Laws and instruments communities can draw on to support their Right to Say No

Introduction

There are several human rights, legal, and non-legal instruments that communities can draw on to support their Right to Say NO (R2SayNO) to mining and other extractives industries that are trying to take over their land and resources. While these instruments may not all establish a legally enforceable R2SayNO, they do say that governments must take crucial information into account when it makes decisions about big projects. This creates an important opportunity to deepen the R2SayNO campaigns of communities. Communities can claim the R2SayNO after the projects commence and the companies disrespect national laws, environmental regulations, and agreements with communities.

Or they can claim the R2SayNO when corporations are wanting to expand existing projects.

There are a wide range of tools to draw on: national constitutions and laws; regional and subregional charters and protocols; international declarations and conventions; legal precedents; plans related to carbon emissions reduction, for example, local bylaws; and written and unwritten customary or traditional law and procedures.

Unfortunately, very few of these instruments support the right of a community to make decisions about the land and natural resources that they occupy and use. Therefore, the right to Free, Prior and Informed Consent (FPIC)
found in international laws on indigenous people and customary power is the most powerful source of the R2SayNO.

Other tools that can be used by communities to stop projects are those aimed at preserving vulnerable species or landscapes or plans such as nationally determined contributions (NDCs) which aim to limit carbon emissions causing climate heating. Further instruments that could be drawn upon include local bylaws related to zoning, land use, air pollution, and public health.

Although not all human rights instruments are legally binding, they all set out guiding principles and standards which are well recognised and respected. Even if a national government has not signed a treaty or convention, the human rights principles can still be used to support the arguments we make.

It is important to remember that many conventions, protocols, constitutions, and laws emerge from the struggles of people for new rights to be recognised, written, and enforced against governments and other actors like corporations and individuals. And so, communities in resistance against large extractives projects can make demands for new rights of consent that may not currently be recognised or written into law.

**Limitations of legal and human rights instruments**

Many laws are weak and often not written to serve the interests of most citizens and people that live in a country or local area. It is those who are in power – political parties and the ruling elite – and their masters – corporations and powerful countries – who shape laws to their benefit. In the same way, and for the same reasons, national laws and local bylaws that protect communities may not be enforced, and the required penalties or punishments for not following the law will not be implemented.

Enforcing legal rights often requires that individuals, groups, and communities must go to the courts. This can often lead to long and costly litigation. Courts can be very alienating to communities with limited literacy or understanding of dominant colonial or indigenous languages. And the ways in which courts operate, usually based on Western standards, may also be uncomfortable to communities.

Some of the sources of the R2SayNO we discuss here give a legally enforceable consent right that communities can take to court as a final strategy. Very importantly, these tools and the rights they provide can be drawn upon as communities and their allies, organise and campaign to stop extractive and other projects through direct action and campaigning. The language can be
“...communities in resistance against large extractives projects can make demands for new rights of consent that may not currently be recognised or written into law.”

brought into declarations and memorandums, placards and other visual campaign materials, newspaper articles, resistance songs and more.

This information sheet looks at what a few of the important human rights, legal, customary, and other instruments say, and how community activists can draw on these to support their struggles to stop projects.

It is important to bear in mind that in every country, and even at the local level, the options, and possibilities for claiming or supporting the R2SayNO are different. This is because there are very different histories and experiences of colonisation, liberation, post-independence, and new liberal reforms. It is therefore important for communities and movements to be supported to undertake national research to establish the strongest options for claiming the R2SayNO. For a model terms of reference for undertaking this type of research see [here](#).
Instruments and tools:

LOCAL

Bylaws of local or municipal government

What it says
This varies a lot depending on the government structure in a country, as well as the capacity of these structures, especially at a local level. The powers of local or municipal government can vary a great deal. These laws generally demand that the decision-maker speak to affected people and take their concerns and other issues into account when making a decision. By knowing what these factors are, communities can use them to strengthen the R2SayNo. Examples of bylaws that could be used to slow down or stop a project based on the R2SayNO include:

- **Zoning** – how land and buildings can be used, where buildings and other structures may be located, and what may or may not be developed on a piece of land.
- **Avoiding or minimising air pollution.**
- **Administration, management, and protection of public open spaces.**
- **Public health hazards and nuisances.**

Uses and limitations
Communities and groups living in urban or peri-urban contexts are most likely to be able to draw on local bylaws to contest proposed developments. These laws typically only require consultation from decision-makers, rather than consent. Rural local government is usually weak or non-existent in many countries and so these tools will likely not be available.

NATIONAL

Written or unwritten African customary or traditional law

What it says
Customary law is an independent system of law with its own rules and processes. It is developed and practised by a community, traditional, or identified group as living law and enforces customary rights over land and natural resources. It provides for traditional governance systems, with decision-making usually taking place at the local village level. Customary law is recognised by many constitutions but is also usually subject to these constitutions and in many countries, subject to state law. That means that if a customary law or practice goes against the constitution or state law of the country, it will not be allowed. In a few contexts, women being excluded from decision-making would be a violation of the constitution. These laws may be codified, that is, written into law, or be uncodified.
**Uses and limitations**

Communities or groups who live in villages or areas under customary law have rights to land through custom. This often includes the right to consent to any developments on the land and this gives them the R2SayNO when their land and livelihoods are threatened. Customary law is thus a strong basis for consent rights that can be claimed in court. A community asserting its customary law and demanding that anyone wanting to enter their land follow that law gives a lot of power to communities. This is because they know a lot more about their own laws than those used by government or companies. Decision-making which undermines customary law and procedure can also be taken up in courts, including the African Commission on Human and Peoples’ Rights and the African Court on Human or Peoples’ Rights. Only six African countries have made a declaration allowing individuals and communities to go to this court, so this is not possible for most communities.

**Statute law**

**What it says**

In every country, there will be legislation that regulates mining, communal land rights, environmental impacts, etc. See [https://africanlii.org/ebook/free-prior-and-informed-consent-extractive-industries-southern-africa](https://africanlii.org/ebook/free-prior-and-informed-consent-extractive-industries-southern-africa) for a summary of relevant statute law in five Southern African Development Community (SADC) countries and how these can be used.

**Constitution**

**What it says**

The constitution of any country is the highest law of the land and says that no law can be written, or government action taken, which is opposite to what the constitution says. Constitutions normally set out rights to dignity and equality. In some countries, constitutions may give socio-economic rights, like rights to food, shelter, and education. The constitution may also create specific rights related to customary law, property rights and ownership of other natural resources, and the protection of the environment and government accountability. These could be drawn on by communities organising for their R2SayNO.

**Uses and limitations**

The right to dignity and equal treatment can be drawn on to support the R2SayNO.

Where the constitution provides for socio-economic rights a community can demand to say no to developments that threaten their livelihoods.
INTERNATIONAL INSTRUMENTS:

States first sign an international treaty. After approval has been granted under the State’s own internal decision-making procedures, then it will notify other parties that it has consented to be bound by the treaty. This step is called ratification. In most countries, you cannot go to court demanding a right in international law. But courts in some countries would like rulings that are not opposed to an international treaty that a country is bound by. If you are campaigning and not going to court, then treat the obligations contained in ratified treaties as direct rights.

United Nations Declaration on the Right to Development (DRTD), adopted by the United Nations General Assembly by its resolution 41/128 of 4 December 1986

What it says

The Preamble states that “development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”

Article 8 states, “Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices. States should encourage popular participation in all spheres as an important factor in development and in the full realisation of all human rights.”

Everyone has the right to development. The sustainability of development relates to the ability of people to control their development objectives. Community participation in projects that affect them should be consistent with the principles underlying FPIC.

Uses and limitations

The Declaration is clear that communities and women have the right to participate in development planning and to control development objectives. This means that communities and women have the R2SayNO. Development should improve the lives of the community, so if mining worsens the situation of a community, the community can demand the R2SayNO. Communities and women can organise and campaign to demand that this right be respected as the basis for saying NO to a megaproject.

International Labour Organization (ILO) Convention 169

What it says

The principles of FPIC were first formally laid out by the 1989 ILO’s Convention on Indigenous and Tribal Peoples in Independent Countries (ILO 169). Articles 6, 7, and 9 of ILO 169 establish that consent must be acquired before indigenous or tribal communities are relocated, or before development is undertaken on their land.
Uses and limitations
An indigenous or tribal community cannot be moved, and their land cannot be developed without
their consent. This has been used by some countries in advocacy and court cases to help define
FPIC. In the African context, the notion of indigenous communities or groups is challenged by the
histories of wars, migration, and displacement, as well as nation state creation under the colonial
period. ILO 169 was largely crafted in the Latin American context to respond to the struggles and
demands of indigenous people there. There are challenges of translating rights defined on another
continent to Africa. African states have also been reluctant to recognise indigenous rights for fear
of deepening ‘ethnic’ tensions and the possibility of armed conflicts.

Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), adopted in 1979 by the UN General Assembly

What it says
Articles of specific interest to the R2SayNO are:

Article 7: concerning taking all appropriate measures to eliminate discrimination against women in
public life, including ensuring their right to participate in the formulation of policy.

Article 14: concerning non-discrimination against rural women, including ensuring their right to
participate in development planning, equal treatment in land and agrarian reform, and their right
to adequate living conditions including in relation to housing.

Uses and limitations
Women’s right to participate in development planning and their right to adequate living conditions
is a basis for women to say NO to development that does not benefit them.

United Nations Framework Convention on Climate Change (UNFCCC), 1992

What it says
The UNFCCC is a framework for international cooperation to address climate change which has
197 country parties. By 1995, countries started negotiations to strengthen the global response to
climate change and adopted the Kyoto Protocol in 1997. There are 192 parties to the Kyoto Protocol.
The Kyoto Protocol recognised that some countries had different historical responsibility for climate
change and legally bound these developed countries to targets for reducing carbon emissions. The
2015 Paris Agreement, adopted in 2015, largely replaced the Kyoto Protocol. This agreement aims to
limit the global temperature increase to 1.5 degrees Celsius. It also agreed to strengthen the ability of
poor countries to deal with the impacts of climate change through the creation of the Green Climate
Fund, which has been a great failure. And it stepped back from legally binding carbon emission
targets, moving to voluntary nationally determined contributions (NDCs) to reach the global average
temperature increase target.

Uses and limitations
Communities and their allies could make arguments, especially against fossil fuel projects and
mega-hydro dams, by referring to the 1.5-degree commitment and the country NDC.
**Convention on Biological Diversity, December 1993 (Biodiversity Convention)**

**What it says**

This convention has three main goals: the conservation of biological diversity (the variety of life on Earth at every level); the sustainable use of earth’s diversity of species; and the fair and equal sharing of benefits arising from genetic resources (this means any material of plant, animal, bacterial or other origin which contains genes or units of heredity). It recognised for the first time in international law that the protection of biodiversity is “a common concern of humankind” and central to the development process. The convention also offers decision-makers guidance when there is a significant threat to biological diversity; the ‘precautionary’ (or preventive) principle must be applied even in the absence of scientific certainty. The convention aims to develop national strategies for the conservation and sustainable use of biological diversity.

**Uses and limitations**

Article 6 of the Biodiversity Convention creates an obligation for a national biodiversity strategy and action plan, which reflects how the state party intends to fulfil the objectives of the convention. Ninety-eight percent of the parties have concluded a strategy and could contain commitments and actions that could be drawn upon to advance the R2SayNO. Indeed, the Biodiversity Convention itself will also inform R2SayNO demands and strategies.

**Other key international mechanisms or instruments include:**

- The Universal Declaration of Human Rights (UDHR), General Assembly resolution 217 A, December 1948.
- Voluntary Guidelines on the Responsible Governance of Tenure, endorsed by the Committee on World Food Security on 11 May 2012.
REGIONAL AND SUB-REGIONAL INSTRUMENTS

**African Charter on Human and Peoples Rights**

**What it says**

Article 14 protects the right to property. The Commission’s guidelines and principles to the Charter explains that this right includes “rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership. This places an obligation on State parties to ensure security of tenure to communities, and their members.”

Article 22(1) provides that: “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.”

Article 21 provides for the following:

“All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

In case of spoliation [ruining or dispossessing property] the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

States parties... shall undertake to eliminate all forms of foreign economic exploitation... to enable their peoples to fully benefit from the advantages derived from their national resources.”

**Uses and limitations**

The African Charter is an important human rights document upon which communities can base the call for the R2SayNO. The Charter is ratified by all member states of the African Union and is therefore binding on all. It promotes participation, development, self-determination, and protection of the environment; the right to property including customary tenure rights; the right to culture which may not be unnecessarily disturbed by development projects; the right to freely dispose of natural resources; the right to restitution and reparations. In the Endorois decision (see legal precedents below), the African Commission on Human and Peoples’ Rights (ACHPR) said that the right to development in the Charter includes the requirement that FPIC be sought from a community in terms of its customary law.

**African Commission on Human and Peoples’ Rights (ACHPR)**

(a) Resolution 224
(b) Resolution on Climate Change (2009)

**What it says**

**Resolution 224** calls on States to ensure local participation in decision-making related to natural resource governance. The resolution specifies that States should take all necessary measures “to ensure participation, including the Free, Prior and Informed Consent (FPIC) of communities.”

The resolution does not limit FPIC application to indigenous peoples but rather links it to natural resource projects. ACHPR notes concern over the “disproportionate impact of human rights abuses upon the rural communities in Africa that continue to struggle to assert their customary
rights of access and control of various resources, including land, minerals, forestry and fishing.” In this context, ACHPR introduces FPIC as a safeguard to counter risks associated with natural resource projects which have great human rights risks.

In the Climate Change resolution, the Commission expressed a concern that “the negotiations on climate change leading to the Copenhagen Conference in December 2009, make no clear reference to human rights principles, such as the rights to traditional knowledge and intellectual property of local and indigenous communities, as well as the principle of free, prior and informed consent by communities, as enshrined in the Maputo Convention and other relevant African human rights instruments” and urged “the Assembly of Heads of State and Government of the African Union to ensure that human rights standards and safeguards, such as the principle of free, prior and informed consent, be included into any adopted legal text on climate change as preventive measures against forced relocation, unfair dispossession of properties, loss of livelihoods and similar human rights violations.”

**Uses and limitations**

**Resolution 224** considers a broad range of natural resource extraction activities which affect communities and specifically provides for the R2SayNO in the form of FPIC.

The Climate Change resolution very usefully refers to the importance of traditional knowledge and the FPIC rights of communities.

Neither of these resolutions give communities legal rights, but these are important commitments that communities can use in their campaigns to stop projects.


**What it says**

**Article 2** - “States parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.”

**Uses and limitations**

This supports women’s rights. It allows states to intervene when customary law promotes gender discrimination. Article 15 can be used to promote women’s interest in a FPIC process. It can also be used to argue against unilateral traditional leadership-based decision-making.
The destructive economic system communities are saying NO to

**ECOWAS Mining Directive**

**What it says**
Directive C/DIR3/05/09 on the Harmonisation of Guiding Principles and Policies in the Mining Sector provides explicit recognition for FPIC continuously throughout the mining cycle (Article 16).

It provides for benefit sharing (Article 8) with a broader localisation or empowerment perspective (Article 11) and draws no artificial distinction between indigenous and local communities (Articles 4, 16).

It talks of providing capacity for communities engaged in negotiations (Article 18).

It requires respect for human rights (Article 15) and provides for relief via the ECOWAS Court of Justice, which can be employed by a state, an individual or a stakeholder (Article 18).

**Uses and limitations**
This conforms to ACHPR Resolution 224 and is mentioned by this same resolution. It can be drawn on to support the R2SayNO.

**Other key regional and sub-regional mechanisms or instruments include:**
- Recommendation 6 (d) of the Pan-African Parliament which requires that any foreign direct investment is approved through the FPIC of affected communities.
- The Framework and Guidelines on Land Policy in Africa (2010) produced by the ACHPR, the African Development Bank, and United Nations Economic Commission for Africa (UNECA) demands the recognition of customary land rights, a national strategy for sustainable agricultural development, and specific recognition of the land rights of women. It also says that women’s voices must be given more attention. When it comes to development decisions, it says that these must be based on the “prior informed participation and social acceptance by affected communities”. It also demands that investments be assessed to identify their economic, financial, social, and environmental costs and benefits across the life of the project.

**LEGAL PRECEDENTS**

**Judgements in national and international courts can serve as legal precedents (examples) to be argued in consent rights cases**

**What it says**
Examples of cases on the African continent:

1. **Xolobeni Judgement, Pretoria High Court, South Africa**: A local community organisation, the Amadiba Crisis Committee, launched a court case against the Department of Mineral Resources and the Australian company Transworld Energy and Mineral Resources (TEM) over mining rights. The ground-breaking judgement found that the mineral resources minister must obtain consent from the community, as the holder of customary rights on land, prior to granting any mining right to TEM.
2. Decision, African Commission on Human and Peoples’ Rights: In the landmark Endorois case against the Kenyan government in 2003, the Commission said that the community’s right to development was violated because they were informed about the development of a game reserve on their land but were not given an opportunity to shape the project or decide on their role. The community representatives were in a very unequal position because they were largely illiterate and had a different understanding of land ownership and use as compared with the Kenyan government. The ACHPR argued that the government should have done the consultations in such a way that the community could be fully informed and participate in shaping the project to protect the life of the community. The ACHPR also said that the right to development included the requirement that the FPIC be obtained from the community in terms of its customary law. An affected community’s right to development under the Charter must be based on a process that is equitable, non-discriminatory, participatory, accountable, and transparent. Equity and freedom of choice must be present as a part of the right to development.

Uses and limitations
All African countries ratified the African Charter. The Commission’s decisions are powerful interpretations of the Charter and States are required to respect these.