

THE OGIEK COMMUNITY FREE PRIOR AND INFORMED CONSENT (FPIC) PROTOCOL



TABLE OF CONTENTS

Acronyms	3
Acknowledgement	4
Introduction	5
Executive Summary	6
Rationale for Development of the FPIC Protocol	6
Background of the Ogiek Community	7
FPIC Legal Environment in Kenya	8
7.1 National Policy, Legal and Institutional Framework for FPIC in Kenya	8
7.2 Principle of Public Participation as the Basis for FPIC in Kenya	13
7.3 Key International Policy, Legal and Institutional Framework for FPIC in Kenya.....	14
Principles Governing the FPIC Protocol	18
The FPIC Process	18
9.1 Pre-Consent Process	19
9.2 Actual Public Participation Leading to an Agreement	19
9.3 Consultation and Participation Throughout the Project Cycle	20
9.4 Post-Consent Processes	21
9.5 Obtaining Consent Post Project Development, Access to Resources, Culture or Other Community Rights	22
9.6 Agreements Further to the FPIC Protocol	23
Triggers of Public Participation and FPIC	24
i. Notice	24
ii. Land and Natural Resources	24

TABLE OF CONTENTS

10. Triggers of Public Participation and FPIC	
iii. Need to Secure and Protect Livelihoods, Traditional and Indigenous Knowledge	25
iv. Culture, Cultural Expressions, Heritage and Identity	25
v. Access and Benefit Sharing	25
vi. Conflict Resolution	26
vii. Research of All Nature	26
viii. Environmental Strategic and Project Impact Assessment and Audit	26
ix. Investments in Community Land from External Sources	27
x. Trade in Goods and Services from the Community's Ecosystem	27
xi. Corporate Social Responsibility within the Ogiek Community Land	27
xii. Policy, Legal or Other Guideline Development and Review	27
xiii. Extractive Industry Projects	27
xiv. Climate Change Adaptation and Mitigation Projects	27
xv. Biodiversity Protection and Conservation Projects	27
xvi. Regional Projects Affecting the Ogiek Community	27
11. Ogiek Community Profile	
11.1 Ogiek Culture	27
11.2 Governance of the Ogiek Community	27
11.3 Social Structure of the Ogiek Community	27
11.4 Qualities of an Ogiek Community Leader	28
12. The Ogiek Community Territory and Its Relevance for FPIC	
12.1 Zoning of Ogiek Territory	29
12.2 Territorial Eco-Climate Zones	29
12.3 Cultural Zoning of the Ogiek Territory	30

ACRONYMS

FPIC	FREE PRIOR INFORMED CONSENT
CBD	CONVENTION ON BIOLOGICAL DIVERSITY
PIC	PRIOR INFORMED CONSENT
COK	CONSTITUTION OF KENYA, 2010
IWGIA	INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS
ACHPR	AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS
PFMA	PUBLIC FINANCE MANAGEMENT ACT, NO. 18 OF 2012 (REV. 2020)
CGA	COUNTY GOVERNMENT ACT, 2012
UNGA	UNITED NATIONS GENERAL ASSEMBLY
ILO	INTERNATIONAL LABOUR ORGANISATION
UN	UNITED NATIONS
GBF	GLOBAL BIODIVERSITY FRAMEWORK



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INTRODUCTION.

The Ogiek Community have undertaken to develop their own FPIC Protocol to enable them engage with internal and external actors and participate in decision making involving realization and enforcement of their rights and freedoms and performance of their duties and responsibilities more effectively and meaningfully.

This Protocol begins with a discussion on the rationale for its preparation after which it delves in to the key national and international policy legal frameworks for FPIC applicable in Kenya. It then talks about the Ogiek indigenous Community, their culture & traditions and their land and natural resources to provide a background for the next topic. It is followed by a discussion about some of the triggers of public participation and FPIC. Annexes relevant to the Ogiek Community FPIC are then attached to further and justify the need for FPIC. This Protocol is also prepared in the spirit of Article 3 of UNDRIP which provides that indigenous People have the right to self determination and by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. [1]

[1] United Nations Declaration On the Rights of Indigenous People (UNDRIP)

EXECUTIVE SUMMARY.

RATIONALE FOR DEVELOPMENT OF THE FPIC PROTOCOL

The Protocol seeks to ensure that engagement and consultation with the Ogiek Community is done in a manner that respects their human rights and other rights enshrined in local, national, regional and international statutes, instruments and decisions of judicial mechanisms.

This protocol also seeks to describe the cultural and traditional mechanisms of decision making of the Ogiek community for engagement with stakeholders who engage with them on the basis of respect for their culture, traditions and customary laws which is duly recognised as a system of law in Kenya.

This Protocol is prepared based on International Human Rights law Statutes, instruments and decisions made by judicial mechanisms and or entered into by State Parties including Kenya.

This Protocol is made in recognition of the rights of the Ogiek Community to a clean, healthy and sustainable environment, to economic and social rights, among other fundamental rights and freedoms enshrined in law Statutes, instruments and decisions made by judicial mechanisms at local, national, regional and international levels. This protocol is being developed to support the Ogiek Community in protecting and realizing their rights under various legal, administrative and policy regimes through their participation and meaningful interaction in all processes that affect them or are likely to affect them. Indigenous peoples' consultation and consent standards to be developed by this FPIC seek to reverse exclusion of Indigenous Peoples from decision making processes and activities that have affected their rights[2].

On the basis of the Provisions of the Constitution of Kenya (CoK), 2010 alone, there is justification for development of FPIC protocols for communities in Kenya if only to ensure protection of fundamental rights and freedoms of the Ogiek community as a whole.

The difficulty of realisation and enforcement of the rights of the community also stems from the fact that Kenya like many other African Countries do not recognise indigeneity of communities within their countries considering that they consider all African people as indigenous to Africa but this argument according to the International Work Group For Indigenous Affairs (IWGIA) report does not necessarily mean that some people will receive special treatment. It simply recognises the communities that have been marginalised over time. It is reported that the African Commission on Human and Peoples Rights (ACHPR) has addressed the misunderstandings surrounding the use of the term "indigenous Peoples" including the misconception that protection of indigenous rights would give special rights to some ethnic groups over and above the rights of other groups within a state.[3] The ACHPR pointed out that the issue is not that "certain groups have special rights but that certain marginalised groups are discriminated in particular ways because of their particular ways culture, mode of production and marginalised position within the state. A form of discrimination that other groups within the State do not suffer from". The Report of IWGIA continues to state that the Use of the term "Indigenous Peoples" is not meant to deny all other Africans their legitimate claim and identity but rather to give space for these groups to assert the present-day international law understanding of indigenous peoples. The term is used to enable adequate analysis of the particularities of their

[2] Study on Consultation and Free, Prior and Informed Consent with Indigenous Peoples Report by IWGIA, 2022, pg.24

[3] Ibid

sufferings and by which they can seek protection in international human rights law and moral standards[4]. In line with recognition of indigeneity, these communities have rights to self-determination as reiterated by the ACHPR should be understood by the United Nations and other institutions to include a series of rights involving:

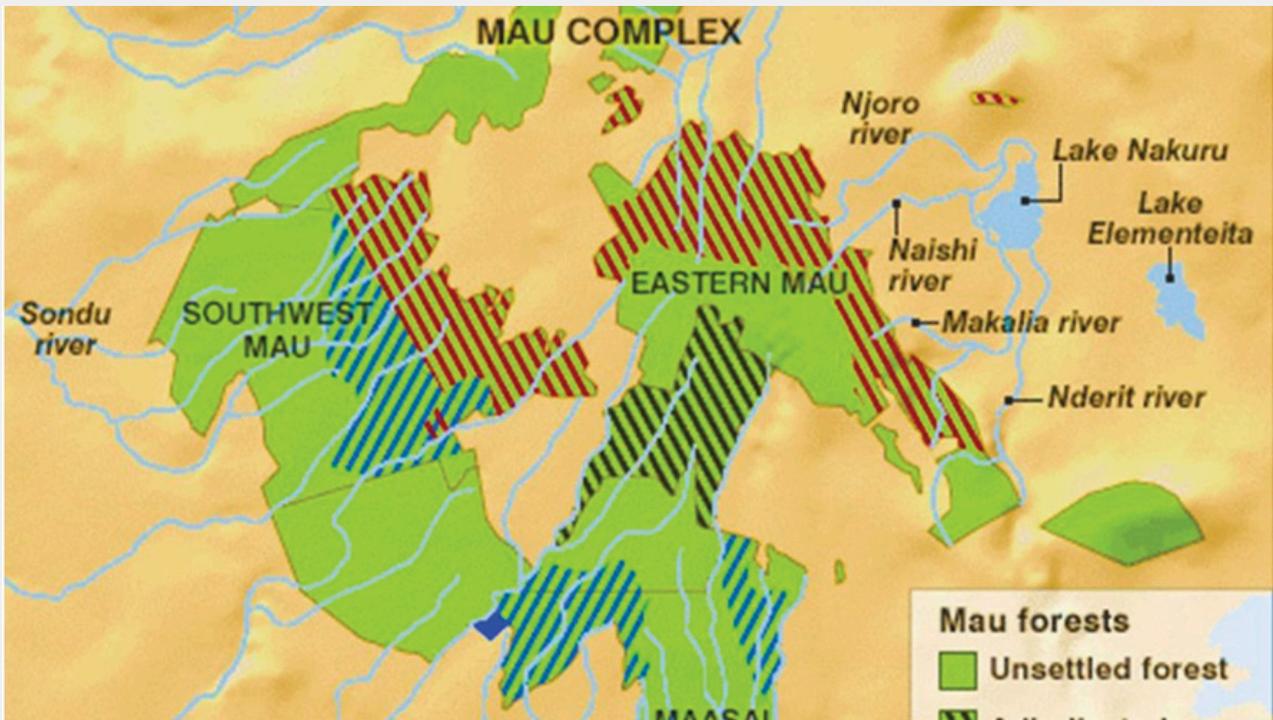
“(T)he full participation in national affairs, the right to local self-government, the right to recognition so as to be consulted in drafting laws, programs concerning them, to a recognition of their structures as well as traditional ways of living as well as the freedom to preserve and promote their culture. It is therefore a collection of variations in the exercise of the right to self-determination, which are entirely compatible with the unity, and territorial integrity of State Parties”. [5]

[4] Ibid.

[5] Ibid

BACKGROUND OF THE OGIEK COMMUNITY

The Ogiek are an indigenous hunter-gatherer community that has lived within the Mau Forest Complex since time immemorial. The term 'Ogiek' means caretaker of forest flora and fauna. The Ogiek have had a long-standing relationship with Mau Forest, this is evident from the various Ogiek names that are in use identifying various areas within Mau Forest complex. Currently, the Ogiek are scattered across six counties within the Rift Valley region. These are ; Uasin Gishu, Narok, Nandi, Nakuru, Kericho and Baringo.



Within these counties, the Ogiek are found in areas of Mariashoni location (Eastern Mau), Nessuit location (Eastern Mau), Sururu (Eastern Mau) Sogoo (Maasai Mau), Nkaroni (Maasai Mau), Kiptunga (Molo), Tertit (Eastern Mau), Tinet area and Saino (South Western Mau), Sasimwani (Maasai Mau), Oloopirik (Maasai Mau), Ololoipang'i (Maasai Mau), Nkareta (Maasai Mau), Olmekenyu (Maasai Mau), Keneti/Lemek/ Kuto (Narok West County), Eburru (Naivasha) Koibatek (Maji Mazuri, Narasha), Kericho (Sorget & Tendeno), Uasin-Gishu (Northern Tinderet), Kipkurere (Northern Tinderet), Ndungulu/ Cengalo (Northern Tinderet), Seregonik (Northern Tinderet) and Tindiret Forest.

Across these counties Ogiek community members speak the Ogiek language although with minor variations such as dialect, accent and tone. Additionally, the Ogiek language has been affected by the borrowing of words from neighbouring communities. Some small sections of the Ogiek community have all together lost their language and have adopted the use of neighbouring bigger communities' languages. For example, Ogiek in Narok County have adopted the Maasai language although a majority still speak the Ogiek language.

The Ogiek community divided the Mau Forest complex territory into clan territories (gonoitweeg). The boundary makers were natural occurring topography and features. This boundary knowledge was passed from generation to generation through oral literature such as songs, dances, poems, folklore, puns and riddles. These territories are well known, respected and passed on through the patriarchal lineage. Division of clan territory happened as a conflict resolution mechanism, for instance, when disputes occurred within a clan, wronged family would split from the clan and a distinct territory would be carved out for them. Other instances where a territory would be cut out were when a marriage occurred between members of the same clan. The couple would be given a territory to start their own clan.

FPIC LEGAL ENVIRONMENT IN KENYA

National policy legal and institutional framework for FPIC in Kenya

By virtue of Article 2(5) and 2(6) of the CoK Kenya has laws that recognise Prior Informed Consent (PIC) in various processes involving communities and the general public. Unfortunately, FPIC is not recognised in the laws of Kenya and the community is left with the option of utilising PIC and other laws that support the need for public participation. That notwithstanding, communities engage in processes that are contractual in nature in order to grant PIC. According to the law of contract in Kenya, these contracts are entered into free of compulsion and without duress failing which they can be challenged and either nullified or voided.

The Constitution of Kenya 2010 and its relevance for FPIC.

Kenya has a constitution that recognises the rights of communities to; **culture**, to their knowledge, to share in the benefits arising from benefit sharing arrangements among other rights. The Constitution of Kenya has also clearly defined Indigenous People and Minority and Marginalized communities under Article 260 as clearly outlined below.

- The Ogiek Community and other indigenous communities in Kenya though not recognised explicitly as peoples of Kenya, fall under Article 56 of the CoK which provides for their rights as minorities and marginalised groups. These marginalised groups are then said to include indigenous communities that have retained and maintained a traditional lifestyle and livelihood based on hunter or gatherer economy. The CoK obliges the State to put in place affirmative action programmes designed to ensure that minorities and marginalised groups participate and are represented in governance and other spheres of life;

- are provided special opportunities in educational and economic fields;
- are provided special opportunities for access to employment;
- develop their cultural values, languages and practices; and
- have reasonable access to water, health services and infrastructure.

The Ogiek Community fall within the broad categories of minority marginalised groups and are subject to affirmative action programmes. Further, they fall under the special interest groups (SIGs) under the **National Gender and Equality Act, 2011** of Kenya and are therefore also the subject of protection under the National Gender and Equality Commission Act. As such, they are the subject of many rights such as the rights to equality and not to be discriminated against under **Article 27** of the CoK. While describing “marginalised group” as a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4), the CoK describes marginalised community as: ‘... a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or a pastoral community ...’

The 2010 Constitution CoK[6] does not directly speak about FPIC but by virtue of Article 2(5) and 2(6) which allows applicability of International law locally where Kenya has consented to such application, heavy reliance is placed on International law while asserting the right to FPIC.(Link with International law), The CoK provides for among others, national values and principles of governance[7] that include: democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised, good governance, integrity, transparency and accountability, and sustainable development.

[6] <http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010>

[7] Ibid, Art.10.



The Ogiek Community's right to culture

Article 11 of the CoK also recognises culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. Kenya is obliged to promote all forms of national and cultural expression through literature, arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage; recognise the role of science and indigenous technologies in the development of the nation; and promote the intellectual property rights of the people of Kenya.

The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 [8]

was then enacted to operationalise Art. 11 of the CoK and to provide a framework for the protection and promotion of traditional knowledge and cultural expressions; The Act was also enacted to ensure that communities reap benefits from their traditional knowledge and cultural expressions by ensuring that that communities receive compensation or royalties for the use of their cultures and cultural heritage; and recognise and protect the ownership of indigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.

The CoK at Article 61 (1) then obliges the state with respect to environment and natural resources to: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya. This particular provision also strongly supports the need for this FPIC Protocol.

The CoK under Article 61 also provides for Community land as a tenure system in addition to private land and public land law regime within Kenya's system of land governance. It also provides that Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest under Article 63. It goes on to state that Community land consists of: land lawfully registered in the name of group representatives under the provisions of any law, land lawfully transferred to a specific community by any process of law, any other land declared to be community land by an Act of Parliament and land that is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines, ancestral lands and lands traditionally occupied by hunter-gatherer communities or lawfully held as trust land by the county governments. It also provides that any unregistered community land shall be held in trust by county governments on behalf of the communities for which it is held.

The Community Land Act of 2016 was enacted to give effect to the provisions of this part of the CoK, to provide for the recognition, protection and registration of community land rights, management and administration of community land, to provide for the role of County governments in relation to unregistered community land and or connected purposes. The Community Land Act, 2016 also described a community as follows;

‘Community means a consciously distinct and organised group of users of community land who are citizens of Kenya and share any of the following attributes – common ancestry; similar culture or unique mode of livelihood; socio-economic or other similar common interest; geographical space; ecological space; or ethnicity’.

[8] Protection of Traditional Knowledge and Cultural Expressions Act, 2011

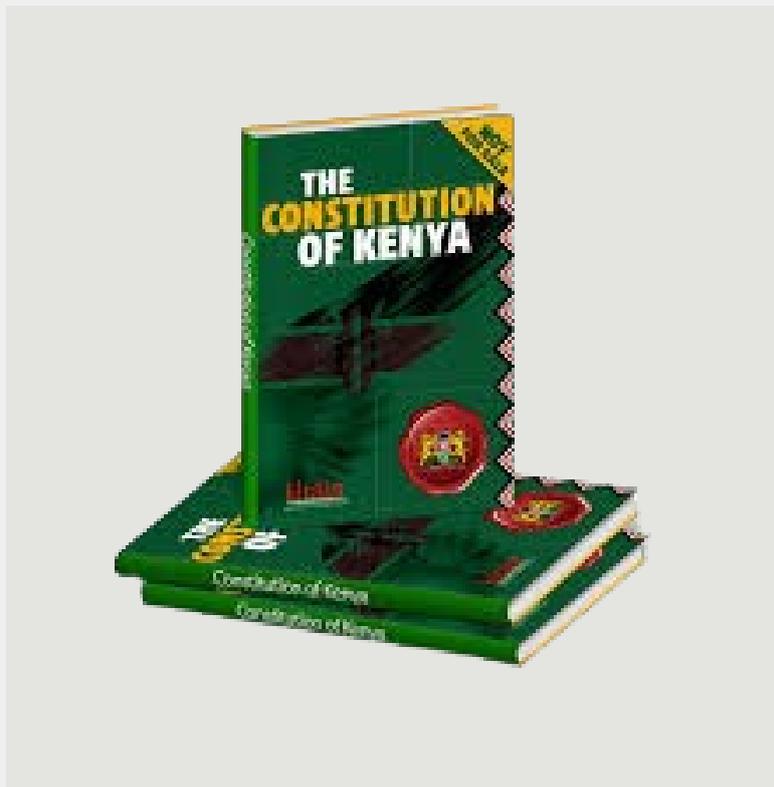
The CoK does not provide the definition of community but does provide for the definition of a marginalised community.

The debate on whether or not we have indigenous peoples in Kenya, should be satisfied by the provisions of the CoK going by the definition of Marginalised communities (which include indigenous peoples) in Kenya. This definition makes particular mention of hunter gatherer communities as indigenous peoples of Kenya.

Under Article 28 of the CoK, every person has inherent dignity and the right to have that dignity respected and protected. In addition, the CoK provides communities in Kenya with fundamental rights and freedoms including the right to equal protection and equal benefit of the law under Article 27.

Equality is the basis of full and equal enjoyment of all rights and fundamental freedoms; women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres, non-discriminate directly or indirectly against any person on any ground, including ethnic or social origin, conscience, belief, culture, dress, language or birth. In this regard, the Government was enjoined to take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination. The Government of Kenya has since put in place some mechanisms to address the requirements of this provision such as enactment of the National Gender and Equality Act, 2011 and the National Gender and Equality Commission mandated to promote gender equality and non-discrimination for all persons in Kenya as provided for in article 27 the Constitution of Kenya 2010 with a focus on the following Special Interest Groups (SIGs): Children, Youth, Women, persons living with disability, older members of society and minority and marginalized groups.

Art 42 of the CoK, also provides that every person has the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in **Article 69**; and to have obligations relating to the environment fulfilled under **Art. 70**.



The right to a clean, healthy and sustainable environment was adopted as a human right through a Resolution of the **United National General Assembly in 2022**. This resolution links the right to environment to human rights and all other rights and international laws as a result of which implementation of all Multilateral Environmental Agreements (MEAS) and instruments touching on environment and human rights must as of necessity be implemented.

The other key rights sought to be implemented through the process of FPIC include:

1. Rights to economic and social rights under Article 43 of the CoK.
2. Right to Language and culture under Article 44 of the CoK.
3. Rights to family under Article 45 of the CoK.
4. Rights to land under Article 61 of the CoK.

In this regard, it is noteworthy that different land tenure regimes have different laws, regulations and guidelines that guide them. Community land is guided by several laws and regulations including:

- i. Community Land Act and its regulations.
- ii. Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (Rev 2018) and its regulations.
- iii. Environmental Management and Coordination Act and the Regulations thereunder particularly those on Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing Regulations of 2006 and
- iv. Environmental Impact Assessment and Audit Regulations, 2003

The Ogiek community's particular land rights are protected under Article 63 of the CoK which provides that community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest and that such land shall include land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines, ancestral lands and lands traditionally occupied by hunter-gatherer communities or lawfully held as trust land by the county governments.

5. Rights of communities to share in the benefits accruing from exploitation and utilisation of resources under Article 69 of the CoK.
6. Rights to enhanced intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities under Article 69 of the CoK.
7. Rights to public participation in the management, protection and conservation of the environment under article 10, of the CoK.

Objectives of devolution in alignment with the FPIC procedures.

“... (T)he application of devolution lies in determining the extent to which the apportionment of the traditional power and authority of state to tax, spend, account for governance, provide and deliver services, control, distribute and deliver resources, legislate, set public policy, define and enforce rights and put in place and enforce a governing machinery; is reserved in the central / national state organs or dispersed across a range of devolved and centralised entities or mini governments”[8]. Thus, with respect to the right to environment, they include powers and authority to make decisions affecting the environment in a sphere of public policy delegated by law to lower-level units of government.

The objects of devolution under Article 174 of the CoK[9] seeks among others to:

- Foster national unity by recognising diversity;
- Equitable sharing of national and local resources;
- Give powers of self-governance to the people and enhance the participation of people in the exercise of powers of the state and in making decisions affecting them;
- Recognise the right of communities to manage their own affairs and to further their development; protect and promote the interests and rights of minorities and marginalised communities;
- Promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

The principles of devolved government enumerated under Article 175 of the CoK [10] also support democracy and the separation of powers and require counties to have reliable resources of revenue to enable delivery of services. These objectives show that there is another level of governance, the County Governance structure that the community is supposed to rely on in addition to the governance structure at the National level. The County Governance structure is further defined by the County Governments Act of 2012[11].

The CoK has laid a basis for FPIC by not only recognising and protecting communities, their diversity, culture and knowledge but also by putting in place mechanisms for public participation, sharing of benefits arising from utilisation of community’s resources, a devolved system of governance that allows the services of the National Government to reach the sub-national governments (Counties) and recognition of the right of self-governance. Unfortunately, the gap between the national government and communities, County government and communities and generally all stakeholders exists. To seal this gap, the Ogiek Community have a lower-level community governance structure depicting how they are organised as a community based on their indigenous way of life. They have written down their traditional way of governance which resonates with their leadership structure and have outlined many of their resources and rights to those resources in their

‘Ogiek Community Bio-cultural Protocol’[12]

[8] A Guide to the Mandates and Procedures of County Governments in Kenya, by Transition Authority (Nairobi: Transition Authority & Electoral Institute for Sustainable Democracy in Africa 2013).

[9] Constitution of Kenya, 2010).

[10] Ibid.

[11] County Governments Act_No17 of 2012

[12] Ogiek Bio-Cultural Protocol- 3rd Edition.



The Ogiek Community has now designed this FPIC Protocol to expose external stakeholders who seek to interact with them to the processes they should follow and the process that would be most appropriate when interacting with the community based on the stipulations of the law and all their rights and responsibilities. The FPIC Protocol is expected to ensure that the diversity, culture & traditions, dignity and other rights of the Ogiek Community to public participation, in decision making and in benefiting from utilisation of their resources, is recognised and respected in the process of interactions with stakeholders who come to their land or seek to engage with the Ogiek Community for any other reason be it development projects of any kind or research that may touch on the community's culture & traditions or ancestral land.

Principle of public participation as the basis for FPIC in Kenya

The CoK and the other Laws of Kenya provide a strong foundation for public participation. The legal imperatives of public participation are modelled along three main key constitutional protections that guarantee rights to access to information, accountability and participation.

Public participation is a principle of practice within Kenya's constitutional and statutory imperatives that promotes public involvement in the decision-making processes, in public engagements and in legal or policy making processes. The CoK states that, all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with it. It also states that the people may exercise their sovereign power either directly or through their democratically elected representatives. In Kenya Sovereign power of the people is exercised both at national and county level.

Public participation is important because it provides an avenue for self-governance to the people while enhancing the participation of the people in the exercise of the powers of the State in making decisions affecting them. It also recognizes the rights of communities to manage their own affairs for self-development.

The legal provisions relevant to public participation can be summarised as including transparency, accountability and participation. The same logic is applied in developing this FPIC Protocol because it is another way of making sure that the community is consulted in a way that aligns with their customs and practices while respecting their culture which is also the subject of protection under **Article 11** of the CoK.

Legal Provisions on Public Participation appear in several statutes that support the need for this FPIC protocol. These provisions appear in various sectors and sections of society such as access to information, information management, national and county levels of governance over resources, finance, policy and law making among other spheres of governance.

For transparency to be realised, there must be disclosure of information, a fundamental right under **Article 35** of the CoK. It provides that every citizen has the right to access to information held by the state and any other person and required for protection of any right or fundamental freedom. **Article 69** of the CoK then provides for obligations in respect of the environment where it obliges the state to ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure equitable sharing of accruing benefits. This is a key provision to the community and for it to be realised, there must be disclosure of information as a basis upon which to negotiate and share benefits which is also necessary for purposes of FPIC. Further, the same CoK requires that principles of finance be guided by openness and accountability that includes public participation under **Article 201** with a view to promote an equitable society that includes special provision for marginalised communities. These provisions are critical on matters of benefit sharing when the transaction is likely to involve the national government, the county government and the Community. **Article 232** on the other hand provides for values and principles of public participation that include:

- Responsive, prompt, effective, impartial and equitable provision of services,
- Involvement of people in the process of policy making,
- Accountability for administrative acts,
- Transparency and provision to the public of timely accurate information,
- Representation of Kenya's diverse communities.

The County Governments are then enjoined to follow the principles of citizen participation and public participation as provided under Section 87 and 93 of the Act respectively and to. The CGA 2012 also provides the objectives of the counties communication, its framework and the need to ensure access to information and inclusion and integration of minorities and marginalised groups under section 94, 95, 96 and 97 respectively. **Section 207** of the **Public Finance Management Act, of 2012 (revision 2020) (PFMA)** also provides for regulations on public participation on matters of finance under the Act to be prepared.

In addition to transparency, accountability in principle should guide all actions such as devolution and public finance as espoused under Article 174 and 201 of the CoK. Accountability is also required of County Governments as they are also enjoined to respond to all citizen petitions and challenges. Finally, the right to participation is further buttressed by **Article 69** on the obligations with respect to the environment, **Article 174, 201, 232** on devolution, public finance and public service. Other provisions that require participation are those enjoining the Counties to ensure participation of Citizens in their affairs and the requirement of participation on matters of finance under the PFMA. The need to ensure proper and meaningful participation is a critical aspect for a good FPIC process to be realised and for the projects that FPIC is applied to.

Kenya had gone further and had come up with several guidelines within various spheres of Governance of public participation in policy formulation; County level public participation guidelines of 2016 and Public Service Commission Guidelines of 2015 and draft policy on public Participation of 2018. Unfortunately, Kenya had made strides in its development of a Draft Law (bill) on Public Participation of 2018 which was later updated to the 2019 version but it has since lapsed. Fortunately, Kenya has a very elaborate **Fair administrative Actions Act of 2015** and a robust grievance redress mechanism comprising various institutions that facilitate access to justice and one that provides remedies and guidance on the general direction on matters of public participation in Kenya.



Key International policy legal and institutional framework for FPIC in Kenya

Kenya has many applicable international policy, legal and institutional frameworks that support the application of FPIC. In this section we shall highlight a few of the major ones and highlight the rest for guidance to anyone looking for more information on which instrument to apply. This section will start with the UNDRIP although Kenya did not support it and is therefore not applicable to Kenya for the reason that it provides substantively the rights that accrue to indigenous peoples as individuals and as collectives.

United Nations Declaration on the Rights of Indigenous Peoples

The **United Nations Declaration on the Rights of Indigenous Peoples**[13] (UNDRIP) contains five specific references to FPIC (articles 10, 11, 19, 29, 32). Unfortunately, Kenya was among the parties that abstained[14] from voting in favour of or against the UNDRIP and therefore did not undertake to be bound by its prescriptions. That notwithstanding, it is important to mention that in Kenya, the CoK recognises marginalised and minority communities and even groups like indigenous peoples who have maintained their traditions such as hunter gatherers, like the Ogiek Community, as part of the marginalised communities. This is absolutely critical to the discourse on recognition of hunter gatherers as a marginalised groups and an avenue through which the rights of hunter gatherer communities can be negotiated

According to UNDRIP, FPIC is required for adoption and implementation of “legislative or administrative measures, and any project affecting [indigenous peoples] lands, territories and other resources” (article 19, 32). It also mentions the relocation of indigenous peoples from their lands or territories and storage of hazardous materials on their lands or territories (article 10, 29). Thus, UNDRIP in this context will only be used for guidance of the conversation but the legal authority for the proposals in the FPIC Protocol will be drawn from existing legislations, policies and instruments that are applicable to Kenya. The guidance from UNDRIP include:

- Restrictions from forcibly being removed from their lands or territories without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return (Art.10).
- Recognition of the right to practice and revitalize their cultural traditions and customs including the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature (Art 11.1)
- Obligation of States to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (Art.19).
- Recognition of the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programs for indigenous peoples for such conservation and protection, without discrimination (Art 29.1).
- Obligation of States to take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent (29.2).
- Obligation of States to take effective measures to ensure, as needed, that programs for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented (29.3).
- Recognition of indigenous communities’ right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources (Art 32.1).
- Obligation of states to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (Art 32.2).
- Obligation of States to provide effective mechanisms for just and fair redress for any such activities, and appropriate measures to be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact (Art 32.3)

[13] United Nations Declaration on the Rights of Indigenous people(UNDRIP)

[14] United Nations Declaration on the Rights of Indigenous Peoples

ILO Convention No.169

With reference to Kenya, the ILO convention No.169 [15] emphasizes on the need for consultation and participation; The Convention provides that indigenous and tribal peoples ought to be consulted on issues that affect them. It also requires that they be able to engage in free and informed participation in policy and development processes that affect them, in a way adapted to their cultures and characteristics (Art. 6 and 7.1).

The Kunming-Montreal Post 2020 Global Biodiversity Framework, 2022.

Recently, the Kunming-Montreal Post 2020 Global Biodiversity Framework (the GBF) as adopted by parties during the Fifteenth Conference of Parties (CoP 15) noted that a human rights approach be utilised in implementation of the GBF. This was a major gain for indigenous peoples and local communities who have mostly complained of eviction, abuse of human rights and other rights abuses. The international human rights system has an enforcement mechanism unlike the environment regime and this is a big win for communities. The target provides that sound implementation of the GBF will aim to generate co-benefits for the achievement of the goals established under the Paris Agreement, the United Nations Framework Convention on Climate Change, the UN Ocean Decade, and the promotion of a biodiversity inclusive One Health Approach. With this realisation, the community will be able to Collaborate with beneficial to both parties in the long run.

International Covenant on Economic Social and Cultural Rights

Article 15 of the International Covenant on Economic Social and Cultural Rights[16] (ICESCR), the treaty bodies have increasingly framed the requirement also in light of the right to self-determination.

1. The States Parties to the present Covenant recognize the right of everyone:
 - (a) To take part in cultural life;
 - (b) To enjoy the benefits of scientific progress and its applications;
 - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.'



[15] ILO convention No.169

[16] International Covenant on Economic Social and Cultural Rights

UN Framework and Guiding Principles on Business and Human Rights

The UN Framework and Guiding Principles on Business and Human Rights[17] (2011), obliges the state to protect against human rights abuses by Third parties including businesses, the corporate responsibility to respect human rights and greater access by victims to effective remedy, both judicial and non – judicial. To promote corporate respect for human rights and to protect and prevent human rights abuse by corporate entities, the State is required to ensure among other matters, policy coherence and effectiveness across departments working with business, promote human rights when engaging with corporate and private sector, foster corporate cultures that respect human rights and find innovative policies to guide companies operating in conflict-affected areas. Convention on Biological Diversity (CBD) provides for access and benefit sharing of genetic resources as guided by the Nagoya Protocol[18]

The African Human Rights system.

The African Human Rights system of which Kenya is a signatory provides protection to various aspects of life, education, culture, Language and diversity.

Article 22 of the African Charter[19] 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. It also provides that States shall have the duty, individually or collectively, to ensure the exercise of the right to development. What is development according to indigenous peoples of the Ogiek Community will vary with their needs and ecosystem and may be different from other Indigenous communities in Kenya. This FPIC protocol therefore allows the community to decide what suits the community without ruining their culture, language, identity, relationship with their lands and other aspects of society.

The Africa Human right system also comprises the African Commission and the African Court on Human and Peoples Rights. Among the notable decisions made in favour of indigenous peoples of Kenya include communication 276 of 2003 filed before the African Commission on Human and Peoples Rights involving the Endorois Community[10] and **the Ogiek Community Vs. Kenya (Application No.006/2012)** filed before the African Court on Human and Peoples Rights.[21] The African Commission and Court through these two cases respectively established the law and application of the African Charter in protection of communities and indigenous people of Kenya. Worthy of mention is the Judgment of 23rd June 2022[22] for reparations that followed failure by the Government to implement the decision of the ACHPR where the Court reiterated the rights of the Ogiek Community as an indigenous Community.

The two judgments recognized Ogiek as an indigenous community deserving of protection for them to maintain their culture and traditions on their ancestral lands within the Mau Forest Complex. The court further and most importantly directed that “ the Respondent State to take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs in respect of all development, conservation or investment projects on Ogiek ancestral land;”. [23]

[17] https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

[18] Nagoya Protocol

[19]<https://www.achpr.org/legalinstruments/detail?id=49#:~:text=their%20national%20resources.,ARTICLE%2022,of%20the%20right%20to%20development.>

[20] Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya | African Commission on Human and Peoples' Rights (au.int)

[21] [60db027b8ad0d150454468.pdf](https://www.african-court.org/en/cases/60db027b8ad0d150454468) (african-court.org)

[22] [62babafd8d467689318212.pdf](https://www.african-court.org/en/cases/62babafd8d467689318212) (african-court.org)

[23] Judgment on Merits, 2022



Other key international, policy, legal and institutional frameworks for FPIC in Kenya. The UN Charter;

- The Universal Declaration of Human Rights;
- International Covenant on Civil and Political Rights;
- Vienna Declaration and programme of Action;

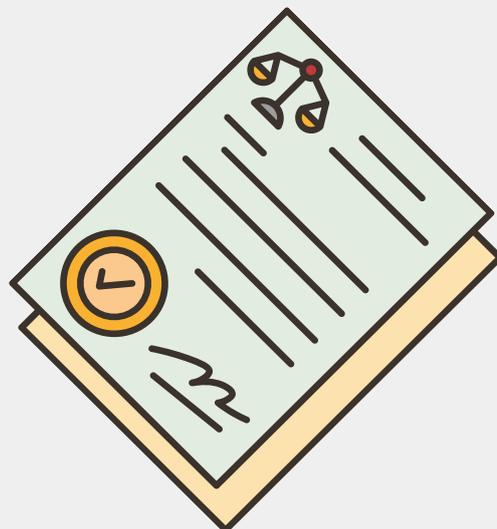
PRINCIPLES GOVERNING THE FPIC PROTOCOL.

From the policy, legal and institutional frameworks outlined above, a few key principles in addition to those laid out in the CoK and all Applicable Statutes, to govern this FPIC and any FPIC process within the Ogiek community are outlined as follows:

- Recognition of the human rights of communities and their rights and freedoms as enshrined in the Constitution.
- Recognition on the right to access to a clean and healthy and sustainable environment as pronounced by United Nations General Assembly (UNGA) Resolution of July 2021
- Respect for the Community's traditional and indigenous knowledge while ensuring fair and equitable sharing of benefits arising from access and utilisation of the community's resources, information and data.
- Respect for the Community's traditions, and customary law.
- Respect for the community's culture & traditions and cultural expressions.
- Respect for the Community's human rights and other fundamental rights and freedoms under the CoK, all laws of Kenya and all relevant international and multilateral instruments and agreements providing for protection of the Ogiek community's rights.
- Use human rights-based approach in dealings with Ogiek Community.
- Recognise and respect the Ogiek Community Bio-cultural Community Protocol, their by-laws and other community protocols.
- Recognise and respect all the fundamental rights and freedoms of the Ogiek Community including their rights under the CoK and all other relevant Laws applicable in Kenya.
- All other relevant principles as provided in any local, national or international law or instrument affecting the Ogiek Community.

THE FPIC PROCESS.

To define the FPIC process, there are several questions to ask to make sure that the process is able to address the challenges with a view to providing a procedure that is informed by previous experience and the rights and freedoms of the Ogiek people that must be secured and protected in line with the law.



Pre-consent process.

The following issues need to be taken into account and agreed upon at this stage.

- Community should be notified of the need for FPIC before licensing or development of any project. The point at which the community be notified of the need to be engaged in FPIC negotiation is dictated by the nature of the project and the licensing requirements of the Government but the best scenario would be to notify the community at the project conception stage.
- The process of seeking FPIC will begin with the Ogiek Council of Elders. They are the community group that is authorised to take lead in giving the consent.
- The community should clarify to the project developer, the legal nature of the FPIC and its enforceability.
- The process of obtaining FPIC should be based on the community's culture and governance hierarchy.
- The procedure of grant of FPIC within the community.
- The relevant project documents, requirements, licenses and permits must be provided in the process of seeking FPIC during the consultation process.
- If the topic is new or complicated or one that needs awareness to be created first to allow meaningful participation, then the community should advise the project developer at this stage to make arrangements for capacity building and or awareness raising.
- The community shall inform the project developer about its expectations and the kind of benefits that could possibly accrue to the community to enable them to prepare ahead of the actual negotiation.
- A process of transparency and accountability needs to be in place within the community and with the external stakeholders before the next stage.
- A dispute resolution mechanism that includes alternative dispute resolution mechanism needs to be in place by this stage.
- The costs of the meeting and other disbursements should be borne by the project developer and or the government depending on whose interest is being pursued.
- The Community has the right to invite whichever expert they prefer to have at the meeting to ensure that their interests are taken care of or that they get additional advice about the project.
- The community has a right to reject the proposal at this stage and their decision should be respected.
- All minutes, evidence of consultation and communication should be recorded and kept by the community.
- The community then formally invites the project developer to a formal negotiation of the agreement on a later, convenient date when the terms of the partnership will be negotiated.



Actual public participation leading to an agreement

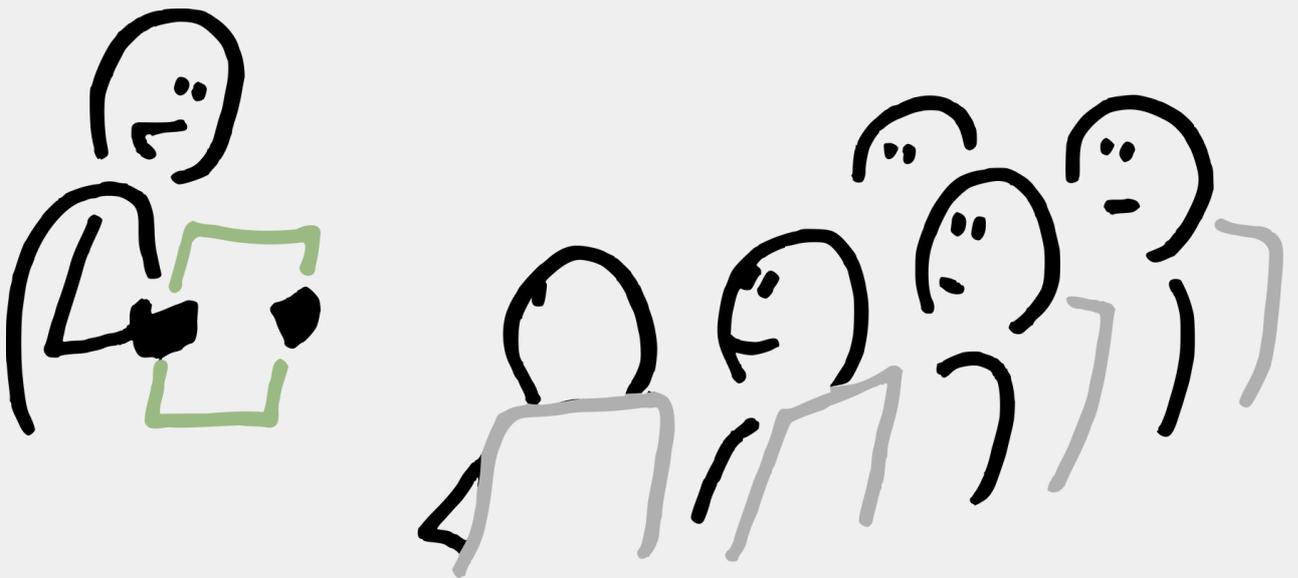
- Proper capacity building should be done before the public participation process begins especially where the topic being discussed is new to the community, government or is complicated?
- The format of the capacity building and the full project documents, summaries and or presentation and information should have been transmitted and shared with the community in advance.
- The time, date and process of actual negotiation, consultation and public participation to obtain consent needs to be clarified.
- The environment must be one that allows public participation that is free of influence, coercion or duress. Voting if any and if it is allowed by the community structure must be free of bias without the need to identify the persons supporting or opposing the project to maintain cohesion amongst the community members regardless of the outcome.
- Interpreters of the Ogiek community language or Swahili must be availed as needed to ensure the community is able to communicate in the language that they clearly understand.
- Review of Project documents, the agreement and time needed for such review should be allowed. The community need not rush to sign any agreement that are binding at this stage without being sure.
- Community should negotiate the benefits to be shared very comprehensively and have them written down. Any benefits including payments, local content to be infused into the project like jobs, services and materials to be supplied and scholarships, transfer of technology, value addition by the community, could take place at this stage? Adequate time for consideration and consultation amongst the community members within their structure should be allowed. The stage could be followed up by several meetings to consider further the negotiated agreement.
- Have in place an accountable and transparent mechanism for sharing of benefits, monitoring and review of implementation of the project. The same should be the stated in the agreement to be drafted.
- Dispute resolution mechanisms that include alternative dispute resolution mechanism must be available throughout the process. This must be stated in the agreement to be drafted.
- Confidentiality must be negotiated and agreed during this stage because some information could be confidential but some should not be confidential in public interest and in the interest of the community.
- The costs of the meeting and other disbursements should be borne by the project developer and or government but these funds must not be used to influence or coerce the community into submission to approve.
- The Community has the right to invite whichever expert they prefer to have at the meeting to ensure that their interests are taken care of or that they get additional advice about the project.
- The community has a right to reject the proposal at this stage and their decision should be respected.
- All minutes and communication should be recorded and kept by the community.



Consultation and participation throughout project cycle.

Continuous involvement of the community throughout the project cycle as an underlying principle should be done. This must be in the FPIC agreement. The relevant document should be supplied with achievement of every milestone and documents prior to the next stage should also be supplied.

- The community involved in the environmental, financial or other compliance assessment or audit of the project.
- The community must be involved in monitoring and evaluation of the project throughout the project cycle?
- The community must be able to follow up on benefits already agreed, royalties or profits to be shared through a transparent and accountable mechanisms for sharing of benefits, monitoring and review of implementation of the project. The same should be the subject of the agreement to be drafted. The community must also be made aware through the mechanism of the inputs and outputs at different stages of the project to enable them calculate with clarity what benefits are due to them out of the whole project operation. Additional benefits that were not anticipated should be negotiated if the project design, or direction of other changes that requires a re-opening of negotiation occurs.
- Dispute resolution mechanisms that includes alternative dispute resolution mechanism must be available throughout the process. This must be stated in the agreement to be drafted.
- Confidentiality must be negotiated and agreed during this stage because some information could be confidential but some should not be confidential in public interest and in the interest of the community.
- The costs of the meeting and other disbursements should be borne by the project developer and or government but these funds must not be used to influence or coerce the community into submission to approve.
- The Community has the right to invite whichever expert they prefer to have at any meetings held to ensure that their interests are taken care of or that they get additional advice about the project. The community has a right
 - to reject the proposal at this stage and their decision should be respected.
 - All minutes and communication should be recorded and kept by the community.



Post-consent processes

- Monitoring and evaluation and or investigation. Costs of follow up, monitoring and evaluation of the project should be borne by the project developer.
- Request for disclosure and accountability should be demanded of the project developer. All documents, project papers, licences, permits and all relevant material must be provided.
- Capacity building on the project monitoring and evaluation process and tools should take place at the project developer's cost.
- The community must be able to follow up on benefits, royalties or profits to be shared through a transparent and accountable mechanism for sharing of benefits, monitoring and review of implementation of the project. The same should be the subject of the contract agreement to be drafted. The community must also be made aware through the mechanism of the inputs and outputs at different stages of the project to enable them calculate with clarity what benefits are due to them out of the whole project operation.
- Dispute resolution mechanisms that include alternative dispute resolution mechanism must be available throughout the process. This must be stated in the agreement to be drafted.
- Confidentiality must be negotiated and agreed during this stage because some information could be confidential but some should not be confidential in public interest and in the interest of the community.
- The costs of the meeting and other disbursements should be borne by the project developer and or government but these funds must not be used to influence or coerce the community into submission to approve.
- The Community has the right to invite whichever expert they prefer to have at any meetings they hold to ensure that their interests are taken care of or that they get additional advice about the project.
- The community has a right to reject the proposal at this stage and their decision should be respected.
- All minutes and communication should be recorded and kept by the community.

Consent

Obtaining consent post project development, access to resources, culture or other community right.

What happens if FPIC has not been sought in advance? The process starts from Stage two of the process.

- Monitoring and evaluation and or investigation. Costs of follow up, monitoring and evaluation of the project should be borne by the project developer.
- Request for disclosure and accountability should be demanded of the project developer. All documents, project papers, licences, permits and all relevant material must be provided.
- Capacity building on the project should take place as soon as possible.
- Negotiate and follow up on benefits to be shared through transparent and accountable mechanisms.
- Community should negotiate the benefits to be shared very comprehensively and have them written down as part of the agreement. Any benefits including payments, local content to be infused into the project like jobs, services and materials to be supplied and scholarships, transfer of technology, value addition by the community, could take place at this stage? Adequate time for consideration and consultation amongst the community members within their structure should be allowed. The state could be followed up by several meetings to consider further the negotiated agreement.
- Dispute resolution mechanisms that include alternative dispute resolution mechanism must be available throughout the process. This must be stated in the FPIC agreement to be drafted.
- Confidentiality must be negotiated and agreed during this stage because some information could be confidential but some should not be confidential in public interest and in the interest of the community.
- The costs of the meeting and other disbursements should be borne by the project developer and or government but these funds must not be used to influence or coerce the community into submission to approve.
- The Community has the right to invite whichever expert they prefer to have at any meetings they hold to ensure that their interests are taken care of or that they get additional advice about the project.
- The community has a right to reject the proposal at this stage and their decision should be respected.
- All minutes and communication should be recorded and kept by the community.



Agreements further to FPIC Protocol

The FPIC Process must lead, as far as possible to the development of an agreement. Agreement as a record of the meetings, engagements and deliberations and agreements between the parties. The FPIC will contain information on among other relevant matters:

- The rights that are likely to be affected duly enumerated.
- Correspondences between the parties.
- The project documents and summaries made in form of presentations during the FPIC process.
- Licenses and permits issued by the government or deliberation on appropriateness of process and truthfulness of information given. Licenses obtained before consultation and engagement with community will not be accepted and will be negotiated under a separate process.
- List of participants from each of the parties; The same ought to include youth, women and persons with disabilities.

APPENDIX I.

TRIGGERS OF PUBLIC PARTICIPATION AND FPIC.

Triggers can therefore be summarised as those actions tending to affect either directly or indirectly the rights of the Ogiek community with respect to their fundamental rights and freedoms under the CoK, among other rights in various statutes and regulations. Triggers could also be based on the areas mentioned in the UNDRIP as highlighted or can be triggered by many other instances and some may not even have been anticipated but in principle, public participation needs to take place. This consultation and public participation must take place in a way that facilitates meaningful engagement with the community. Some might yield an FPIC agreement through consensus, others might need capacity building, or advocacy while others might require that dispute resolution mechanism be invoked in the absence of consensus.

- **Notice.**

The first trigger for FPIC protocol process is notice either in writing to the community to engage in consultation and public participation, or without notice in writing where there is actual activity on the ground of a proposed activity or development, or publication of an impending activity without notice of any consultation and public participation process with the community. FPIC might also be triggered by the discovery or knowledge of an already existing violation such as an activity that took place before this FPIC Protocol and the need to enforce the community's rights post facto (after the event has occurred). The triggers can be placed squarely within the various legal requirements and legal regimes and the requirements for compliance. The process flow for each of these instances is different.

- **Land and natural resources**

The Ogiek community are stewards of natural resources and guardians of biodiversity. Mau Forest Complex is the home of Ogiek and they have coexisted with the ecosystem for decades. They have rich resources that are attached to them in their territories. They also have spiritual connection to their territories. However, for decades they have suffered the loss of bio-diversity and environmental degradation. The Ogiek ancestral land is the home to wild animals which Ogiek used to hunt, the hub for medicinal herbs and a water catchment area that supplies water to various lakes and rivers in East Africa. The Ogiek Community is dependent on natural resources for sustenance however for decades they have suffered frequent evictions by the government in the name of conservation without prior informed consent.

The United Nation Declaration on the Right of Indigenous Peoples (UNDRIP), recognizes the importance of land, territory and resources for indigenous people and protect their rights. Article 10 of the UNDRIP states “Indigenous people shall not be forcibly removed from their land or territories. No relocation shall take place without the Free Prior and Informed Consent (FPIC) of Indigenous Peoples concerned”.

In 2020, the government through a multi-agency team started the process of land demarcation in East Mau without community consultation. This was a breach of the law and it prompted the community to lodge the case at the local court and they were issued with a conservatory order.

Article 32 (2) of the UNDRIP states that “the state shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources

The community FPIC protocol will support the communities in defending their territorial and natural resource rights. In the event of developmental activities affecting community land, territories and other resources will be subjected to consultation to obtain their Free Prior and Informed Consent.

- **Need to secure and protect livelihoods, traditional and indigenous knowledge**

The Ogiek livelihoods are highly dependent on forest and forest resources for survival. These include hunting of wild animals and collection of their wild fruits, herbal medicines among other benefits. The introduction of unfavourable laws by the government that regulates and restricts access to use of forest resources without community consultation undermines their traditional livelihood practices as well as hindering the advancing and transferring of traditional knowledge. The Ogiek community possess traditional knowledge which is resourceful in protection and sustainable use of natural resources. For instance, traditionally Ogiek are not allowed to cut down green trees and whoever goes against it was subject to punishment. As a matter of fact, the community used to collect deadwood which help in protecting biodiversity and allowing growth of the new trees. The respect for FPIC will contribute to enforcement of the favorable laws that contribute to recognizing the value of traditional knowledge systems for forest management and strengthening of capacity for the Ogiek community in conservation and sustainable forest management

- **Culture, cultural expressions, heritage and identity**

The Ogiek community have their own distinct cultures and identity based on their historical and close relationship with their land, territories and resources. For decades, they have protected, managed and nurtured their land and natural resources in Mau Forest. This community should be given access to use and utilization of their land, territories and natural resources to ensure they protect their culture and identity.

The right to culture is enshrined under Article 11 of the United Nation Declaration on the Rights of Indigenous People (UNDRIP). The Ogiek community have multi-faceted role in protecting the Forests which contributes to sustainable forest resource management to support their livelihoods and protect their culture.

Due to their traditional practices and spiritual connection to lands and territories, most indigenous peoples suffer disproportionately from loss of biological diversity and environmental degradation.

Free Prior and Informed Consent will bolster the protection of Ogiek community right to land, territories and resources, culture and nature among others.

- **Access and benefit sharing**

The Ogiek territories are rich in natural resources and they have the right to fair access and equitable sharing of benefits that accrue from the resources. The area consists of mature trees both indigenous and exotic that are often harvested by multinational companies. Additionally, there are wild animals and sites like waterfalls and caves which are useful as part of the ecosystem services and are tourist attraction sites. The community have the right to be consulted on Access and Benefit Sharing arrangements relating to all resources found within their territory. The researchers who collect information on various issues from the community for their own use should negotiate for Free Prior and Informed Consent. FPIC will protect the community from being exploited, from violations of various rights and to earn benefits from their own resources.



- **Conflict resolution**

The Ogiek Council of Elders is the main instrument for conflict resolution. These elders are skilled in conflict resolution and management. Special meetings are often called to resolve conflicts. Elders also meet with leaders from other communities in the instance of intercommunity wrangles. Resolution of conflicts at the family level are overseen by the father who is the highest point of authority, in the absence of the father, the first-born son acts on the father's behalf. The constitution and the laws of Kenya recognises customary law as long as it is not repugnant to justice and morality. As such, the Ogiek are within the proper legal frame if they practiced their culture.

Under the Constitution of Kenya (CoK), culture and traditional dispute resolution mechanisms are recognised. As such, the Ogiek Community can continue to practice their traditional dispute resolution mechanisms as long it is aligned with the spirit and values of the CoK and the practice is not repugnant to justice and morality.

The Constitutional Courts in Colombia have found that the government had not guaranteed the right to free prior and informed consent and on that basis, they proceeded to declare the agreements that had been entered into as illegal. The government was duty bound to guarantee the right of the community to free prior and informed consent.

- **Research of all nature.**

- Where only basic research is to be undertaken
- noting all basic research is potentially commercially viable.
- Where samples are being taken away for scientific research
- Where samples have already been taken away for conservation in labs under the International Treaty on Plant Genetic Resources for Food and Agriculture
- Where samples have already been taken away for scientific research under the Nagoya Protocol.

- **Environmental strategic and project impact assessment and audit**

For the Ogiek Community, it is not enough for an EIA to be done and approvals to be issued after wide consultation. Considering the indigenous people's relationship with land, it is absolutely a necessary consideration for the project developer, be it government or private sector. The project developers ought to be guided by the discussions during FPIC consultations as to which alternative from the ones provided suits the Ogiek Community and if none of them do, the Ogiek community could suggest to the project developer what could work for them while meeting the project developers' objectives. For example, choosing a zero-project option is also a decision that can be made in an EIA process and in any event, the community must be availed the right to say no where the project is likely to have impacts that cannot be mitigated. It would be more advisable if the FPIC process allowed an Ogiek community leader to accompany the project conception and development stage all the way to project construction and operation. This way, there can be capacity building of the community, employment of the community members, transparency and accountability can be assured and benefits arising from utilisation of their resources can be obtained.

Investments in community land from external sources.

Investments from external sources should be led by the Priority set by the community. In the event that none have or in case of new ideas, there should be thorough awareness and capacity building, consultation and public consultation ahead of any decisions that affect the community.

- **Trade in goods and services from the community's ecosystem.**
- **Corporate social responsibility within the Ogiek Community land.**
- **Policy legal or other guideline development and review**
- **Extractive industry projects.**
- **Climate change adaptation and mitigation projects.**
- **Biodiversity protection and conservation projects**
- **Regional projects affecting the Ogiek community.**



APPENDIX 2

Ogiek Leadership, governance and Eco-Climatic Zones

Ogiek culture

The Ogiek community are antiquity hunters and gatherers. The hunting included the collection of wild berries, root tubers, fruits and honey.

The Ogiek community is patriarchal. The community used the age-set system where community members who underwent circumcision together formed a new age-set with a special name unique only to this set.

Healers and traditional medicine men (pangelmataa) and women (typotiig) were highly esteemed

Governance of the Ogiek Community

The Ogiek are governed by a Council of Elders (poisionig) who represents their clans. Currently, the Ogiek Council of Elders[24] is the main spokes channel of the community; they solve community disputes and are at the helm of advocating for peace and land rights within the communities living within the Mau Forest Complex. Membership of the current Council encompasses youths and women representatives to ensure inclusivity of all.

Each clan has its territory across the Mau Forest. This division ensured that each clan's territory encompassed different ecological zones, where the clans could migrate to during different seasons. This close link that Ogiek have with Mau is still evident as each clan still holds on to their territories apparent by beehives still mounted deep in the forest.

Social structure of the Ogiek Community

Traditionally, the Ogiek community is patrilineal. The community social group was centred on the family and clan clusters. Leadership within the community was based on the age set system; women and youths had their own leaders who presented their issues to the overall council of elders. This traditional social structure is still present today as each clan has a leader (pooyon) who is a member of the overall Ogiek Council of Elders.

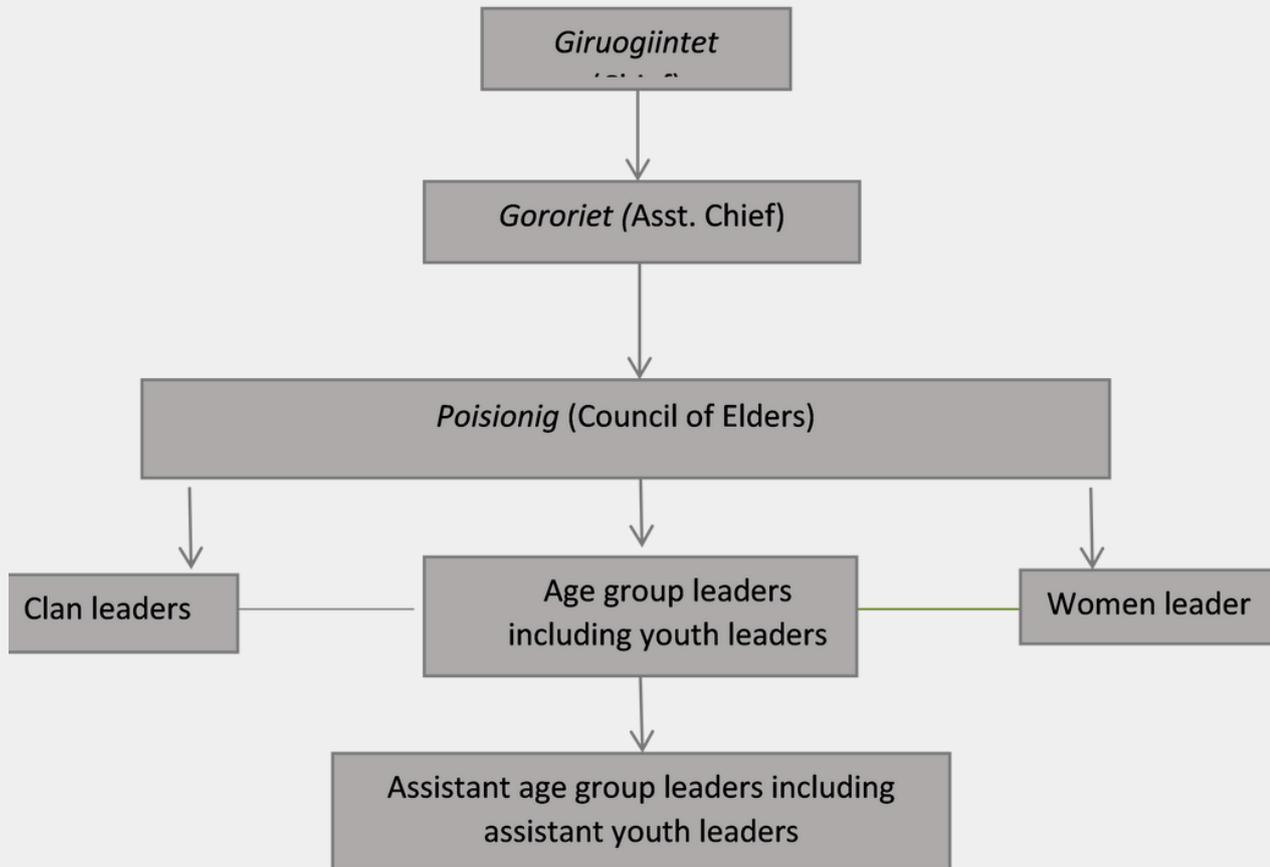
A ceremony is held when a new community chief/leader is elected[25]. An assistant to the chief/leader (gororiet) was also elected.

[24] <https://www.standardmedia.co.ke/rift-valley/article/2001385438/ogieks-get-new-heads-to-push-for-land-rights>

[25] On September 5th 2020, Ogiek Elders met in Nakuru and elected a new council of elders <https://www.standardmedia.co.ke/rift-valley/article/2001385438/ogieks-get-new-heads-to-push-for-land-rights>

Ogiek leadership Organogram and its relevance in FPIC

The Ogiek Community organogram show the hierarchical leadership structure of the Ogiek Community which presents the means through which the community makes decisions and the structure that needs to be taken into account in decision making on matters involving this Protocol.



Qualities of an Ogiek Community Leader

To be an Ogiek leader, one needs to have among other qualities, the following:

- Integrity
- Conflict resolution and leadership skills
- In-depth knowledge of Ogiek culture
- They must be committed and available
- Kind and without criminal record

The Ogiek Community Territory and its relevance for FPIC.

The Mau Forest Complex[26] is located in the Rift Valley region, about 170 kilometres North West of Nairobi; the capital city of Kenya. The Mau Complex covers over 400,000 hectares of land making it the largest closed canopy ecosystem and indigenous forest in the East African region. It is an important water catchment area, a source of several rivers feeding Lake Victoria, Lake Nakuru and Lake Natron. The Complex supports the ecosystems in the Maasai Mara National Park and the Serengeti. Mau Forest complex is the ancestral home of the Ogiek community.

The Complex is divided into 22 forest blocks, some of the major blocks include; the South West Mau block, Maasai Mau, Western Mau and the Southern Mau. There are also minor blocks within the Mau Forest Complex, including; Chemorogok, Kiplombe, Lembus, Anabkoi, Maji Mazuri, Metkei, Londiani, North Tinderet, Olposimoru, Timboroa etc. Eburru, Molo and Southern Mau are satellite forests that are part of the Mau Forest Complex. The Maasai Mau is has never been gazetted, it is held as a trust land by the County government of Narok.

Zoning of Ogiek Territory

Territorial Eco-Climate zones

The Ogiek have lived within the Mau Forest Complex since time immemorial, this has resulted in a deeper understanding of the forest by the community. They have henceforth categorised the Mau Complex and the areas adjacent to the forest for instance the areas around Lake Nakuru, Lake Elementaita, Menengai Creater and Lake Naivasha into distinct eco-climatic zones[27] as follow:

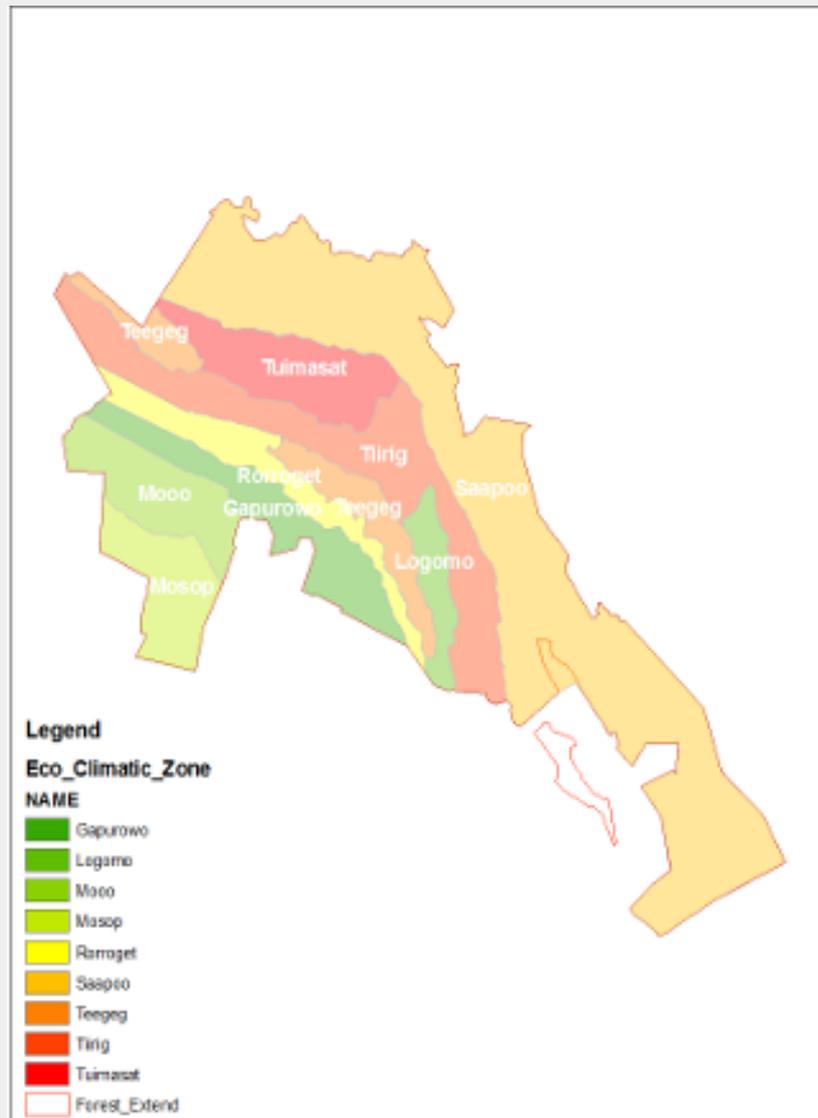
- **Sooywo** - main vegetation in this zone is the Savanna grassland (turgut) and experiences low rainfall.
- **Saapo** - covers areas of the Mau Escarpment; it is moderately colder than Sooywo.
- **Mou (Mau)** - forms the upper water catchment areas of rivers draining into Lake Nitron and Lake Victoria. Covered by closed canopy indigenous trees. Experiences heavy rainfall.
- **Tirap** - area inhabited by wild game; these were Ogiek hunting grounds.
- **Logomo** - receives heavy rainfall and the soil is brown volcanic with rocky surfaces giving rise to numerous glades (**tiriikweg**).
- **Tiriig**- covered by sparsely distributed bamboo forests.
- **Tuimasat** - experiences relatively heavy rainfall and the vegetation is mainly trees and shrubs. This region is considered as an infertile region.
- **Teegeg**- experiences high and heavy rainfall
- **Rogroget**- scattered bamboo forests with indigenous plants most of which are medicinal.
- **Gaporowo**- contains a swampy region that is the source of rivers. It receives high rainfall; the climatic conditions in this zone are favourable to medicinal plans.

These eco-climate zones are identified through the nature of their terrain, the vegetation available, the amount of rainfall received annually, altitude (**tororindo**), temperature (**goristo**) and the topographic features present. The quality and quantity of honey collected from the zones was also a factor for identifying zones.

[26] Article published by the Kenya Forest Service (KFS) on the importance of Mau Forest Complex; accessed from <http://www.kenyaforestservice.org/index.php?>

[option=com_content&view=article&id=699:mau-forest&catid=183&Itemid=695](http://www.kenyaforestservice.org/index.php?option=com_content&view=article&id=699:mau-forest&catid=183&Itemid=695) on 09/11/2021 at 1pm.

[27] The Ogiek categorised Mau Forest Complex into eco-climate zones that guided their socio-economic activities https://issuu.com/cde.unibe.ch/docs/fullversion_atlas_opat_2011_cde



Cultural zoning of the Ogiek Territory.

The Ogiek community is already zoned according to traditional knowledge and a science as perceived by the community. The community has sacred sites, shrines, a cultural centre, burial sites, medicine plants, trees and animals, wildlife breeding areas, beehive areas, areas designated for traditional ceremonies, among other places that must not be interfered with even in the case of projects or development. Further, this zoning has served the community and the ecosystem that the Mau ecosystem supports for decades without a problem. The cultural zoning of the Ogiek territory is further supported by the requirements of the Community Land Act, 2016 which provides that community land must be zoned in a way that sets aside, settlement, cultural and heritage sites, community conservation areas among other critical areas of the community to be served. This reasoning is based on all established rights of the Ogiek community as discussed on the policy, legal and institutional mechanisms available for protection of the rights of the Ogiek community.



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