simultaneously, the danger that companies or corrupt governments abuse FPIC in order to whitewash land deals cannot be overlooked. There is a risk that FPIC becomes a way of mitigating the negative side effects of these activities without as such questioning them.

178 Oxfam Australia 'Women, communities and mining: The gender impacts of mining and the role of gender impact assessment' 7 <http://www.oxfam.org.au/explore/mining> (accessed 11 January 2016).

179 Congolese indigenous law (n 130 above) art 3.

180 See SH Williams 'Democracy, gender equality and customary law: Constitutionalising internal cultural disruption' (2011) 18 *Indiana Journal of Global Legal Studies* 65.

181 U Baxi *The future of human rights* (2006) 249.

182 See Fédération Internationale des Ligues des Droits de l'Homme 'Gold mining and human rights in Mali' 2007 https://www.fidh.org/IMG/pdf/Mali_mines_final-en.pdf (accessed 16 December 2014).

183 B Campbell (ed) *Regulating mining in Africa: For whose benefit?* (2004) 9.

184 Campbell (n 183 above) 23.

In this context, the question arises whether FPIC as a legal transplant depending (in most cases) on the goodwill of states or companies can empower local communities at all. Some decolonial theorists, like Suárez-Krabbe, doubt that concepts such as human rights can be appropriated in a meaningful way, as appropriation processes through regional and national elites happen 'at the expense of the subaltern and their voice'.¹⁸⁵ The proliferation of human rights on the local level contributes to the decline of other strategies of empowerment and homogenises modes of resistance.¹⁸⁶ Moreover, it is questionable whether human rights can help overcome power asymmetries emanating from today's global order. FPIC does not necessarily amount to a 'real choice'.

Despite these negative observations, legal transplantation also opens up opportunities for local communities. In this respect, it is crucial that local communities define what FPIC means and what the procedure should look like. From a practical point of view, human rights lawyering and political civil society advocacy can improve the position of local communities.¹⁸⁷ However, the involvement of such intermediaries also bears dangers by creating more dependencies and hierarchies. There is an urgent need for more anthropological data on how the voice of communities (or lack thereof) impacts the transplantation as well as on the role of intermediaries.

4 Conclusion

While governmental organisations and a few states and companies have appropriated and translated FPIC, a 'localisation' of the right is still lacking. But even (sub)-regionally, many documents fail to translate FPIC in a meaningful way. While it is a positive development that some of them extend the scope of FPIC to non-indigenous communities, the potential of the African Charter has not yet been fully tapped. Many documents suffer from a lack of clarity, for instance, with regard to the temporal dimension of FPIC. It is also obvious that FPIC in some cases needs to be interpreted as a veto right. Otherwise, it is likely to become merely another tool for muzzling critics and whitewashing development projects. The fact that it is generally put in relation to substantive rights, such as the right to benefit sharing, is a positive development.

However, the lack of national implementation of FPIC is striking. This may be traced back to two main reasons: first, the key challenge of bridging the gap between internal and external empowerment;

185 J. Suárez-Krabbe *Race, rights and rebels: Alternatives to human rights and development from the global south* (2015) 103.

186 S. Engle Merry 'Transnational human rights and local activism: Mapping the middle' (2006) 108 *American Anthropologist* 38-49.

187 See Cotula (n 119 above) 113.

second, the persisting asymmetries in power between local communities, Third World states and transnational corporations.

The structural problems of FPIC notwithstanding, communities in sub-Saharan Africa have decided to use their right to FPIC as a way of working with what they have. Rajagopal acknowledges that, even though human rights are not by nature anti-hegemonic, social movements have in some cases successfully appropriated them.¹⁸⁸ FPIC could be reinterpreted as a counter-hegemonic project and contributes to a new subaltern cosmopolitanism.¹⁸⁹ This it can do by evolving from a localised globalism¹⁹⁰ to a process which is to the largest extent possible controlled by the communities in question.¹⁹¹ Both intermediaries and communities need to be aware of the structural limitations inherent to FPIC and should try to find ways around these. The early stage of the transplantation process can be both an advantage and a disadvantage. On the one hand, it leaves intermediaries and local communities more room for translation; on the other, it also facilitates contestations and undermines legal certainty and the predictability of legal processes. In view of the strong advocacy by NGOs and international organisations and the growing local legal consciousness, it is unlikely that FPIC has already developed fully.

To conclude, FPIC, just like any other strategy for mitigating the effects of global injustice, is not clear-cut. The choice of whether to use and adapt a legal transplant and to accept the offers made by intermediaries must ultimately be in the hands of the communities.

188 B Rajagopal 'Counter-hegemonic international law: Rethinking human rights and development as a Third World strategy' (2006) 27 *Third World Quarterly* 767-770.

189 B de Sousa Santos & CA Rodríguez-Garavito 'Law, politics and the subaltern in counter-hegemonic globalisation' in B de Sousa Santos (ed) *Law and globalisation from below: Towards a cosmopolitan legacy* (2005) 13.

190 Localised globalism describes the process in which transnational concepts are transferred to the local level and destructure and restructure local conditions.

191 B de Sousa Santos 'Toward a multicultural conception of human rights' in B Hernández-Truyol (ed) *Moral imperialism: A critical anthology* (2002) 39-42-43; Doyle (n 12) 16.