

Report to the CERD on how Kenya neglects its obligations on rights of indigenous peoples who have to be protected from forced evictions under the ICERD

CONTENTS

A) Introduction to Kenya's situation of forced evictions of its indigenous peoples

How indigenous peoples get discriminately evicted as a result of how Kenya applies justice

1. Indigenous people are inhumanely forcibly evicted from their ancestral land to a disproportionate extent 2
2. Kenya has not respected the court orders on how it shall protect and fulfil indigenous peoples' rights 2
3. Courts of Kenya are not secured to respect indigenous peoples' rights under Kenya's treaty obligations 2

Violations caused by eviction and discrimination against indigenous people's equal enjoyment of rights

4. How the equality of indigenous peoples' civil and political rights is violated 2
5. How the equality of indigenous peoples' economic social and cultural rights is violated 3

B) How Kenya is set to continue and falsely justify the forced evictions of indigenous people

6. In name of saving environment, area's indigenous life gets displaced by area's commercial control 3

Kenya says it evicts indigenous peoples to save forest and environment, but compared to indigenous communities' quite sustainable life, their eviction causes to the forest and environment more damaging impacts - which are left unaccounted

7. How indigenous people get unduly forcibly evicted as 'unlawful' 'occupants' of their own ancestral lands 4

- i) Do forced evictions suit to the "character" of indigenous people better than land rights in Kenya? 5

Kenya does not recognise distinct character of indigenous communities and their heritages of how land is sustainably held by tenures which are less based on private possession. It does not treat them as genuine occupants of their ancestral lands

- ii) How Kenya wrongly assumes indigenous people to have 'unlawfully acquired' their ancestral land 6

As indigenous peoples' do not have land titles or documents to show according to which law their ancestors would have in ancient time 'acquired' ancestral land for them, Kenya evicts them as being 'unlawful occupants' of their own ancestral land

- iii) Kenya registers only 'corporate body' to own, hold and manage indigenous communities' ancestral lands 6

The Community Land Act forces all Community Lands to be made corporate property even though the Constitution has recognized indigenous ancestral/traditional Community Land as categorically distinct from such forms of property

- iv) Kenya violates even the conditions which its own law requires for 'humane evictions' 7

While Kenya had still in summer 2023 announced that in all evictions it would follow the law on 'humane evictions' (Land Act section 152 G), still it has continued forced mass evictions of indigenous people in ways which violate that law

8. State hijacks people's fundamental right to self-determination - to enjoy their right on their behalf 7

While state's democratic sovereignty is based on its obligation to respect peoples' right to self-determine their life, and to ensure peoples can enjoy it in their lands, still Kenya claims it can itself as a state "enjoy" this people's right on their behalf

9. Indigenous heritages of 'right to inherit' land do not get equally respected or protected 8

Kenya discriminates against the equality of peoples' rights to their indigenous African inheritances of how lands whose life peoples have adapted to live belong to their life-heritage and how peoples can belong to such lands

10. Indigenous community forest habitats lost/degraded in name of forest conservation/management 9

Kenya claimed to the CERD that its "Forest Conservation and Management Act 2016, protects forests that form the habitat of indigenous people" but the Act does not protect their indigenous forest habitats but takes such areas for other purposes

11. How Kenya and its courts assume they do not need to respect or fulfil human rights treaty obligations 9

Kenya is oriented to continue to violate its human rights treaty obligations on indigenous peoples' rights as it and also some Kenyan courts claim that they must leave such obligations non-applied in Kenyan justice if they may doubt such treaty obligations could be inconsistent with the Constitution, which - as well as Supreme Court - they claim to require this.

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A) Introduction to Kenya's situation of forced evictions of its indigenous peoples

How indigenous peoples get discriminately evicted as a result of how Kenya applies justice

While CERD's previous Concluding Observations in 2017 required Kenya to stop the forced evictions and such discrimination of its indigenous tribal peoples, which violates and adversely affects the realisation of their rights under the ICERD and to develop its laws, policies and its application of justice to prevent such evictions, discrimination and violations, to redress and correct their adverse impacts and to ensure that the victims get justice, what has happened in these respects since 2017 has been on the contrary that:

1. Indigenous people are inhumanely forcibly evicted from their ancestral land to disproportionate extent

Kenya has forcibly evicted in 2023-2024 more than 6000 indigenous people, mostly Ogiek and Sengwer, from their ancestral lands without their free, prior and informed consent, destroying their homes and belongings – evicting ca. 30 % of all Sengwer people, whose population has rapidly decreased last 20 years.

For these indigenous families now evicted and for thousands of Endorois and other indigenous families forcibly evicted earlier, Kenya has not provided such due restitution of their ancestral or traditional land or due resettlement and rights to the land of equal quality or due remedies with full compensation of damages in compliance with what Kenya's international human rights obligations would have required.

2. Kenya has not respected the court orders on how it shall protect and fulfil indigenous peoples' rights

Kenya has not respected and secured the rights of its indigenous peoples as the legal orders and decisions of the African Court/Commission on Human and Peoples' Rights and Kenyan courts have ordered to prevent such forced evictions and violations, correct and compensate their damages, reconstitute lands and restore rights for Endorois, Ogiek, Sengwer, Turkana, Rendille, Samburu, El Molo and other indigenous peoples.

3. Courts of Kenya are not secured to respect indigenous peoples' rights under Kenya's treaty obligations

As the African Court on Human and Peoples' Rights has ordered Kenya to ensure indigenous Ogiek people's rights to Mau forest as their collective ancestral land and to protect them from forced evictions from their ancestral Mau forest, the Environment and Land Court in Nakuru however ordered on 30/9/2024 oppositely:

- Kenya to register much of Mau forest into private land titles for ca. 45 000 private settlers instead of Mau becoming demarcated and protected as indigenous Ogiek people's ancestral land

- "the Kenya Forest Service to be at liberty to evict [...] forcefully" "any person found to have encroached onto the forest land" who fails to vacate such land which is delineated as forest (1)

Violations caused by eviction and discrimination against indigenous people's equal enjoyment of rights

Forced evictions and commercial takeover of indigenous communities' traditional land for logging, mining, plantation, settlements, energy, carbon trading, tourism, etc. create tenure insecurity in land and forest use and access by which they sustain their life, livelihood and life-heritage and fulfil their human rights.

These subject indigenous peoples to higher rates of tenure insecurity and forced evictions than others in ways which violate their "equality before the law [...] in the enjoyment of the following rights" (2):

4. How the equality of indigenous peoples' civil and political rights is violated

Indigenous people's equal "right to security of person and protection by the State against violence or bodily harm" (3) is adversely affected by the forced evictions as armed KSF guards burn/destroy indigenous homes, have even killed people and set families to live under constant threat of eviction, physical damage/punishment

Control of indigenous lands by armed corporate/private guards has become a part of 'security' provided for investors, lenders, financiers or corporates by the cost of damaged security of indigenous people's life/safety.

Their "right to freedom of opinion and expression", "of peaceful assembly and association" (4) and/or their "right to freedom of movement and residence" (5) are adversely affected by the threats they face if they move/gather near their ancestral lands from which they are evicted or try to publicly defend their rights there

Their right to participate "in the conduct of public affairs [...] and to have equal access to public service" (6) is violated as they can not participate to decisions on their forced evictions and on their rights to their lands.

Loss of living place and their community school or health point burned weakens their public services access.

Kenya has to ensure for indigenous people "that no decisions directly relating to their rights and interests are taken without their informed consent" (7) and that their lands do not get controlled by armed corporate guards.

5. How the equality of indigenous peoples' economic social and cultural rights is violated

Disproportionately high scale of forced evictions of indigenous communities and commercial takeover of their lands affect and violate their "equality before the law [...] in the enjoyment of the following rights" (8):

Equality of indigenous people's rights to adequate food and housing, to "health, medical care, social security" (9), "to equal participation in cultural activities" of their ethnic heritage (10) and of their "rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment" and equality of their opportunity in access to their traditional occupations (11) get violated as evictions deprive them of such their access to land, forest, water and their homes on which these rights' realisation depends.

As indigenous people have developed and adapted their life-heritages to hold, use and inherit the lands on which they live and access their sources of food, water, housing, health, work and livelihood and fulfil their human rights on these, thus, to get all their violated rights protected, remedied and fulfilled, Kenya has to secure their access to inherit, hold and use such lands as sources by which they fulfil their human rights.

Kenya has to secure the restitution of their ancestral or traditional land or due resettlement to land of equal quality with full compensation for all caused damages as the African Commission and Court have ordered and that "indigenous communities can exercise their rights to practise and revitalize their cultural traditions". (12)

B) How Kenya is set to continue and falsely justify the forced evictions of indigenous people

The Kenyan government and courts continue to order Kenya's indigenous peoples to be disproportionately evicted by force, to violate their rights and to discriminate against the equality of their rights in accordance with their ethnic origin/ethnic heritage of their lands which they have ancestrally or traditionally occupied.

While Kenya has not developed legislation to comply with its ICERD or other human rights treaty obligations it has on the contrary developed/adopted such new laws and ways to interpret and apply the law/Constitution and other commitments, which do not respect human rights obligations but in fashionable terms support that how **Kenya acts to falsely justify what maintains indigenous peoples' tenure insecurity, forced evictions and discrimination of their ethnic origin/heritages of land tenures and ways of life, including also as follows:**

6. In name of saving environment, area's indigenous life gets displaced by area's commercial control

While Kenya is forcibly evicting its indigenous peoples and restricting their customary sustainable life in name of conserving the forest and environment, actually the overall impacts of those evictions and restrictions – which Kenya does not duly assess, monitor or address – are in many ways damaging forests and environment.

Indigenous peoples get forcibly evicted from their habitats and get their homes destroyed in name of saving the environment even though their life and homes destroyed, degraded or polluted the environment much less than life and homes of others - who still are not evicted but are instead given control of those forests.

Indigenous people's forced eviction is integral to how their ancestral lands and forests become taken under more commercial control leading to diverse types of damage to forest and environment, like for example:

- When the President of Kenya and Environment, Climate and Forest administration started evictions, they ordered all forest dwellers in Mau, Embobut and other 'water tower' forests just to "leave the forest" as "there will be no negotiations" (13), at the same time in 2023 Kenya started again logging Mau and other forests: "We have decided to open up the forest and harvest timber" to "boost the economy". (14)

- As indigenous people are evicted, thousands of settlers have taken their areas with more damage to forest. Forest officers can start to profit by selling access to illegal loggers, miners, etc. as there is no community to see. Also the African Court noted how "main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions". (15)

- Evicted from forests to towns, industries or plantations, indigenous people live by more consumption, traffic, industry, fossil fuel s, keep more forest displaced/degraded and cause more emissions or other pollution than in their traditional forest life - which allowed forests to regenerate and bind carbon without extra costs.

- As evictions burn and destroy thousands of houses and buildings, from whose ashes wildfires have often started and as new houses must become built, evictions cause much emissions and loss of carbon stocks.

Evictions of indigenous people have various such adverse environmental impacts (presented more in detail in an Annex) which are left unaccounted in Kenya's claims of how evictions would conserve environment.

Such evictions discriminate against the equality of indigenous peoples' rights to protect and conserve the environment in ways how they have been saving it more sustainably - as biodiverse forest ecosystems and self-regenerating water/carbon sources – and with less costs than others, but are not allowed to do so.

"Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources" and "shall not be forcibly removed from their lands or territories [...] without the free, prior and informed consent". (16)

While Kenya claimed its indigenous peoples' forced evictions without their free, prior and informed consent are required by its international conservation obligations and commitments (17), actually the evictions violate also its international conservation obligations and commitments in respect to the indigenous people

Kenya has to sustain, protect and apply more widely indigenous ways and habitats of human life with which the diversity of other living beings and their habitats have been able to regenerate and survive better than with other ways/habitats of human life. As forest and environment have been saved better in areas where indigenous people have lived or influenced and as their eviction has adverse environmental impacts, then:

-If anyone would need to be evicted in order to save environment, it is others rather than indigenous people Also the African Court noted that "main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions". (18)

- Kenya has to ensure also under its CBD based commitments that indigenous peoples' free, prior and informed consent must be obtained also for that how their ancestral/traditional lands' biodiversity and forests are treated

7. How indigenous people get unduly forcibly evicted as 'unlawful' 'occupants' of their own ancestral lands

While CERD requested Kenya to ensure "the collective rights of the Sengwer, the Endorois, the Ogiek and other indigenous peoples to own, develop, control and use their lands, resources and communal territories according to customary laws and traditional land-tenure" and that projects must "obtain the free, prior and informed consent of indigenous communities" in advance (19), Kenya did not show how it would secure these.

Kenya instead continued to forcibly evict thousands of indigenous peoples from their ancestral lands in 2023-2024 in inhumane ways, without their consent, any due compensation or resettlement and reported about how it sees no need for laws/measures which the CERD requested Kenya to adopt, because:

Instead of preventing forced evictions Kenya aims to "govern evictions in Kenya" so that "evictions undertaken by the government" would "strictly conform to constitutional provisions, the law and must be conducted humanely" and "with regard to the Ogiek, Endorois and Sengur communities [...] all genuine indigenous occupants are offered compensation to settle elsewhere or land is identified elsewhere" for them. (20)

As after those words over 6000 indigenous people of these communities have got forcibly evicted, their homes burned with no land identified or no due compensation given to them and law on 'humane evictions' not followed, may be Kenya did not count them to be "genuine" - but "unlawful" - "indigenous occupants"?

i) Do forced evictions suit to the "character" of indigenous people better than land rights in Kenya?

Kenya claimed that Ogieks are not to be demarcated their ancestral lands for their tenure rights because as Ogieks' "cultural and traditional practices which made them distinct no longer exist, thus, the group itself no longer exists" (21) and cannot thus carry collective rights based on group's distinct character – but on the other hand also – quite oppositely – because: Ogieks' huntergatherer traditions and culture of holding land still exists in such a way that demarcated rights to land do not suit such distinct "character of the Ogiek as hunter and gatherer communities who do not have possession based land tenure" (22)

Kenya does not thus recognise their ancestral right to land as it does not recognise people with indigenous huntergatherer heritage as "genuine indigenous occupants" (23) who could be secured rights to their ancestral lands but forcibly evicts them as 'unlawful occupants' due to their such ethnic culture of holding land without "possession based" tenure, to which Kenya assumes land rights do not suit to be given – and so:

Kenya treats Ogiek as if it would fit better to their 'character' as hunter gatherers' to be forcibly evicted than to have rights to land and uses distinction of ethnic character to justify people's forced eviction:

Such deprivation of equal realisation of their rights "due to their way of life as a huntergatherer community amounts to 'distinction' based on ethnicity and/or 'other status'" by which discrimination Kenya "also denied them access to their own land" which denial the African Court of Human and Peoples' Rights saw as colonially legalised discrimination of huntergatherers which "is still continuing" in Kenyan law and governance. (24)

While all shall be ensured equally such rights to hold, occupy and use the land by which they have been adapted in their life-heritage to sustain their life with dignity and to fulfil their human rights, now however:

Colonial inheritance of how land has got registered as acquired possession and property has not secured for indigenous Africans equal rights as for Europeans to follow one's own heritage to hold and use the land.

Kenya shall not discriminate against peoples' rights to occupy, hold, use and protect the lands in ways how they have traditionally done in their own life-heritage of such lands and how they are adapted to sustain their life, to secure and fulfill their equal human rights with dignity on such lands.

As far as indigenous people with hunter-gatherer heritage have been adapted to sustain dignified life and to fulfill their human rights in their ancestral land by land tenures that are distinctive to their own means of subsistence on such land, Kenya has to recognise, respect and protect their rights to their distinctive land tenures on their ancestral land – no matter if Kenya sees such tenures not being based on possession.

People have adapted to live the life of lands to which their distinct life-heritage has belonged - as adapted to sustain dignified life and to fulfill their human rights in such lands which have thus also belonged to their heritage of life and their own means of subsistence. As that how lands have belonged to peoples, to their life-heritages and their means of subsistence has thus depended also on how their abilities to sustain their life and to fulfill equal human rights have in their life-heritages distinctively belonged to those lands, thus:

That what kind of rights people have to such lands depends on this how people's own means of subsistence, their ability to sustain their life and to fulfill their human rights belong to such lands in their life-heritage.

As the colonial law however imposed into Kenya such control over land and forest, which treats ancestral African ways to hold or use lands and forests as 'unlawful', Kenya has to unwind such control so that:

Kenya has to secure equal rights for indigenous Africans to inherit, occupy, hold and use African lands and forests according to their indigenous African ways to do so - as there is no justified reason why should indigenous African people's rights on African lands be required by law to follow such European forms to acquire, own, inherit and possess which do not suit to the 'character' of indigenous African land tenures.

ii) How Kenya wrongly assumes indigenous people to have 'unlawfully acquired' their ancestral land

As indigenous peoples have occupied, held and lived on lands without land titles or documents which could show when and compliant to which law they have acquired the lands where they live, Kenya treats them as if they would have "unlawfully acquired" (25) the lands on which they live - and may have lived for centuries.

As they can not demonstrate how they would have lawfully acquired the lands where they live, Kenya treats them as being 'unlawful occupants' of their ancestral or their traditionally occupied lands and orders by its law that "an unlawful occupant of private, community or public land shall be evicted". (26)

But all ways how people occupy or hold land do not hold or treat the land or forest as 'acquired' 'property'. Peoples have had on lands various customary rights which are not based on assumptions that people could 'own' or 'acquire' land as 'property' or that rights on land should be somehow based on rights to 'acquire' or 'own' things

One can not 'acquire' ancestral land for oneself or for anyone for example by buying it to be one's ancestral land. Still one can have rights to one's ancestral land - without having ever bought any ancestral land. Land is ancestral land through generations having lived and bequeathed the life of that land as people's own life of such land. Rights to such ancestral land can not be reduced to owning the land as property.

Kenya is obliged to respect indigenous peoples' internationally recognised rights to hold, occupy and use their ancestral lands as they have traditionally done in indigenous African ways how lands and forests have belonged to people in Kenya before the colonial law - also in other ways than how one can now under the colonial inheritance of laws 'acquire' land to be such 'property' which one can 'own' as 'acquired' or exchanged.

Also the Constitution recognises as indigenous peoples' community lands their "ancestral lands and lands traditionally occupied by huntergatherer communities" (26), which Kenya is obliged also internationally to:

- secure for indigenous peoples right to occupy, hold and use their ancestral or traditionally occupied lands as they have customarily occupied, held and used such lands as their ancestral or traditional lands.

- enforce these their internationally recognised customary rights according to how they have customarily occupied and held 'ancestral lands and lands traditionally occupied by huntergatherer communities' - not to treat these indigenous people's rights to occupy, hold and use their ancestral or traditional lands as dependent on whether the state has registered for them land titles to own these lands as acquired property

iii) Kenya registers only 'corporate body' to own, hold and manage indigenous communities' ancestral lands

Constitution recognises "ancestral lands and lands traditionally occupied by huntergatherer communities" (27) as such form of Community Land for indigenous communities, which is categorically distinct from how registered property can be owned and acquired under other categories of Community Land, but still:

While this Constitution-recognised indigenous peoples' ancestral/traditional community land could have been set to be implemented through the Community Land Act as their right to hold, occupy and use such land as they traditionally did, the Act requires however on the contrary each community to transform itself into a 'corporate body' to own, hold, use and manage 'Community Land' primarily as corporate registered business property.(28)

In name of recognising 'Community Lands', it thus discriminates against the diverse indigenous ways how land belongs to indigenous communities in their life-heritages of their ancestral/traditional lands. How they have inherited, held, used and protected such lands, differs crucially from how such corporate owns its property.

For the Community Land category of "ancestral lands and lands traditionally occupied by huntergatherer communities" (29) recognised by the Constitution as categorically **distinct from registered property owned/acquired under other Community Land categories, Kenya must ensure respectively distinct implementation** compliant to indigenous peoples' internationally recognised rights to their ancestral/traditional lands.

Kenya has to fulfil their rights to inherit and hold their ancestral lands of their communities' life-heritages according to their locally adapted indigenous ways how their life-heritages belong to their ancestral lands.

Otherwise the Community Land Act can deprives indigenous peoples of their land heritages and of their own means of subsistence and survival as indigenous peoples who they are.

Corporate body's "absolute ownership" right to indigenous land as its commercial business property (30) takes lands away from indigenous peoples' rights to occupy, hold, inherit and use lands as they have traditionally done, displacing the diverse ways how lands belong to indigenous communities as their ancestral lands, whose value - what they are and signify in the life on such lands led by the indigenous communities - is not any exchange value of land as commercial property, which a corporate can exchange away to buy something else.

iv) Kenya violates even the conditions which its own law requires for 'humane evictions'

Kenya reported to the CERD and UN Human Rights Committee that "evictions undertaken by the government" will "strictly conform to constitutional provisions, the law and must be conducted humanely". (31)

But after that Kenya has only started calling 'humane' the severely inhumane forced mass-evictions which it continues by armed KFS guards burning or destroying homes of thousands of its vulnerable and marginalised indigenous people without their free, prior and informed consent, without due consultation or restitution.

Kenya has to stop forced evictions of its indigenous peoples from their ancestral/traditionally occupied lands, not advertise such evictions to be 'humane'. While Kenya claimed the evictions would "strictly conform to constitutional provisions" it may have followed strictly only such interpretation of its Constitution which does not comply with its international and regional human rights obligations but treats indigenous peoples as "unlawful occupants" who would have somehow "unlawfully acquired" their ancestral land as mere property.

While Kenya claimed still in July 2023 how evictions will follow the conditions which section 152 G of the amended Land Act has set "on how to humanly evict unlawful occupiers" (32), still the Sengwer evictions in 2024 for example did not follow even these conditions which Kenya had itself legislated 'humane' evictions would require. Sengwer were forcibly evicted without advance notice, without authorisation of National Land Commission, without due compensation or resettlement. Evictions were not "carried out in a manner that respects the dignity, right to life and security of those affected" - as the section 152 G would require. (33)

As armed guards who evicted people and burned their houses, told that they are not able to differentiate even who are indigenous Sengwer inhabitants of their ancestral Embobut land and who are other settlers, thus in order to respect their dignity and security, Kenya needs to authorise indigenous people to identify their members based on their human rights and on their communities' indigenous lineages and heritages of how they occupy, hold and use the lands, which state has to respect and protect accordingly.

Also public purpose was not identified for the evictions in a way which fulfils Kenya's treaty obligations.

8. State hijacks people's fundamental right to self-determination - to enjoy their right on their behalf

State is sovereign primarily to fulfil its obligation to respect, secure and serve peoples' inalienable right to self-determine their life on land where they live compliant to such "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources" (34) that state has to ensure at least that:

"In no case may a people be deprived of its own means of subsistence". (35) Thus also in case of peoples who consist of "large human groups", "ethnic groups or communities" who do not have - or are deprived of having - their own state in their control, also each such people has right to determine its life on land on which it lives. (36)

So also "indigenous peoples have the right to self-determination", "to be secure in enjoyment of their own means of subsistence and development" with their "right to determine and develop priorities [...] for the development or use of their lands or territories and other resources". (37)

While this **people's right to self-determine its life in its land "shall be exercised in the exclusive interest of the people"** so that "in no case shall a people be deprived of" this right (38), **still Kenya claims that on behalf of its peoples, the state of Kenya "would ultimately exercise the enjoyment of the right" to self-determination of peoples (39) thus hijacking from people their inalienable right** so as to 'enjoy' people's right on their behalf.

“In no case shall a people be deprived” by Kenya of its right to self-determination of its life (40) of its ancestral traditional lands which a people uses as its own means of subsistence to secure and fulfil human rights - as indigenous peoples' ancestral/traditional lands are integral to their their right to self-determination and their own means of subsistence, whose “realization [...] is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights”. (41)

“Indigenous Peoples can freely pursue their [...] development and dispose of their natural wealth and resources for their own ends only if they have land or territory in which they can exercise their self-determination” (42) and thus **State has to secure "the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity"**. (43)

Kenya has to secure for the Ogiek and Sengwer their access to their own "forms of subsistence, which make them distinct from other neighbouring tribes" (44) and for Endorois rights to the "resources traditionally used for their subsistence" and survival by use of "natural resources found within traditionally owned lands" (45) by which they have adapted to subsist, to live life of such lands in ways which fulfil their human rights.

9. Indigenous heritages of 'right to inherit' land do not get equally respected or protected

In their heritage of life of their ancestral or traditionally occupied lands, indigenous people inherit life that is distinctive to those lands - designed, adapted and inherited to be lived there to duly fulfil their human rights. In inheriting their life of such lands which sustain such their distinctive life, indigenous people inherit also such lands as their own means of subsistence - by which they sustain their distinctive self-determined life.

Kenya's forced evictions deprive them of their indigenous life-heritage's ways to inherit their own distinctive life of the lands where they can live it. By evictions Kenya discriminates against such inheritance of lands which belongs to their inalienable right to live their life-heritage's distinctive life of such lands.

Kenya has to respect, protect and realise the equality of indigenous peoples' 'right to inherit' life of lands on which they can live their distinctive life and “to protect [...] communities like the Endorois” with equal respect for their life-heritage, to “allow for different cultures and ways of life to exist, develop in view of the challenges” such as “displacement from their traditional territories and deprivation of their means of subsistence”. (46)

Kenya has to secure equality of justice on how 'right to inherit' land differs among different land heritages. Different land heritage cultures how lands belong to people and how people belong to lands in diverse ways, Kenya has to respect and protect equally according to how they realise human rights on such lands - so that:

- Also for indigenous people Kenya has to secure 'right to inherit' lands in ways which are culturally equal also for their ethnic life-heritages of how lands belong to people and how people belong to lands.

- Kenya has to treat their different indigenous cultures of inheritance equally also according to their ability to sustain life and to realise human rights by use and life of such lands. It has to respect the ways how land belongs to people who live life of that land as distinctive for people's ability to fulfil human rights.

Currently Kenya and its laws do not implement indigenous heritages' ethnic equality in terms of the “right to inherit”/“to own property”. (47) The prevailing culture of law and how lands are registered to be owned as commercial property has been forced on indigenous peoples and discriminates against their equal right to inherit or own the lands in ways how they have inherited lands to belong to them in their land heritage.

While the Constitution recognises equally also for indigenous communities their inheritance to hold and occupy a 'Community Land' as indigenous people's ancestral lands (48), still:

Community Land Act, other land laws and ways how they are applied do not implement equally indigenous communities' constitutional rights to this Community Land inheritance category of “ancestral lands and lands traditionally occupied by huntergatherer communities” (49) compliant to its distinctive character and content.

Kenya violates thus indigenous people's “equality before the law [...] in the enjoyment of” (50) their “right to inherit” and “to own property” (51) and their “right to equal treatment before the tribunals and all other organs administering justice” (52) so that:

- domestic laws/courts do not equally respect/apply indigenous peoples' constitutional/international rights
- the government does not fulfil indigenous peoples' rights equally even when the courts order it to do so
- in forced evictions of indigenous peoples the law on conditions of humane evictions is not respected

Kenya has to eliminate such discrimination of indigenous peoples' constitutionally equal rights to inherit and hold the ancestral lands on which they can continue to live as they have traditionally done and on which their life, livelihood, life-heritage and their own ability to fulfil their human rights equally are based.

"The right of Indigenous Peoples to maintain their own judicial structures and systems is a fundamental component of their rights to autonomy and self-determination" and has to be respected as far as it is "consistent with international human rights standards". (53)

10. Indigenous community forest habitats lost/degraded in name of forest conservation/management

Kenya reported to the CERD that its "Forest Conservation and Management Act 2016, protects forests that form the habitat of indigenous people and provides for community participation in forest management".(54) This Act says "community forests include" also "forests on ancestral lands and lands traditionally occupied by huntergatherer communities." (55)

But how this Act orders such forests to be managed - as if to 'conserve' or 'protect' them - does not conserve or protect such indigenous people's forest habitats by which such forests have been conserved and protected for centuries as far as those indigenous peoples could decide how the forests were treated as their habitats.

The Act does not allow the indigenous people to hold, occupy, conserve and protect those their ancestral forests in their customary sustainable use as their habitats as which their communities held such forests for centuries in better condition before the forest administration started to govern the forests – as now instead:

The Act orders any 'community forest' to be treated only according to how the Kenya Forest Service agrees forest to be used, managed or conserved (56) in accordance with such its commercial/industrial interests (57) which drive the key causes for which forests have got lost /degraded and communities' rights violated.

Kenya shall secure indigenous peoples' rights to inhabit, inherit and hold their indigenous forest habitats to live their indigenous life of the habitat by regenerating diversity of habitat's life without displacing it - and not take such areas to be controlled/ managed for external commercial/administrative purposes, displacing indigenous peoples' forest habitats by KFS corporate-ordered or commercially ruled forests, violating what the commitments to protect forest as 'habitat of indigenous people' internationally require.

11. How Kenya and its courts assume they do not need to respect or fulfil human rights treaty obligations

Kenya claims that provisions of its internal law in Kenyan Constitution require that "any law, whether national or international, that is inconsistent with the Constitution is null and void to the extent of the inconsistency" and "the applicability of international law [...] still remains within the realm of the test on inconsistency". (58)

As this would make provisions of its internal law to determine whether it needs to respect, apply and fulfil its international treaty obligations - which would be violated by such conditions -, Kenya has to be alarmed:

State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" (59) - which Kenya would however do if it applies its human rights treaty obligations "as sources of law" (60) only selectively according to what Kenyan state organs prefer to see as being 'consistent with the Constitution'.

Kenya's approach of presenting the 'primacy' and provisions of its internal law to justify the violations of its human rights treaty obligations is put in practice also by some courts who can re-interpret the Constitution and Kenya's treaty obligations how ever they find it relevant to leave the international or African human rights treaty obligations not respected or applied, like for example:

The Environment and Land Court (ELC) at Nakuru on 30/9 2024 thus ordered "the Kenya Forest Service to

be at liberty to evict [...] forcefully” Ogiek people who are “found to have encroached onto the forest land” in Mau area (61) where Ogieks have however right to live in their ancestral land as ordered by the African Court.

ELC claimed that its order to allow the forced evictions of Ogieks to whom state has not given land titles, would have been “guided by the Supreme Court Advisory opinion” (62), which however did not give any advise specifically on Ogieks, their forced evictions or on decisions of the African Court on Human and Peoples' Rights.

While the Supreme Court opinion guided to verify the applicability of the treaty courts' orders by assessing whether treaty courts' decisions are made “in line with the mandate conferred by their parent treaty” for their jurisdiction (63), the ELC decision to allow forced evictions of the Ogiek from their ancestral land did not assess or verify these accordingly from African Court's Ogiek decision and did not present any evidence on how that Ogiek decision would have deviated from its mandate.

ELC maintained the primacy of land titles-based land ownership provided by the domestic justice and presented on the African Court's Ogiek decision merely a doubt “whether this Court and indeed other Local Courts would stand bound by the decision of” the African treaty court on Ogieks' ancestral land rights. (64)

As Kenya has constitutionally approved and ratified its international and African human rights obligations - equally also on indigenous peoples' rights – to fully apply and respect and to duly fulfil these obligations as ordered/guided by the respective treaty courts or treaty monitoring bodies, this it must do compliant to how:

As such its human rights obligations Kenya has approved and ratified in accordance with its Constitution, it cannot leave them non-applied or not fulfilled as if they were 'inconsistent with the Constitution', which itself explicitly demands Kenya to apply and fulfil them so that Kenya “shall enact and implement legislation to fulfil its international obligations in respect of human rights”. (65)

How Kenya continues forced evictions of its indigenous peoples from their ancestral lands even after the treaty courts and treaty monitoring bodies urge it to stop, “points to a systemic violation of their rights”. (66)

Notes and references

1. Environment and Land Court (Nakuru), 30/9/2024 case ILC petition no. 11 of the year 2020, section 121.5
2. ICERD article 5
3. ICERD article 5 b
4. ICERD article 5 d viii & ix
5. ICERD article 5 d i
6. ICERD article 5 c
7. CERD, General recommendation XXIII on the rights of indigenous peoples, 1997, paragraph 4 d
8. ICERD article 5
9. ICERD article 5 e (iii)-(iv)
10. ICERD article 5 e (vi)
11. ICERD article 5 e (i) and ILO Discrimination (Employment and Occupation) Convention 111, articles 1.3 and 2, see also https://www.ilo.org/sites/default/files/wcmsp5/groups/public/%40dgreports/%40gender/documents/publication/wcms_862144.pdf
12. CERD, General recommendation XXIII on the rights of indigenous peoples, 1997, paragraph 4 e
13. <https://www.citizen.digital/news/ruto-tells-those-who-have-encroached-mau-forest-to-leave-immediately-n328462>
14. <https://www.climatechangenews.com/2023/08/29/kenya-ruto-logging-ban-africa-climate-summit/>
15. African Court on Human and Peoples' Rights, Judgment 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya Application no. 006/2012, Judgment, section 130
16. UNDRIP articles 10, 29.1 and 32,1
17. African Court on Human and Peoples' Rights, Judgment 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya Application no. 006/2012, Judgment, section 220
18. *ibid.*, section 130
19. CERD/C/KEN/CO/5-7, paragraph 20
20. CERD/C/KEN/8-9, paragraphs 53-54

21. African Court on Human and Peoples' Rights, Judgment 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya Application no. 006/2012, Judgment, section 175
22. African Court on Human and Peoples' Rights, Judgment 2022, African Commission on Human and Peoples' Rights v. Republic of Kenya Application no. 006/2012, Judgment, Reparations, section 106
23. CERD/C/KEN/8-9, paragraph 54
24. African Court on Human and Peoples' Rights, Judgment 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya Application no. 006/2012, Judgment, section 141-142
25. The Constitution of Kenya, article 40.6
26. The Land Act articles 152 A-B and Community Land Act, article 14.2
27. The Constitution of Kenya, article 63.2 d (ii)
28. Community Land Act, articles 16 (a) and 18
29. The Constitution of Kenya, article 63.2 d (ii)
30. Community Land Act, articles 16 (a) and 18 and The Community Land Regulations, 2017 Kenya Gazette Supplement No.178 of 24 November 2017, paragraphs 5-7 and Third Schedule (r. 8(9)), Model Rules and Regulations, paragraph 13.2
31. CERD/C/KEN/8-9, paragraph 53
32. CCPR/C/KEN/FCO/4, Information received from Kenya on follow-up to the concluding observations, 18 July 2023, paragraph 26
33. Kenya's Land Laws (Amendment) Act section 152 G (1), paragraph d
34. ICCPR articles 1 and 47 and ICESCR articles 1 and 25 and UN General Assembly A/RES/2625(XXV), Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations 24 October 1970
35. ICESCR, article 1.2 and ICCPR article 1.2
36. UNGA Third Committee, 674th meeting Monday, 28 November 1955, paragraphs 12 and 33 and African Court on Human and Peoples' Rights, Judgment 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya Application no. 006/2012, Judgment, sections 198-199, see also African charter, Article 19 and 20.1-2
37. UNDRIP articles 3,4, 20.1 and 32.1
38. African Charter on Human and Peoples' Rights, article 21.1 and African Court on Human and Peoples' Rights, Judgment 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya Application no. 006/2012, Judgment, section 195
39. African Court on Human and Peoples' Rights, Judgment 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya Application no. 006/2012, Judgment, section 194
40. *ibid.*, section 195
41. CESCR, E/C.12/GC/26, General Comment 26 on Land and economic, social and cultural rights, paragraph 11 and CCPR General Comment 12 on Right to Self-determination
42. CESCR, E/C.12/GC/26, General Comment 26 on land and economic, social and cultural rights, paragraph 11
43. CCPR/C/135/D/3624/2019, 18 September 2023 on communication No. 3624/2019, paragraph 8.13 and CCPR/C/132/D/2552/2015., 21 September 2022, communication No. 2552/2015, paragraph 8.6
44. African Court on Human and Peoples' Rights, Judgment 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya Application no. 006/2012, Judgment, section 110
45. African Commission on Human and Peoples' Rights, 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, section 263
46. *ibid.*, section 248
47. ICERD article 5 d vi-v
48. The Constitution of Kenya, article 63.2 d (ii)
49. *ibid*
50. ICERD article 5
51. ICERD article 5 d vi-v
52. ICERD article 5 a
53. CEDAW/C/GC/39, General recommendation No.39 (2022) on the rights of Indigenous women and girls, paragraph 25
54. CERD/C/KEN/8-9, paragraph 51
55. The Forest Conservation and Management Act 2016, article 30.3 (e)
56. The Forest Conservation and Management Act, article 49.1 (a)
57. The Forest Conservation and Management Act, article 49.1 (a) and 49.2 (a)-(e)
58. CCPR/C/KEN/4, paragraph 28-30
59. Vienna Convention on the Law of Treaties. Articles 26-27
60. CCPR/C/KEN/4, paragraph 31
61. Environment and Land Court (Nakuru) on 30/9 2024 Tonui v Kenya Forest Service & 3 others; Law Society of Kenya & Others & 12 others (Interested Parties) (Constitutional Petition 11 of 2020) [2024] KEELC 6320 (KLR) (30 September 2024) (Judgment) (<https://new.kenyalaw.org/akn/ke/judgment/keelc/2024/6320/eng@2024-09-30>, section 121.5

62. *ibid.* , sections 116-117

But whereas the Environment and Land Court wrote “notwithstanding the decision by the African Commission on Human and Peoples Rights”, the Ogiek decision was made by the African Court on Human and Peoples' Rights based on what the African Commission on Human and Peoples' Rights had advocated.

63. The Supreme Court Advisory Opinion, Attorney General (On Behalf of the National Government) v Karua (Reference E001 of 2022) [2024] KESC 21 (KLR) (31 May 2024) (Advisory Opinion), section 29, Environment and Land Court (Nakuru) on 30/9 2024 Tonui v Kenya Forest Service & 3 others, section 116

64. Environment and Land Court (Nakuru) on 30/9 2024 Tonui v Kenya Forest Service & 3 others, section 115

65. The Constitution of Kenya, article 21.4

66. African Court on Human and Peoples' Rights: The Matter of African Commission on Human and Peoples' Rights v. Republic of Kenya Application no. 006/2012, Judgment (Reparations), 2022, section 117