



Model Terms of Reference: National Research

ENGLISH

Tools, instruments and strategies for the Right to Say NO

Note: this document presents basic guidance for research to establish the basis for community claims to consent rights/the Right to Say No (R2SayNO), and/ or to inform the building out of R2SayNO national or sub-national campaigns. It is expected that the research ToR will be adjusted to meet different national or local needs. We therefore regard this 'model' as one in ongoing development.





1. Background

Communities, and women specifically, are denied the right to give or withhold consent to large-scale extractives projects on a free, prior, informed and continuous basis. Such projects are promoted as the development pathway out of poverty across Africa, promising communities local development and jobs. Instead the reality is increased poverty and inequality, ecological destruction, climate change, and dire social impacts - such as forced displacements, loss of access to natural resources necessary for survival, ill-health, and increased violence.

Women are affected in particular ways because of their responsibilities for care and social reproduction. Their unpaid labour is further stretched when ill-health and violence increase and when livelihoods are threatened. Women experience health problems such as spontaneous abortions, reduced fertility, and cancers.

When communities resist, corporate and state actors foment divisions and intimidate, threaten, and even assassinate activists and community members. Within these struggles, women endure sexualised forms of violence and rape. Women's critical demand is for control over their bodies as territory.

Despite these gross violations of the rights of people and nature, women and their communities are denied consent rights. This is so despite recognition of Free, Prior and Informed Consent (FPIC) by governments and regional bodies such as the African Commission on Human and Peoples' Rights, the Economic Community of West African States (ECOWAS) and the Pan-African Parliament; and despite protocols, declarations, constitutions, statutes, and customary law, which enshrine many human rights providing the basis for individuals and communities to withhold consent.

Legal and human rights instruments and tools are not the panacea for communities resisting mega projects, but they are an important tool in their struggle toolkit. National law, policy and plans, and regional and/or international frameworks, protocols and agreements which governments have signed onto, offer community struggles a basis for 'legal' contestation and building moral authority in support of their demands.

It is therefore essential that community struggles for consent/ the R2SayNO are supported through country level analysis, which identifies where the consent right lies in law, policy and agreement. The research should also analyse and pinpoint the most strategic basis for claiming this right to give and especially withhold consent.





Finally, such analysis can inform many community struggles and support the building of campaigns at the sub-national or national level. These campaigns need to make clear, focused and strategic demands to strengthen community consent rights, and the national analysis proposed in this ToR is critical to making informed decisions.

2. Purpose and focus of the study

The purpose of this study is to identify opportunities for local communities, and women within them specifically, in country X to claim and advocate for FPIC/ consent rights, as both a right and a principle, to inform decision making pertaining to the disposal and use of land and natural resources held by a community. The study specifically aims to:

- Highlight the existing protections – in national law, international treaties, policies and plans – for communities, or specific groups within communities, directly affected by extractive industry projects.
- Pinpoint the most strategic existing entry points to claim consent rights for communities and women specifically.
- Identify new avenues for promoting and fulfilling the rights of those communities to claim their consent rights and through this realise their right to development sovereignty.

The focus of the research will be on extractives, defined in the traditional sense as mining, oil and gas extraction. However, the building of infrastructure related to extraction, such as energy projects, dam building, pipelines, harbours and the like, are also of great interest.

The research should focus analysis on where the right to consent resides at different levels and in different forms, including:

- International law, such as treaties, declarations and protocols which have been ratified and are considered binding on the state.
- The national constitution.
- Law – mining, environment, land, customary, women's rights, climate and other pertinent laws providing a legal basis and/or political imperative for the right to consent.





- National policies/plans, such as climate policy or commitments set out - for example, in the Intended Nationally Determined Contribution (INDC) - to global greenhouse gas emissions reductions; and
- Recognitions that may support claims to consent rights by communities that hold and manage land customarily if customary law is not accepted as an autonomous legal system.
- Legal precedents of interest.

We expect that the research will draw conclusions and make recommendations as to the most feasible and strategic avenues for communities and women specifically to claim consent rights. Criteria guiding these decisions could be the tools that (a) are already being enforced and respected; (b) could be more effectively respected; and (c) are more likely to win the favour of the wider public. These criteria should be closely considered, discussed and agreed by the researcher and the contracting parties.

Finally, it is expected that the research will make recommendations to guide advocacy for new or amended frameworks, which may greatly strengthen the rights of communities and vulnerable groups within them.

The focus of the research must mainly be on the right to consent. Drawing on research undertaken by Legal Resources Centre, on behalf of Oxfam, we echo their emphasis to carefully distinguish between ‘consent’ and ‘consultation’. “We see the former as the right to give or withhold permission, thus providing a choice in the true sense of the word. Consultation, on the other hand, we regard as the right to be heard and should entail the right to meaningful participation. It does not include the right to have one’s views accommodated, however.”¹ Learning from their research experience, this research should aim to look at tools and examples of consent requirements that are working, as well as existing consultation requirements which could be strengthened to support communities to achieve consent rights.

¹ Free, Prior and Informed Consent in the Extractive Industries in Southern Africa: An analysis of legislation and their implementation in Malawi, Mozambique, South Africa, Zimbabwe, and Zambia (2018), Legal Resources Centre for Oxfam



3. Methodology

We expect that the researcher will undertake the project through the following methods:

- Desktop analysis of the legislation and policies (listed in section 2 above) relevant to the protection of the land and natural rights, as well as the human right to health, safety, a clean environment and the right to development of affected communities; the implementation thereof; and the challenges and opportunities that exist in furthering the protection of affected communities' rights.
- Interviews with key respondents in government, civil society and the academy guided by a questionnaire.
- In the development of the Nigeria consent/ R2SayNO research, it has been determined that case studies of (a) communities that have successfully resisted projects or achieved rewards for damages and costs based on the violation of consent rights and (b) the customary rules and practices of different communities to establish how these could usefully serve as the basis for claiming consent rights, will also be developed.

We expect the researcher to write a response to the ToR, which may propose additions or alternatives to the proposed methodology.

4. Deliverables

The main deliverable is a written report, with a clear and easy to read/understand summary. It is expected that the report will be written for an audience of activists and practitioners who do not understand legal terminology well. Hence, the researcher must write accessibly for a non-legal audience.

The researcher will be expected to present the research to the client, as well as a carefully selected group of organisations and individuals working to build a Right to Say NO campaign in country x, in a validation workshop which will inform the final report and its recommendations.