



Pastoralists Alliance
for Resilience and
Adaptation in Northern
Rangelands

*Building and strengthening resilient, transformational
partnerships and social movements*

Free, Prior, and Informed Consent

**in the Design and Implementation of
Investment Projects and other
Development Initiatives in
Northern Kenya.**



A COMMUNITY MANUAL

ACKNOWLEDGMENT

Acronyms

ASALs	Arid and Semi-Arid Lands
CBOs	Community-Based Organizations
CSOs	Civil Society Organizations
FPIC	Free, Prior and Informed Consent
IEC	Information, Education and Communications
ILO	International Labor Organization
IMPACT	Indigenous Movement for Peace Advancement and Conflict Transformation
IPs	Indigenous Peoples
KWCA	Kenya Wildlife Conservancies Association
M&E	Monitoring and Evaluation
NGOs	Non-Governmental Organizations
NRT	Northern Rangelands Trust
PARAN Rangelands	Pastoralist Alliance for Resilience and Adaptation in the Northern Rangelands
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly

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1.0 INTRODUCTION

This manual on Free, Prior and Informed Consent (FPIC)ⁱ has been developed by the Pastoralist Alliance for Resilience and Adaptation in Northern Rangelands (PARAN),ⁱⁱ which is coordinated by Indigenous Movement for Peace Advancement and Conflict Transformation (IMPACT).ⁱⁱⁱ This is informed by the understanding that Indigenous Peoples have ancestral title to their traditional lands, territories, and resources therein from the moment their Creators placed them on that land (time immemorial) and bestowed them with the responsibility to care for it forever.

However, when colonialist arrived, they laid claim to all land and natural resources^{iv} arguing that they belonged to no one (terra nullius).^v Most of indigenous peoples territories therefore was given to colonial farmers and or designated as national parks, game reserves or forest reserves. Natural resources like gold, oil and gas, rivers and other water bodies are classified as public land vested in the government. The few remaining indigenous territories were classified as Trust lands. Indigenous communities were generally then marginalized from the political and economic decision-making in all countries including in Kenya. This marginalization makes indigenous communities vulnerable in the design and implementation of projects, including conservation initiatives, in their territories.

The UN Declaration on the Rights of Indigenous Peoples^{vi}, the African Court on Human and Peoples Rights in the *Ogiek Community case*,^{vii} the African Commission on Human and Peoples Rights in the *Endorois Community case*^{viii} and the South African Constitutional Court in *Alexkor Ltd and Another v Richtersveld Community and Others*,^{ix} among others recognize that Indigenous people's rights to their land, territories and resources therein. Ancestral rights to land and the resources therein flows from ancestral laws. These ancestral rights were not extinguished by formal law.^x This applies to Northern Kenya too.

Though endorsed with immense natural resources, northern Kenya has been historically marginalized. But in the recent past, there has been rapid increase of conservancies, oil exploration, wind energy and other infrastructure projects like extensive road networks, dams, and mineral exploration among others. The increased interest in the resources found in Northern Kenya against a weak land tenure in the region, puts at immense risk the land and resource rights of indigenous communities in the region.

Further, Climate Change mitigation and adaptation strategies under the Paris Agreement,^{xi} and actualized through Nationally Determined Contributions (NDC)^{xii} and other arrangements, are increasingly focusing on indigenous people's territories. For example, forest territories are earmarked for REDD+ projects^{xiii}, other areas are targeted for large-scale renewable energy that include Geothermal, Wind, Solar, Biomass and large-scale hydropower and irrigation projects. These projects require

large tracts of land only available in indigenous people's territories. Under the Convention on Biological Diversity, discussions around the Post-2020 Global Biodiversity Framework, focus on "30 by 30" – a plan to conserve 30% of Earth's land and sea areas by 2030 through "area-based conservation measures" like protected national parks. With the rapid increase in the establishment of conservancies in Northern Kenya, 30 by 30 will accelerate efforts to establish new conservation areas in the region.



Against the above background, it is therefore critical that the free, prior and informed consent of indigenous peoples is obtained in all initiatives in their lands and territories in Northern Kenya.

1.1. Purpose

The purpose of this manual is to provide guidance on what needs to be considered in the pursuit of indigenous communities FPIC in the design and implementation of development projects, including conservation activities in Northern Kenya.

1.2. Scope

The manual provides a brief overview of FPIC including its legal foundations, the importance of FPIC and general steps that should be followed to obtain indigenous communities' consent.

2.0. WHAT IS FPIC?

FPIC in full stands for Free, Prior and Informed Consent. FPIC refers to a right of Indigenous peoples to consent, on a free and informed basis, to developments that affect them and the lands on which they live. The consent must be given voluntarily without coercion, intimidation, or manipulation.^{xiv}

- FPIC means that indigenous peoples must be informed about conservation, irrigation, infrastructure – power generation and transmission, roads, railways, oil pipelines, logging, dams, irrigation and other large projects/initiatives in a timely manner and with full information so that they can make informed decisions about the project.
- FPIC allows indigenous peoples to give or withhold consent to a project that may affect them or their territories. If they give consent, they can withdraw.
- FPIC is a specific right that pertains to indigenous peoples and is recognized in international human rights law. It derives from their right to property through ownership or traditional use.
- FPIC is one of the most important principles that Indigenous Peoples believe can protect their right to lands and resources and participation in projects and activities being implemented in their territories.
- FPIC enables indigenous communities to negotiate the conditions under which the project will be designed, implemented, monitored, and evaluated.
- FPIC is of central importance in relations between Indigenous peoples, investors, and states, particularly in the context of natural resource governance.
- However, FPIC is not veto power but a standard that guarantees the land and resource rights of indigenous peoples.

FPIC is a process undertaken repeatedly in good faith to ensure mutual respect and meaningful participation of indigenous communities' decision-making. It is not just a procedural process but a meaningful mechanism to ensure the respect of indigenous people's collective rights especially in relation to land and territories, resources, as well as self-determination.

REDD+ Kenya FPIC Guidelines

WHO ARE INDIGENOUS PEOPLES?

There is no universal definition of indigenous peoples. However, the African Commission Working Group on Indigenous Populations indigenous peoples provided a criteria for identifying indigenous peoples in Africa. This includes: -

- that their cultures and ways of life differ considerably from the dominant society, and that their cultures are under threat, in some cases to the point of extinction.
- that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon.
- They suffer from discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society.
- They often live in inaccessible regions, often geographically isolated, and suffer from various forms of marginalization, both politically and socially. They are subjected to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalization violates their human rights as peoples/communities, threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in decisions regarding their own future and forms of development.

The criteria generally fit pastoralists, hunter-gatherers and small fisher-folk communities

2.1. Is FPIC legally- recognized?

Under the doctrine, indigenous people's lands, territories and resources continued to be taken without consultations and/or compensation. The global Indigenous rights movement sparked the birth of the FPIC concept as a way of countering the continued impact of the doctrine of discovery.

Subsequent international legal and policy framework provides for FPIC rights for indigenous peoples. This includes: -

- The Indigenous and Tribal Populations Convention, 1957 (No. 107) adopted by the International Labour Organisation (ILO) in 1957 was the first acknowledgement of FPIC in an international law context.
- In 1989, Convention 107 was replaced by the Indigenous and Tribal Peoples Convention, 1989 (No. 169) under which
 - Article 7(1) provides that Indigenous people “shall have the right to decide their own priorities for the process of development as it affects their lives ... and the lands they occupy or otherwise use ... and to exercise control, to the extent possible, over their own economic, social and cultural development”.
 - Article 16 states that where “relocation of Indigenous peoples is considered necessary as an exceptional measure; such relocation shall take place only with their free and informed consent”.
- The UN Declaration on the Rights of Indigenous Peoples adopted in 2007 specifically provides for FPIC in its various articles but that it is the duty of States to secure FPIC from Indigenous Peoples in the following circumstances:
 - population relocations.
 - the dispossession of “cultural, intellectual, religious and spiritual property”.
 - “Confiscated, taken, occupied, used or damaged” lands, territories, and resources.
 - before “adopting and implementing legislative or administrative measures”; and
 - “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”.
- The Convention on Biological Diversity protects indigenous knowledge by allowing its use only with prior approval. It also affirms explicitly the principle of prior informed consent.

- The Programme of Work on the implementation of Article 8(j) and related provisions of the Convention states that “access to traditional knowledge, innovations and practices of indigenous and local communities should be subject to prior informed consent or prior informed approval from the holders of such knowledge, innovations and practices”.

FPIC is now recognized and practiced by: -

- i. By many Countries. Kenya’s Ministry of Environment and Natural Resources has developed
 - *National Guidelines for Free, Prior and Informed Consent (FPIC) FOR REDD+ in Kenya.*^{xv}
 - *FPIC is an extension of the right to participation in decision making that is enshrined in Kenya’s constitution.*

- ii. Several UN agencies and some have developed guidelines. This includes: -
 - *UNDP Social and Environmental Standard 6: Indigenous Peoples*^{xvi}
 - *UNREDD Guidelines on Free, Prior and Informed Consent*^{xvii}
 - *FAO Free, Prior and Informed Consent Manual,*^{xviii}
 - *IFAD How to do: Seeking free, prior and informed consent in IFAD investment projects: Manual for Project Practitioners,*^{xix} and *respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition.*^{xx}

- iii. Multilateral lending and development agencies have also developed FPIC guidelines. For example
 - *World Bank’s Environmental and Social Framework 7 on Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities requires obtainment of Free, Prior, and Informed Consent (FPIC) of affected parties.*^{xxi}
 - *International Finance Corporation (IFC) Performance Standard 7 on Indigenous Peoples require FPIC.*^{xxii}

- iv. Environmental and Conservation related organizations like the International Union for Nature Conservation (IUCN), Worldwide Fund for Nature (WWF) and Conservation International (CI), among others, have developed a rights-based approach to conservation.

2.2. FPIC derives from the right to self-determination

The right to self-determination is the right of a people to determine their own destiny. In particular, the principle allows a people to choose their own political status and to determine their own form of economic, cultural and social development. UN Committee on the Elimination of Racial Discrimination has stated that the right to self-determination involves *'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference'*. Self-determination is a right that pertains to groups of people, not individuals. The right to self-determination is a principal of international human rights law and is enshrined in

- ✚ *Article 1 of the International Covenant on Civil and Political Rights^{xxiii}*
- ✚ *Article 1 of the International Covenant on Economic, Social and Cultural Rights^{xxiv}*
- ✚ *Article 20 of the African Charter of Human and Peoples' Rights of 198^{xxv}1 among others.*

A Rights-Based Approach (RBA) is an approach to conservation that respects, and seeks to protect and promote, recognized human rights standards. This requires the recognition of human rights standards that include international human rights' frameworks developed and adopted through the United Nations, such as the UN Declaration on Human Rights, its associated Covenants, and UN frameworks articulating the rights of indigenous peoples, women, and children.

3.0. ELEMENTS OF FPIC?

In this part, we explain in detail the four elements of FPIC - free, prior, informed and consent.

a) Free

The word **free** can be defined in two limbs; "that information should be delivered freely" and "communities can freely respond or react" through the channels agreed by the community. That a person or community is not controlled by its leaders, another community, government, or the investor.

b) Prior

Prior means before. In FPIC, the consent of the community is sought: -

- *far before the start of the activities.*
- *at the early stages of a development or investment*
- *and when the need arises to obtain approval from the community.*
- *It is therefore a continuous process before, during and at the close of the project.*

For this to be possible, it is important that the community is give

- *time is to understand, access, and analyze information on the proposed activity. The amount of time required will depend on the decision-making processes of the rights-holders and the community timeline must be respected.*

c) Informed

It is critical that a community must make a decision after understanding everything about the project. Therefore, the community must be given all information about the project. The information: -

- *should be accessible, clear, consistent, accurate, and transparent*
- *delivered in the local language so that it can be understood by everyone*
- *delivered and presented in a culturally appropriate format (including radio, traditional/local media, video, graphics, documentaries, photos, oral presentations, or new media); and with respect for cultural norms, language and timeframe compatible with the communities' cultural norms, ensuring human rights principles are observed but also putting into consideration other decision-making structures that have been agreed upon (ample time depends on the circumstance and the issues under considerations)*
- *Information should be relayed by culturally and language appropriate personnel; with constant capacity building of indigenous/local trainers*
- *must be complete covering both positive and negative impacts. This is critical because in most cases, a community is just given the positive side and rarely are they told about the negative side.*

d) Consent

Consent means that the community: -

- *makes a collective decision through a mutually agreed decision-making process.*
- *The decision maybe a “yes” a “no” or a “no with an option to reconsider when certain facts change*

This means that the consent is given: -

- **Voluntarily** – *the community does, make, or give the consent willingly*
- **Without coercion** – *no force or threats has been used to get the community to agree. In most cases, force or threats include statements like “this are orders from above” or “it will be done whether you want it or not” or “you are enemies of development”. Force includes arrests and even killing of community leaders opposed to the project/activity.*
- **Without manipulation** – *The community has not been handled skillfully or cleverly to make a decision wanted by the government or investor or even their leaders. In most cases, a community is promised many good things like*

roads, jobs and even money as a way to make them agree. Sometimes their leaders are taken to expensive hotels or meetings with high level government. So, there should be no bribery of the community.

- **Without intimidation** – The community has not been frightened or overawed. To frighten a community, they might be told that if the project does not happen, then the consequences will be terrible or something bad will happen. For example, if you don't agree to the project, the government will withdraw its security forces from your area. Overawe implies that a community is given an example that is so impressive that they are shocked by it and agree to something without thinking.
- **The process is self-directed by the community** – the community organizes themselves as they wish. They should not be organized by others or be told how to organize themselves.
- **'Right holders'** should be **well recognized as grassroots members of the community** for effective public participation mapping and to avoid gatekeeping; while using existing structures on the ground but still giving room to accommodate for all voices
- **All community members are free to participate regardless of gender, age or standing.** It is critical that all members of the community participate freely. This includes women, youth and persons with disability.
- **No externally driven expectations or timelines** - A community should not be told to make a decision by this date

All elements within FPIC are interlinked. They should not be treated as separate elements. The first three elements (free, prior and informed) qualify and set the conditions of consent as a decision-making process. In short, consent should be sought before any project, plan or action takes place (prior), it should be independently decided upon (free) and based on accurate, timely and sufficient information provided in a culturally appropriate way (informed) for it to be considered a valid result or outcome of a collective decision-making process.¹

¹ FAO FPIC Manual

CASE STUDY 1:
PROCESS TOWARDS ESTABLISHMENT OF ILNGWESI CONSERVANCY

A neighbouring rancher with the support of a high-ranking government official from the locality approached elders of Ilngwesi with the idea of establishing a conservancy. About two weeks later, 70 members of Ilngwesi picked from various across Ilngwesi villages were taken on a tour of Olchoro Oirowua Conservancy in Narok South. The visit was planned to coincide with a ceremony where members of Olchoro were welcoming rhinos they had just imported from South Africa. The team from Ilngwesi were then taken through the benefits of a conservancy including the many jobs it could offer. On the return journey, every member of the team was convinced of the need to establish a conservancy. Two weeks after return, the leadership informed the community that a site for a lodge has been identified and financing for the construction of the lodge has also been found. A contractor started constructing the lodge soon after.

Exercise 2:

Discuss the case study in the context of the four elements of FPIC and answer the following questions.

1. Was there FPIC in establishment of the Ilngwesi conservancy?

2. What are the reasons for your answer?

4.0. BENEFITS OF FPIC?

When FPIC is implemented correctly, it will benefit both the community, the investor and the government in the following ways: -

- a) For the community, FPIC will ensure
 - *the realization of their self-determination*
 - *their participation in decision-making*
 - *Reduced risks of social conflict around natural resource projects*
 - *More benefits from the project*
- b) For the Investor, FPIC will ensure
 - *Greater community support for the project*
 - *Security of the investment*
 - *Guaranteed and even more profits*
- c) For the Government, FPIC will ensure
 - *Successful implementation of the project*
 - *Peace and national prosperity*

5.0. WHO GIVES FPIC?

The rights holders who are indigenous peoples. This will include

- The indigenous community in whose territory the project will be undertaken.
- Neighboring indigenous communities if the project will affect their territories.

CASE STUDY 2: KIPETO ENERGY LIMITED AND VULTURES

Kipeto Energy Limited is a wind power generation company based in Kajiado. In the design of the project, they opted to lease the targeted land for the project from the Maasai landowners rather than compulsorily acquire it. During the project feasibility period, they paid the landowners lease fees depending on the land size of each landowner. However, some conservation NGOs objected to the project arguing that the project area was an area of high vulture activity and was close to colonies of critically endangered vultures. The wind turbines will therefore pose a threat to the vultures. In response, the Maasai threatened to kill the vultures. The company collaborated with the conservation NGOs and started a vulture protection program.

1. Why do you think the community supported the project so much?
2. What benefit would the vulture conservation program have?

6.o. WHOSE RESPONSIBILITY IS IT TO IMPLEMENT FPIC?

Who has a responsibility to ensure the FPIC of communities?

a). The State

The State has a primary duty to protect, promote and fulfil human rights. The State works through the government officials in your territory. This includes the Chiefs, Assistant County Commissioners, Deputy County commissioners, County government officials and elected leaders at the national and County government levels. These officials must ensure that FPIC is sort in every project designed and implemented by: -

- *Government agencies for example, government ministries, parastatals, Kenya Wildlife Service, County governments etc.*
- *By third parties including business corporations including conservancies, NGOs, donors, and oil companies among others.*
- *That state must also ensure that laws, policies and regulations at both the national and county levels recognize and respect FPIC.*

b). Investors

Under the UN Guiding Principles on Business and Human Rights, business enterprises including those in conservation, should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. Observing FPIC will be a critical step to respect human rights and avoid adverse impacts.

- *The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. All the aspects of a business operation must therefore be considered in a FPIC process.*
- *To meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances that clearly commit to respect human rights including FPIC.*
- *Investors should put in place the time and resources to ensure community FPIC without pressurizing the community.*
- *This responsibility exists independent of the state duty. This means that a conservancy agency, for example, must not wait for the government to pursue FPIC. It should invest in FPIC without waiting for the government.*

Rights-based Approaches (RBA) to conservation means the integration of rights, norms, standards, and principles into policy, planning, implementation, and outcomes assessment to help ensure that conservation practices respects rights in all cases and supports their further realization where possible.

FPIC is a key component of Rights-based Approaches

7.0. STEPS TO FPIC

FPIC is not just a single decision by the community to agree or not to agree to a project. FPIC also involves the **process** that will be undertaken before a community decides on the project. It also extends to the activities after the community has decided whether to agree or not to agree to the project. FPIC therefore involves the following steps

a) Entry into the community

▪ Why is it important?

When there is no clear method of how to start engaging the community, anybody can just come to the community and do whatever they want. In most cases, investors come into the community through government officials either from the national or county governments or through brokers from the community. A few people are then picked to consult and then the project starts. There is no full community consultation or involvement in the design and development of the project and in most cases only a few people benefit from the project. Such a project raises serious legal challenges as they progress.

It is therefore important that each community prepares a Biocultural Community Protocols (BCPs). These are instruments that set out clear terms and conditions to governments and the private sector, research, and non-profit sectors for engaging with indigenous and local communities (ILCs) and accessing their local resources and knowledge. They are developed through culturally rooted, participatory decision-making processes within the communities and are based on communities' customary norms, values, and laws.²

CASE STUDY:

MICROBES FROM LAKE BOGORIA

Lake Bogoria is situated in Baringo County and is the ancestral home of the Endorois community. In 1992, a researcher from a British University came to the Lake and harvested some micro-organisms which are very valuable to the global biotech industry. Enzymes from the microbes and micro-organisms are used to produce antibiotics and cleaning products. In 1995 the researcher sold the micro-organisms to companies in the Netherlands and the United States for millions of dollars. Both the Endorois and the Government of Kenya only learnt later of the value of the micro-organisms in Lake. Had both the Endorois, the County and/or national government placed effective structures of entering such community land, such a thing would not have happened.

² Federal Ministry of Economic Cooperation and Development, Biocultural Community Protocols at http://archive.abs-biotrade.info/fileadmin/media/Knowledge_Center/Pulications/BCPs/giz2013-en-biodiv-biocultural-community-protocols.pdf

Every community protocol is distinct due to the unique biological and cultural diversity of the people that develop them. However, they tend to include the following elements:

- A definition of the community, its leadership and decision-making structures and processes, both formal and customary
- A description of community-based natural resource management systems, knowledge, innovations, and practices (i.e. in situ conservation and sustainable use) of indigenous flora and fauna, and details of those natural resources;
- Ways of life, including the links between culture, spirituality, and customary laws and values.
- Rights, responsibilities, and duties of the community according to customary, national, and international law.
- Conditions set out by the community for granting access to their lands, resources and knowledge, such as procedures for Free, Prior and Informed Consent (FPIC);
- Challenges faced by the community and calls to various stakeholders to engage on specific issues.

At this stage, initial information about the project/activity should be shared with the community.

b) Mapping of Rightsholders and other stakeholders

This is the process of identifying and categorizing key stakeholders involved in achieving the goals of the project/initiative/activity. Stakeholder mapping is done by the institution seeking FPIC from the community. Similarly, demographic and geographic considerations should be well outlined while implementing FPIC; every project should carry out preliminary and situational analysis of the presence; such as instabilities or drought

A mapping therefore assists the institution seeking FPIC to properly identify the rights-holders from whom FPIC should be sort. A mapping also helps identify the vulnerable groups within the community and informs the establishment of systems for consultations with the vulnerable groups.

c) Developing and/or engagement of community decision-making structures

Strong community decision making structures is a critical element in the FPIC process. A project proposer will therefore need to understand the decision-making structures way before the implementation of the project. Some communities have strong institutions and therefore strong decision-making structures. However, it will be necessary to establish decision-making structures: -

- *Where community decision-making structures have collapsed or are collapsing.*
- *Where there are multiple centres of power in a community. For example, who makes the final decision for the community between the Committee of the Group Ranch/Community Land, the Chairperson of a business e.g. sand harvesting, the age-set chiefs, local politicians, or church leaders?*
- *To ensure women, youths, persons with disability and elderly are included in decision-making.*
- *Where a project involves two or more indigenous communities.*

d) Sharing of information about the activity/projects

Sharing of information regarding the project happens at several stages. This includes

- ◇ *Basic information of the project before the project starts*
- ◇ *Details of the project during the consultations phase*
- ◇ *Regular updates during the implementation of the projects including during the closure of the projects*

What information should be shared?

- ◇ The nature and extent of the project including the full cycle of the project.
- ◇ How it will impact on their land and livelihoods – both positively and negatively. A detailed environmental and social impact assessment should be undertaken by or in consultations with local experts.
- ◇ The roles and responsibilities of all involved.
- ◇ Benefit-sharing arrangements from the project to the community. This will include any shares in the project, jobs from the project and any other opportunities that come with the project.

What are some of the factors to be considered?

- ◇ Avenues of information sharing include public barazas, focused group discussions with cluster leaders and community leaders, exchange visits to other community territories where such projects are being undertaken
- ◇ In what language or languages will the information be shared? It is important to share information in a language that is understood by the most illiterate members of the community. It is therefore critical to have translators who understand the project idea and the local language.

e) Undertaking consultations

This is the process of undertaking detailed discussions about the project/activity with the community. This is the stage where all information is shared and discussed with the community so that they can make an informed decision.

The first step in community consultations is the preparation of a **consultation plan**. The consultation plan will include several things for example,

i. Place of consultations - Consultations should take place at the community. This is in the respective villages to ensure that everyone is involved. However, most consultations are usually organized in hotels in towns not far from the project area. This should be minimized and focused more on the villages. Village consultations usually take place under trees, in churches or schools.

ii. Method of consultations – the methods of consultations are critical. This can be in community baraza's where people are free to talk as they place or targeted to each village and even household. It should target, professionals from the community, men, women, youth, elders, widows, and other vulnerable persons. It is the community which decides how they should be consulted.

iii. Frequency of consultations – Consultations should also be undertaken anytime throughout the project period. From the design to implementation and even during the monitoring of the project.

iv. Identification of priority issues – issues that touch on land, grazing, water and benefit sharing tend to be very emotive for the community. Negative messages or falsehoods about these issues ruin consultations. These priority issues should therefore be documented at the beginning and clear messaging developed and shared appropriately.

CASE STUDY:

PARTIALITY IN ELECTIONS IN SHOMPOLE GROUP RANCH

Shompole Group Ranch covers 62,700 hectares of grassland and savannah in the Magadi Division, Kajiado County. With the guidance of the South Rift Association of Landowners (SORALO), an Maasai-ran NGO in the area, the 2,000 registered members representing around 10,000 Loodokilani Maasai dependents registered a Shompole Community Trust to manage the group ranch. In the 1990s, the Shompole communities sought to generate income from ecotourism the benefit of residents. They set aside 10,000 hectares for strict conservation, and in partnership with a private investor established a luxury eco-lodge that attracted high profile visitors including Bill Gates. Revenue from ecotourism was directed through the Shompole Community Trust into protecting and restoring the environment and funding healthcare services, education, and water projects. Over 400 community members were directly employed by the conservancy.

In the next circle of elections in 2014 for new officials of the Community Trust, the community was deeply divided. In pursuit of campaign financing, a faction approached the investor with a promise that they will include him in the group ranch register if he finances their campaigns. The investor fell for this and started actively financing the faction. Violence ensued and two community members were killed. The community then set ablaze the Shompole Eco Lodge, burning to ashes a KES 4.6 billion investment!

v. Language of consultations - understand that not all community members are educated, consultations should be undertaken in the local language or languages where several communities are involved.

vi. Impartiality - The impartiality of the project proponent is critical in the FPIC process. This means that the government or investor should not take sides or favor one side of a community. They should also not push the community to make a particular decision. Rather, the community should be left alone to make the decision they want.

vii. Documentation of the process – the entire consultation process should be documented. Video recordings are a great way to document but also reports of every consultation should be made.

viii. Learning from similar experiences – exchange visits to other communities with similar experiences/projects will provide more information that will enable the community to make an informed decision.

ix. Legal representation - Legal representation is critical for the community to understand the legal implications of the project and the choice they make.

f) Decision making

Community decision making is the choice they make about the project. They can choose to agree, agree with changes, not to agree or not to agree with the option of agreeing at a later date when some things change. It is important to note that decision making is not a one-off affair. The community can make a decision at every stage of the consultation process. However, the decision should be clearly communicated by the community.

Key questions to consider on giving consent.

- Who gives consent?
 - i. The officials of the community land or group ranch?
 - ii. The lawyers?
 - iii. Or the Community in a community baraza?

- How is consent given?
 - i. Will it be in writing sign
 - ii. By show of hands
 - iii. Acclamation or in which other method?

CASE STUDY:

COMMUNITY LEGAL REPRESENTATION IN KIPETO ENERGY LIMITED

Kipeto Energy Limited (KEL) is a wind power project in Esilanke area, Kiserian Division, Kajiado County, Southwest of Nairobi. With a generation capacity of 100MW of clean, renewable electrical energy, the project is the second largest wind power project in Kenya and is being implemented among the Maasai community. During the consultations towards the project development, both KEL and the community recognized the need for legal support for the community. Such legal support is normally absent in most projects either because the community does not understand the need for such legal support, or the investor does not want the community to have legal representation. In this case, several factors drove KEL to a lawyer to help the community understand the legal issues involved. First, community members perceived conflicting messages due to different levels of understanding of the project details. Secondly, considering the high legal fees that the poor landowners could not afford, most of them did not want legal representation. Consultations between the company and the community resulted in the hiring of a Maasai lawyer from Kajiado. Initially, the company was not to pay for the lawyer but after further consultations with the community, it was agreed that the legal fees could be deducted from the land leasing fees. This arrangement later changed when some of the landowners opposed the deductions and the company decided to pay for the lawyer anyway. While some landowners were satisfied to proceed this way, a few able landowners still opted to retain their own lawyers. To ensure that the community lawyer paid for by the company is not biased against the community; consultations with the community were public with the lawyers hired by the individual landowners in attendance, thus providing alternative legal support for the community.

1. Does your community have a lawyer?
2. Is he from the community or understands the community issues and able to explain the issues in a language that is understood by the community?
3. Who is paying the legal fees? The Community? The Government or the Investor?

g) Neighbouring communities

Though a project area is clearly defined, neighbouring villages or communities might have an interest in the project area. In Shompole Conservancy for example, members of Irkiramatian group ranch have a grazing and water interest in the conservancy. Shompole conservancy managers have chosen to extend consultations to Irkiramatian group ranch so that they can be able to design effective conservation strategies in Shompole.

h) Monitoring

A team with representatives from the community and the government/investor should be created to monitor and ensure that all that was agreed to is being implemented.

i) Dispute resolution mechanisms

A strong dispute resolution mechanism is critical as a part of the FPIC process. This is because people will have different understandings of what was agreed to or circumstances might have and even expectations might change as the project advances. It is important therefore establish strong dispute resolution that from the household level to the project level. Recourse to courts should be the last option. This is especially because Kenya now recognizes Alternative Justice Systems (AJS) for dispute resolution. AJS is faster, cheaper and less adversarial.

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- ⁱ The Manual has been deliberately simplified and pegged for ease of understanding by persons with at least post-primary level of education.
- ⁱⁱ Pastoralist Alliance for Resilience and Adaptation in Northern Rangelands (PARAN at <https://paranalliance.org>
- ⁱⁱⁱ IMPACT at <https://www.impactkenya.org>
- ^{iv} For more on the Doctrine of Discovery, please see <https://doctrineofdiscovery.org/what-is-the-doctrine-of-discovery/> and <https://www.ictinc.ca/blog/christopher-columbus-and-the-doctrine-of-discovery-5-things-to-know>
- ^v For more on Terra Nullius, please see for example, *Mabo and others v. Queensland* https://aiatsis.gov.au/sites/default/files/research_public/overturning-the-doctrine-of-terra-nullius_0_3.pdf
- ^{vi} UN Declaration on the Rights of Indigenous Peoples at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf
- ^{vii} For more on the Ogiek Community case, visit [https://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%20Rights%20v.%20the%20Re-public%20of%20Kenya..pdf](https://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf)
- ^{viii} For more on the Endorois Community Case, visit https://www.escri-net.org/sites/default/files/Endorois_Decision.pdf
- ^{ix} *Alexkor Ltd and Another v Richtersveld Community and Others* at <http://www.saflii.org/za/cases/ZACC/2003/18.pdf>
- ^x Para 82, Richtersveld community case.
- ^{xi} For the Paris Agreement, visit <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>
- ^{xii} For Kenya's Nationally Determined Contributions, please visit [https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Kenya%20First/Kenya%27s%20Fir-st%20%20NDC%20\(updated%20version\).pdf](https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Kenya%20First/Kenya%27s%20First%20%20NDC%20(updated%20version).pdf)
- ^{xiii} For more on REDD+, See What is REDD+: Forest Carbon Partnership Facility at <https://www.forestcarbonpartnership.org/what-redd>
- ^{xiv}
- ^{xv} The Guidelines can be downloaded at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiDy-nEyOnoAhXniuAKHWABDaAQFnoECAMQAQ&url=https%3A%2F%2Fwww.undp.org%2Fcontent%2Fdam%2Fkenya%2Fdocs%2Fenergy_and_environment%2F2019%2FFPIC%2520Kenya%2520Guidelines%2520Final.pdf&usg=AOvVaw36igyzh7_jew2me2z_xlh4
- ^{xvi} UNDP Standard 6: Indigenous Peoples at https://info.undp.org/sites/bpps/SES_Toolkit/SitePages/Standard%206.aspx
- ^{xvii} UNREDD Guidelines on Free, Prior and Informed Consent at <https://www.unredd.net/documents/un-redd-partner-countries-181/templates-forms-and-guidance-89/un-redd-fpic-guidelines-2648/8717-un-redd-fpic-guidelines-working-final-8717.html?path=un-redd-partner-countries-181/templates-forms-and-guidance-89/un-redd-fpic-guidelines-2648>
- ^{xviii}
- ^{xix} IFAD How to do: Seeking free, prior and informed consent in IFAD investment projects at https://www.ifad.org/documents/38714170/40197975/htdn_fpic.pdf/7601fe69-3ada-4b9d-a30d-95ae4c98216b
- ^{xx} IFAD Respecting free, prior and informed consent: Practical guidance for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition Available at <https://www.fao.org/3/i3496e/i3496e.pdf>
- ^{xxi} World Bank EES7 at <https://thedocs.worldbank.org/en/doc/276101511809520481-0290022017/original/EnvironmentalSocialStandardESS7FactSheetWBESF.pdf>
- ^{xxii} IFC Performance Standard 7 on Indigenous Peoples at https://www.ifc.org/wps/wcm/connect/9baef8f6-9bd9-4d95-a595-7373059081d4/GN7_English_2012.pdf?MOD=AJPERES&CVID=mRQk089
- ^{xxiii} International Covenant on Civil and Political Rights at <https://www.google.com/?client=safari>
- ^{xxiv} International Covenant on Economic, Social and Cultural Rights at <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>
- ^{xxv} African Charter on Human and Peoples Rights at <https://www.achpr.org/legalinstruments/detail?id=49>