

ANNEX: Kenya's false justifications for its forced evictions of its indigenous peoples

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Preface

1. Kenya and Kenya Forest Service have forcefully evicted indigenous peoples like Sengwer and Ogiek to take their ancestral lands and forests without their free, prior and informed consent for commercial investments and projects.

The Kenya Forest Service (KFS) guards started on 29 April 2024 to forcibly evict indigenous Sengwer people from the glades of their ancestral Embobut forest area. It raided Sengwer homes and "burnt them to the ground destroying all their belongings and leaving families destitute and precarious at a time of heavy rainfall." (1) Since that more than 1200 houses have been burnt, affecting more than 3200 families.

2. The evictions violated the conservatory order of the Court of Appeal at Kisumu, 19th March 2021 which had ordered that "those who are in occupation of forest land as of today should not be evicted, but no new persons should be allowed to occupy forest land". (2) The KFS did not act according to its duty to prevent new persons from coming to the area even though Sengwer had informed it that there were coming to the area new Marakwet persons who should have been removed.

When KFS started on 29 April to evict people in the area, instead of just removing newcomers, it burned the houses of area's indigenous Sengwer inhabitants to forcibly evict and arrest them. Some Sengwer got jailed as they could not pay big fines ordered for them for being in their ancestral land.

KFS's failures to adhere to courts' conservatory orders have repeatedly led also earlier to human rights violations and forced evictions by burning and destroying of thousands of Sengwer houses - also in 2014 and in 2017-2018 when Sengwer were injured and even killed like Robert Kirotych was shot dead by the KFS on 16th January 2018 for opposing the forced eviction.

3. And from Autumn 2023 onwards the KFS carried out also forced evictions of indigenous Ogiek people in Mau forest and burned their houses even though the African Court on Human and Peoples Rights had ruled that by such evictions Kenya violates also its obligations under the African Charter Human and Peoples Rights.

4. Why does Kenya continue forced evictions of its indigenous peoples even though the UN human rights treaty monitoring bodies and the African Court on Human and Peoples Rights have confirmed that such evictions violate indigenous peoples' rights and Kenya's obligations on them?

As the Kenyan government still tries to defend its forced evictions which have been already confirmed to violate indigenous peoples rights, it is important to address:

- By what type of false justifications the state of Kenya tries to justify how it continues to forcibly evict the indigenous peoples in violation of their rights?

- How does Kenya's approach differ from the rights recognised for the indigenous peoples and could be done to stop Kenya from continuing such violations with false justifications?

5. By its forced evictions Kenya continues to violate indigenous peoples' internationally recognised rights and their human rights to dignified life, to home, privacy, physical security, to adequate housing, shelter, security of tenure, food, water, health, work, livelihood and education, their right to clean, healthy and sustainable environment, their right to be not deprived of their own means of subsistence and their rights to enjoy their indigenous way of life and culture in their communities.

6. Instead of respecting human rights of indigenous peoples as the UN treaty bodies and the African Court have required, the Kenyan government has continued to defend its forced evictions of its indigenous communities by false justifications like for example as follows:

a) Kenya continues to present the ways how indigenous peoples use and live in the lands and forests which they have traditionally occupied and used as if they were 'unlawful occupants', 'encroachers' or 'squatters' of such their traditional lands as Kenya has not given them title deeds on these areas and has not registered these areas in their name.

This violates indigenous peoples' rights to the lands, territories and resources which they have traditionally used and to which they are internationally recognised to have rights also without land title deeds or registrations.

b) The Kenyan government continues also to claim that it is obliged and/or responsible to carry out these forced evictions for public purposes of national development and environmental protection of forests, water towers, biodiversity, climate, etc.

The forced evictions of its indigenous communities however do not fulfil but violate what Kenya is obliged and responsible to do in respect to its indigenous communities under its international and regional treaties and commitments on environmental protection and right to development.

The ways how Kenya has carried out the forced evictions violate also the conditions which its international obligations have set for how evictions could be justified for 'public purposes'.

c) Kenya tries to justify the violations also by publicly mis-presenting its international and regional treaty obligations to be something else than what is confirmed by the UN treaty bodies, African Court on Human and Peoples Rights, by other respective mandate holders and in the UNDRIP.

The Kenyan government also claims falsely that it can leave non-applied such its ratified treaty obligations if it or its domestic courts may interpret them to be inconsistent with its constitution. But Kenya can not have authority to unilaterally change or re-determine its multilateral or international treaty obligations by its domestic law, justice or governance for its national interests.

Find here below a more detailed presentation of how Kenya uses these types of false justifications to continue to carry out forced evictions of its indigenous communities in case of its most recent evictions of the Sengwer and Ogiek communities.

1. How Kenya treats its indigenous peoples as 'unlawful occupants' of their ancestral lands

7. Sengwer are hunter gatherers who have moved from North-west to Kenya rift valley some 2000-1000 years ago and have occupied there at least for 250 years also the Embobut forest area which was taken away from them by the British colonial proclamation order No. 26 in 1954.

While Sengwer traditionally lived in their ancestral lands and forests without title deed documents, the colonial rule forced the rights of indigenous communities to use and to live in their ancestral African lands to depend on ownership documents from a heritage of another continent, Europe.

Since the 1970's onwards, the Kenya's government and later the Kenya Forest Service after it was founded have increasingly carried out repeated and increased evictions of the Sengwer treating the indigenous inhabitants of the area as 'encroachers', 'squatters' or "illegal settlers"

In 2023 the Kenyan government declared more widely for all forest dwelling peoples that "for anyone residing in the forest, there will be no negotiations. People should leave the forest". (3)

I (1). African land tenures 'unlawful' for the Kenyan forest administration's colonial inheritance

8. Kenya still continues its colonial inheritance of forced evictions of Africans who hold and use their African lands in indigenous African ways - as if Africans were 'unlawful occupants', 'encroachers' or illegal 'squatters' of their ancestral African lands if they do not have European-type 'land titles' to hold their indigenous African lands.

Kenya evicts its African forest dwellers as 'unlawful occupants' or 'encroachers' of their ancestral forests if they do not have colonially introduced European type 'land titles' for their African forest life - even though Kenya does not even accept titles to fit for hunter-gatherer communities because:

9. As Kenya claims that titles do not fit to "the character" of "hunter and gatherer communities who do not have possession based land tenure systems" (4), Kenya denies titles from them due to their such 'character' but **forcibly evicts them for not having titles which it itself denies from them.**

So is Kenya's policy that it shall forcibly evict the hunter gatherers due to their such 'character' that they "do not have possession based land tenure systems" and can not thus hold rights on land?

Does the Kenyan government assume that the only rights on land are European forms of property and possession which do not fit to the hunter gatherers' 'character' ?

Does it assume that it fits better to the 'character' of hunter gatherers' to be evicted by force than to have rights to the land?

If Kenya assumes that this must be the case because rights must be title-based, then as the evictions are however also determined as based on titles, how could they fit to hunter gatherers?

10. By forced eviction Kenya violates international law and African Charter also as follows:

a) Under the international human rights law while "tenure takes a variety of forms" also in respect to "occupation of land", still "notwithstanding the type of tenure, all persons" are to be ensured by the state "security of tenure which guarantees legal protection against forced eviction, harassment and other threats" by "immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection". State has "to abstain from [...] evicting occupants from the land on which they depend for their livelihoods" and to "provide all [...] with a reasonable degree of tenure security that guarantees legal protection against forced evictions". (5)

Human rights to adequate housing, food or other living conditions or "protection from forced eviction, should not be made conditional on a person's land tenure status" - as "property status" of "land ownership or tenure [...] or the lack of it" is "a prohibited ground of discrimination". (6)

"States parties shall protect access to land by ensuring that no one is forcibly evicted", that traditional "collective systems of use and management of land [...] be identified, recognized and registered" and that "land tenure rights of individuals and communities, even within customary tenure systems, are recognized and respected." "Local communities that have traditionally used the land should be prioritized in the reallocation of tenure" (7) instead of land's commodification.

b) If some indigenous peoples "do not have possession based land tenure systems" (8), that does not mean non-possession-based forest tenures could not get protected by demarcation but that:

- "Indigenous Peoples have the right to have their lands demarcated" (9) as they have traditionally held those lands. State has "to recognize and adjudicate the rights of indigenous peoples pertaining

to their lands, territories and resources" they have "traditionally occupied or used" and they have "right to participate in this process".(10)

- As forest biodiversity has survived better under indigenous communities' non-possession based tenures of their forest habitats, lands have to be demarcated to sustain and protect such tenures with which people can live such indigenous forest life which allow its diversity of life to regenerate.

11. Under Kenya's Constitution the forms of "protection of right to property" in the ways how land is held "do not extend to any property that has been found to have been unlawfully acquired". (11)

But as the Constitution does not explicate how it would be "found" whether land is "unlawfully acquired" (12), then:

- How will it be proven has a community 'acquired' the forest where it has lived for centuries or for millennia ? Or whether a community acquired the land a millenia ago lawfully or unlawfully ?

- If in an area where no one lived, people started to live before there were any laws, did they 'acquire' the land - even if there may not have existed any law or even a concept of "acquisition"?

And is a land considered 'unlawfully acquired' if one can not say in accordance to which law the ancestors centuries ago may have acquired the land?

If there is no document on how a community may have 'acquired' a forest where it has lived for millennia, is the community assumed to have 'acquired' it 'unlawfully'?

If the descendants then inherited the area from generation to generation for millennia without any buying, selling or ownership documents, how or why would such inherited forest tenure be 'unlawfully' 'acquired' or occupied?

As the colonial law made 'unlawful' the indigenous African ways to hold and use lands and forests, was that just?

If land was ordered to be registered to fulfil the colonial law, was that justified to exclude as 'unlawful' such indigenous African ways to hold land which did not serve colonial interests?

12. As the concept 'acquisition' has become applied to the lands and forests in Kenya as determined by the colonial European commercial law, then:

Such European colonial concept of 'acquisition' may not treat equally in terms of human rights the indigenous African cultures of economy or indigenous African ways to hold and use land or forest.

I (2). National Land Commission and the Land Act

13. The Constitution orders also that "All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals" (13) so that:

"Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the [...] security of land rights" and with the "legislation ensuring that investments in property benefit local communities and their economies." (14)

As forced eviction of local community without its free, prior and informed consent and approved compensation does not "benefit local community", Kenya would have thus to respect and protect indigenous local communities' customary rights to use and occupy the land equitably and sustainably - as land has been preserved under their traditional use and occupation.

14. While the Constitution determines that its' property protections "do not extend to any property that has been found to have been unlawfully acquired", it does not clarify what would be the criteria for it to be "found" whether a land is "unlawfully acquired". (15)

But it sets the National Land Commission (16) to "advise the national government on [...] registration of title in land" based on tasks which the laws may set for that how and with what rights the lands are to be held, used, governed and protected.

15. The Land Act sets this Commission to define how land may be "unlawfully occupied" so that occupant "shall be evicted". (17)

On customary rights and occupations on land the Land Act defines that land held by customary "right or license, under customary [...] law" does not mean "unlawful occupation" of land. (18) Land Act appears to recognise customary land tenures (19):

How indigenous forest people customarily hold and use the forest land under their local communities' customary law is thus not basically 'unlawful occupation' of such land and has to be equally protected under the Constitution and international human rights obligations of Kenya as others

16. But even if a land held by community's traditional right "under customary [...] law" is not by itself "unlawfully occupied", still the way how the Land Act orders the National Land Commission to rule on that land does not have safeguards or criteria which would prevent the commission from ruling that a land which is held by customary right under customary law is "unlawfully occupied".

If that how land is held and used lawfully in a community is set to be decided by such National Land Commission who is not even familiar with the customary rights or the customary law of that community, such decisions can not respect community's customary rights under its customary law.

If such Commission which does not know how a community has customarily lived in a land under the local customary law is set to decide whether people "shall be evicted" as "unlawful occupants" if they can not "show cause" which convinces the Commission "as to why the person should not vacate the land" (20), that violates the rights of indigenous peoples on their traditional lands.

17. It remains also unclear what are the criteria how one could "show cause" for having a customary "right or license, under customary [...] land law" to live in an area (21) - to build a home or to cultivate, graze, etc. there (22) and to avoid being evicted?

As the Land Commission often does not know what have been indigenous communities' customary rights and occupations on land or its land tenures under customary laws, this can easily violate indigenous rights with which the land has been often better preserved than by the state.

If modern administrative state organ like Land Commission who does not even know the indigenous customary law in the area decides what is "lawful authority or [...] right or license, under customary" law (23), that does not duly reflect or respect community's indigenous customary law and rights.

18. As the content of customary rights should flow from the local customary law of area's indigenous heritage of forest life, how would National Land Commission have adequate competence equally in all diverse local indigenous life-heritages and customary laws to decide even whether and how the claimed rights comply with the local customary law?

As indigenous peoples have rights to hold and use lands they have traditionally held and used, Land Commission's lack of competence in diversity of indigenous peoples' customary land tenures and rights can lead it to assume that indigenous peoples' internationally recognised rights to their traditional lands could be 'unlawful' and that "unlawful occupant [...] shall be evicted".(24)

19. And where people have customarily built their communities under such local customary authority, on which the national commission or officers do not have adequate knowledge, that can also lead to violations:

- If there does not exist an official documentary proof of the authority to build, the indigenous inhabitant of the area remains then seen as an "unlawful occupant" so that "by reason of that unlawful occupation, the Commission has the right to require the person to vacate the land". (25)

The Land Commission can so evict as 'unlawful occupant' anyone who just can not "show cause" which convinces the Commission "as to why the person should not vacate the land". (26)

- As the Land Act says that "where the erection of any building [...] has commenced or been completed on any land without authority, the competent officer shall order the person in whose instance the erection or work began or was carried, to demolish the building". (27)

Kenya Forest Service (KFS) officers tend to carry out forced evictions of indigenous communities and burn their homes even when the Land Commission has not determined anything on indigenous customary occupations and has not ordered them to be 'unlawful' occupants who should be evicted.

20. KFS tends to forcefully evict the communities even without knowing who may belong and who may not belong to such indigenous communities or what have been their customary lands or tenures.

As far as the Land Commission has not specifically confirmed for registration that certain customary use of a land is not 'unlawful', it appears that the Kenya Forest Service (KFS) may act as if such customary use would be 'unlawful' and as if the KFS were authorised to forcibly evict the customary occupants as 'unlawful' occupants.

21. So, even though the customary occupation is in principle recognised under the Land Act, still in practice the Act is implemented without any framework to protect the indigenous communities' customary land tenures from forced evictions as the international human rights law would require.

Such forced evictions violate the rights of indigenous people, are unlawfully carried out and do not treat equally the indigenous customary ways to hold and use the land.

And after one has been determined to have no legal authority to one's home place to have home, when one is evicted from there, one does not have authority to settle one's home anywhere.

Indigenous forest dwellers' houses and belongings get burned, they get evicted, and are often not resettled to have legal land title anywhere. This leads them to get forcibly evicted again and again.

22. Only when the Land Commission has decided community's customary ways to use, hold or occupy a land to be not 'unlawful' land use or occupation, only then a community can allocate land for purposes "governed by customary law" so that whoever earlier "held a right to use and occupy any part of community land [...] may continue to use and occupy such land under that right, subject to the same terms and conditions". (28)

Then they "may reserve special purpose areas" for "community conservation", for "cultural and heritage sites", farming, settlement or "any other purposes as may be determined by the community" (29) - but only if the Land Commission has approved them as lawful occupants.

I (3). Conditions of 'humane' evictions have not been respected

23. CCPR has requested Kenya to implement the safeguards which the Land Act claims to provide to secure that when eviction is done, it would be done in 'humanly' way as the Act was amended by Land Laws (Amendment) Act section 152 G.

But even though Kenya had just in June 2023 informed the CCPR that on evictions it would comply with these safeguards of the Sections 152B-152I (including the requested section 152G) of that Land Laws (Amendment) Act (30), still Kenya's forced evictions of Sengwer in 2024 and of Ogiek in 2023-2024 did not comply with or implement these safeguards, because:

a) Evictions were not "preceded by the presentation of the formal authorizations for" the eviction by Land Commission or by written notice 3 months in advance or "preceded by the proper identification of those taking part in the eviction or demolitions" or burning of houses. (31)

b) Evicted people were not informed such "government officials or their representatives to be present during an eviction" who would "give the affected persons the first priority to demolish and salvage their property" (32) and "ensure that there is no arbitrary deprivation of property or possessions" (33) or protect these from destruction when these get "left behind involuntarily". (34)

c) In the evictions Kenya also did not "ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities" (35) and did not follow the "principles of necessity and proportionality during the use of force". (36)

Instead, all Sengwer had to just run away when the armed KFS guards came to burn their houses and to arrest those who try to claim their rights to their home and belongings not to be burned, looted or destroyed - because if Sengwer do not run away they may get killed like a Sengwer man Robert Kiroitich was shot dead by the KFS guards earlier in 2018 in such forced eviction.

d) The evictions have not thus been "carried out in a manner that respects the dignity, right to life and security of those affected". (37) And KFS violated human rights of Sengwer also by harassing and arresting Sengwer for being found in their ancestral land and by jailing some of them if they can not pay big fines.

So, despite Kenya just informed the CCPR in June 2023 that it respects in evictions these Land Act's amended section 152 G requirements of "how to humanly evict unlawful occupiers" (38), still in its forced evictions few months later - of Ogiek in Autumn 2023 and Sengwer in Spring 2024 - Kenya violated even these its own legal requirements which it just claimed to follow.

24. Kenya has also not complied with its respective international obligations on rights of indigenous peoples or Kenya's constitutional obligations on rights of hunter gatherers. And as CCPR had requested Kenya to ensure "the investigation, prosecution, conviction and punishment of all individuals who breach the law during evictions" (39), still over thousand houses were burned and human rights violated through unlawful procedure with continuing impunity and no investigation.

I (4). Unlawfully acquired lands and rights to hold lands in different ways

25. CCPR recommended Kenya to "intensify implementation of the Community Land Act [...] so as to ensure indigenous peoples can obtain official recognition and registration of their land". (40)

Kenya claims to be "protecting the rights of minorities and marginalized communities" so that also "indigenous people form part of marginalized communities" whose "rights to land are recognized and protected under the Community Land Act [...] in relation to unregistered community land" and: They "must be protected through specific affirmative action designed to ensure that they enjoy their human rights and fundamental freedoms on an equal footing with others" and "all dealings with community land can only be conducted with the consent and participation of communities." (41)

While Community Land Act "enables local communities to legally register and own their communal lands", "to secure a single collective title [...] and manage the property" (42), in fact however:

That how under the Community Land Act "a customary right of occupancy on any community land subsisting before the commencement of this Act shall [...] be a recognisable right of occupancy" in community land, remains "subject to Article 40(6) of the Constitution" (43) which orders property protection to "not extend to any property that has been found to have been unlawfully acquired".(44)

26. So the state may also assume that a land which a community has traditionally held under its customary law is "unlawfully acquired" by the community and then that such "customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency". (45)

And the Land Commission can determine customary land users to be 'unlawful occupants' even without the commission knowing the customary law of the community and without addressing the relevant rights and obligations under the international law.

What will be approved as if being 'customary law' determined land use for communities, becomes easily determined by the state or National Land Commission rather than by communities' diverse indigenous local life-heritages and their customary laws. Indigenous communities' lands continue being 'found' to be 'unlawfully acquired' and get evicted as they do not have land title deeds. (46)

27. And while Kenya claims that "a customary right of occupancy in community land shall in every respect be equal in status and effect to a right of occupancy granted in any other occupancy category of land and shall" be "governed by customary law in respect of any dealings" (47), in fact however:

What Kenya calls here "customary right of occupancy in community land" "governed by customary law", refers only to what will get granted and determined by the National Land Commission and state officers as "customary right of occupancy in community land" and as "customary law". (48)

So, even though Kenya recognises that under the Kenyan law the rights under customary law can be lawful, its procedures of land governance do not secure for indigenous communities such equal rights to the lands which they have traditionally occupied or used under their customary law which

they are internationally recognised to have.

28. Community Land Act does not secure for indigenous communities rights to such their ancestral lands to which they do not yet have land titles but allows them to be forcefully evicted as if they were 'unlawful occupants' of their ancestral or traditional lands. This is clearly the case if such lands have been declared by colonial rule as 'public land' like ancestral Embobut forest of Sengwer.

If people occupied forest in Africa traditionally by customary African practices before any written laws were brought to the area from Europe, was such occupation 'unlawful' ? If such forest was taken over by a colonial force which then registered and documented it and made a law on how the forest belongs to the colonial state, was the forest 'lawfully' acquired by such colonial power?

29. Colonial state started in Kenya to take forests ca. 130 years ago to become determined under its colonial law which ruled as 'lawful acquisition' the takeover of land and forest by colonial force and further buying/leasing of a colonially ruled area in conformity with the European commercial laws. In terms of such colonially established 'lawful' control over forest, the Kenyan state has inherited procedures which treat the ancestral African ways to hold or use the forest as 'unlawful'.

And even in case of lands held as trust lands by county government as if for the benefit of some communities, the procedure of establishing such trust lands as community land under Community Land Act does not secure such lands as lands to which indigenous peoples are internationally recognised to have rights as their ancestral lands.

30. The entities which are allowed to claim such lands as their community lands under the Act may also not represent the indigenous community or its life-heritage and the criteria for what the community land can be applied, designed and registered do not correspond the rights internationally recognised for indigenous people on their ancestral land.

While the state acts as if it were crime of Sengwer to live in their ancestral land as they traditionally did without titles, it is under the international law a violation by the Kenyan state if it has not secured them such titles which it requires them to have to fulfil their internationally recognised rights.

I (5). Forced evictions carried out unlawfully without competent public purposes

31. African Court on Human and Peoples Rights has ruled in respect to the forced evictions of the Ogiek, that Kenya has not proven necessity or due justification for forced eviction of its indigenous communities as its international obligations would require. Kenya has not demonstrated "public need" or "general interest of the community" which would prevent it from "guaranteeing and granting access to the Mau Forest for the Ogiek". (49)

The Court ordered Kenya to adopt legislative and other measures which are "guaranteeing the non-repetition of the violations identified" (50) and to identify, "delimit, demarcate and title Ogiek ancestral land and to grant collective title to such land in order to ensure, with legal certainty". (51)

While such "protection of rights to land and natural resources remains fundamental for the survival of indigenous peoples" (52) still Kenya continues to violate international human rights by forced evictions are continuously carried out unlawfully without explicating a competent public purposes, as Kenya:

- has not yet enacted due "national legislation that explicitly prohibits forced evictions" (53) or conditions which would ensure the compliance of the evictions with the international law,

- has not taken action to "ensure that all feasible alternatives are explored in consultation with the affected persons" (54)
- has not taken "every effort [...] not to break up communities" and has not secured safe alternative housing, "security of tenure, enabling access to public services [...] and livelihood opportunities".(55)
- has neither demonstrated or proven necessity or due justification for the eviction, nor ensured it to be "the least restrictive [...] to fulfil the legitimate purpose" or fit to fulfil it (56)
- has not ensured that "the benefits of the limitation in promoting the general welfare shall outweigh the impact on the enjoyment of the right being limited". (57)

State "shall clearly define the concepts of public purpose in law, in order to allow for judicial review" of how the limitation is "suited to the legitimate purpose cited" so that "the benefits of the limitation in promoting the general welfare shall outweigh the impact" of limiting enjoyment of human rights. "Limitation shall be determined by law", "promote the general welfare or "public purpose" in a democratic society" and "shall be necessary" and "the least restrictive" to fulfil the purpose. (58)

32. Regarding the public purposes of development in areas where indigenous people traditionally lived, Kenya has to provide "indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics" (59) ensuring that:

- Indigenous peoples "can freely pursue their [...] cultural development and dispose of their natural wealth and resources for their own ends" in lands where they have lived with their "right to autonomy or self-government in matters relating to their internal and local affairs" (60)
- "Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources" (61) and "to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional [...] economic activities" (62)

But Kenya has not fulfilled any of these its obligations and commitments and has instead started to continue the forced evictions of the Ogiek in violation of the orders of the African Court. And after that started also the forced evictions of Sengwer without the required legal protections.

II. How Kenya violates its international obligations on indigenous peoples' customary rights

33. Kenya treats indigenous peoples' customary laws and land tenures in ways which violate their internationally recognised rights. Their houses and belongings get burned, they get forcibly evicted and are often not resettled to have legal land title anywhere but get forcibly evicted again and again.

Kenya appears to try to just ignore the UN bodies' internationally authorised interpretations of the international law and the African Court's interpretations of the African Charter.

II.(1). Kenya claims it can unilaterally change its multilaterally agreed international obligations

34. International law obliges state to respect land related human rights by not "evicting occupants from land on which they depend for their livelihoods", not "demolishing property" to punish 'encroachers', not "committing any discriminatory acts in [...] land registration" or administration.(63)

Instead of fulfilling its obligations to respect and secure peoples' right to self-determination and

equal rights of all peoples in compliance with the international law, Kenya assumes that "while the right of ownership and control of natural resources belongs to the people, States are the entities that would ultimately exercise the enjoyment of the right in the interest of the people" (64) and that:

- "The applicability of international law [...] still remains within the realm of the test on inconsistency with the Constitution" so that "any law, whether national or international, that is inconsistent with the Constitution is null and void to the extent of the inconsistency". (65)

- "while international instruments and the norms of international law do form part and parcel of our law, they do so only in so far as they are not inconsistent with the Constitution" as interpreted by Kenya and its courts under "supremacy" of the Kenyan constitution. (66)

- the government must consider its "internal infrastructural processes, budget and national ethos" or "existing policies" to determine, rule or decide bindingly unilaterally by itself what its multilaterally agreed international and African obligations shall mean. (67)

35. The government assumes thus that the Kenyan courts could rule whether or where the international obligations which Kenya has ratified could have such inconsistencies with the Kenyan Constitution that Kenya would not need to respect or fulfil such its international obligations. (68)

But even the Kenyan constitution itself requires instead on the contrary that Kenya "shall enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms" (69) in accordance with what those obligations require so that:

"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution". (70) To implement the Constitution consistently, it has to be interpreted in ways which comply with Kenya's treaty obligations, which the Constitution demands to be complied with.

36. These constitutional requirements how Kenya shall "fulfil its international obligations in respect of human rights" as a "part of the law of Kenya under this Constitution" (71) demand that their constitutional approval is "not subject to challenge by or before any court or other State organ". (72)

The text of the Constitution does not present any inconsistency with Kenya's international human rights obligations. And as Kenya had ratified the UN human rights treaties before approving its new constitution of 2010, Kenya would have violated its human rights obligations by changing its constitution to become inconsistent with its international human rights treaty obligations.

37. If the legislative intent in enacting Kenya's 2010 constitution would have been inconsistent with its international treaty obligations, Kenya would have had first to note such inconsistency to the treaty monitoring bodies and to withdraw from the treaties before approving such constitution.

Kenya however did not withdraw from the treaties but enacted a constitution which orders on the contrary the "Supremacy of this Constitution" (73) as "the supreme law of the Republic" of Kenya - which is not the supreme law of the world or of its international order and - which orders domestic laws, courts and organs to respect Kenya's obligations under the international law so that:

Also on human rights "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution" (74) and Kenya "shall enact and implement legislation to fulfil its international obligations in respect of human rights". (75)

So, such customary rights on land which Kenya has recognised and agreed under the African and international treaties and their monitoring systems to respect, protect and fulfil - like indigenous people's rights to the lands they have traditionally occupied or used - comply with the Constitution.

Indigenous peoples' customary rights to occupy and use the lands they have traditionally occupied and used are not 'unlawful occupation' and human rights treaties which Kenya has ratified can not be inconsistent with its Constitution that requires them to be fully respected and implemented compliant to its international obligations. Also "the President shall ensure that the international obligations of the Republic are fulfilled through the actions of the relevant Cabinet Secretaries".(76)

38. Kenya is constitutionally bound to fulfil its international treaty obligations in compliance with the international law of treaties also through the state's legislation and its implementation so that:

State "may not invoke the provisions of its internal law as justification for its failure to perform a treaty" - like Vienna Convention on the Law of Treaties orders. (77)

What has been multilaterally agreed can not be unilaterally changed into something else. States can not thus get rid of their treaty obligations by changing or interpreting their constitution in ways which do not comply with their international treaty obligations.

39. As Kenya informed also the UN Human Rights treaty monitoring that the Constitution "would be in line with General Comment 9" of the CESCR (78), which also requires Kenya to not subordinate its international obligations to be conditioned by Kenya's own laws, by its 'national ethos' or by its infrastructural or budgetary interests. CESCR General Comment 9 requires the state instead to:

- ensure that the terms of the human rights treaties are also in domestic implementation "retained intact and given formal validity in the national legal order" also "by means of constitutional provisions according priority to the provisions of international human rights treaties over any inconsistent domestic laws." (79)

- "modify the domestic legal order as necessary in order to give effect to their treaty obligations" (80) and ensure such "interpretation of domestic law [...] that would enable the State to comply with" its treaties "in a way which conforms to" its obligations. (81)

40. States must avoid such "interpretation of domestic law that would place the state in breach of" the internationally agreed treaty obligations. (82) State can not get rid of its treaty obligations by re-interpreting or changing its constitution or law to not comply with its treaty obligations.

States have to secure the consistency of their constitutions and laws with their international treaties. Even if Kenyan "customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency" (83), still customary rights and laws which are recognised by international treaties approved and ratified in compliance with the Constitution, are consistent with the constitution.

Such indigenous people's customary rights on land which have been internationally recognised and which Kenya is obliged to respect and fulfil according to what it has agreed and ratified as the African or international treaty law, follows what the Constitution requires and is not "unlawful".

II (2) Peoples self-determination and land where they live

41. The UN human rights law has been based on such inalienable, "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources" (84) which has to be secured

equally for all as "an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights". (85)

Also under the African Charter of Human and Peoples Rights, peoples' right to self-determination "shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it" by hijacking the exercise of right's enjoyment away from peoples to be exercised and enjoyed instead by a state. (86)

42. But as the state of Kenya assumes however that "while the right of ownership and control of natural resources belongs to the people, States are the entities that would ultimately exercise the enjoyment of the right in the interest of the people" (87), the African Court of Human and Peoples Rights ruled instead on the contrary that:

Peoples are "not only [...] the constituent elements of the State" under the African Charter but enjoy their own rights which the state is obliged to guarantee for them, not to enjoy itself instead. And "the enjoyment of the rights" of peoples to self-determination belongs also to "ethnic groups and communities that are part of that population" as far as they "do not call into question the sovereignty and territorial integrity of the State".(88)

And also the sovereignty of all states, their independence and any autonomy of their national law and jurisdiction which create their constitutions are based on peoples' right of self-determination as enacted in the international law and treaties as integral to indivisible whole of human rights:

States have right as "sovereign and independent" if they are "conducting themselves in compliance with the principle of equal rights and self-determination of peoples" and "possessed of a government representing the whole people belonging to the territory without distinction" including those formed or inherited by colonial rule as "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation". (89)

43. People's rights on territory get thus determined in terms of how they belong to the territory and how their life, rights, identity depend on it - which contributes to the inalienable, "inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources" by which they sustain their life as peoples. (90) That how indigenous forest people belong to a forest can for example contribute to making it forest of their life, life-heritage and culture - and their forest more inalienably than any commercially 'acquired' forest that is valued in terms of exchange value.

Also under the main UN human rights covenants world has agreed such right to self-determination which is intended to secure for all peoples such basic inalienable human rights equality in respect to the natural wealth and resources that:

"In no case may a people be deprived of its own means of subsistence" (91) - as was enacted to "prevent" what sets "ethnic groups or communities", "large human groups deprived of their means of subsistence". This was the legislative intent for collective human rights to be protected for peoples under the article 1.2 of the ICCPR and ICESCR the main UN human rights covenants negotiations.(92)

Accordingly also indigenous/ethnic tribal peoples have thus the right "to be secure in enjoyment of their own means of subsistence and development, and to engage freely in all their traditional [...] economic activities" (93) by which they sustain their distinctive life as peoples who they are.

II (3) Right to culture of local land and forest as indigenous self-determination

44. So, also "in the case of Indigenous Peoples, the enjoyment of culture may relate to a way of life which is closely associated with territory" and with "the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity." (94)

Hunter-gatherers' "forms of subsistence, which make them distinct from other neighbouring tribes" have to be secured (95) as the African Court has ruled in Ogiek case. States have to secure people's right "to the natural resources found within traditionally owned lands", "resources traditionally used for their subsistence" and survival as people (96) as the African Commission ruled in Endorois case.

Sengwer and Ogiek have to be treated thus not as "unlawful occupants" of their ancestral or traditional lands or forests but forest dwelling indigenous peoples and vulnerable hunter gatherer minorities whose internationally recognised rights Kenya is constitutionally obliged to respect and implement through its laws which Kenya is obliged to enforce accordingly.

45. Forest and its life in its diversity by whose regeneration the indigenous communities have lived may have such inalienable value for them that it contributes to how they are the people who they are and how they also contribute to that how the forest is the forest which it is.

"The close ties of indigenous peoples to the land must be recognized and understood as the fundamental basis of their [...] economic survival" in order to "prevent their extinction as a people" who they are. Their "rights associated with their ancestral lands" are to be "protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity". (97)

Local land and forest are integral to the culture of sustenance and self-determination of indigenous life. When indigenous people live the life of the forest or live along its life's diversity, such people's life in a forest which makes the forest a source of people's distinctive means of subsistence can make it more inalienably their forest than any commercial property - that has value only as exchangeable.

People can have thus such indigenous rights to belong to a forest which - as crucial also for survival of indigenous forest life - may get excluded if such forest is governed as exchange value of commercial property which can be 'acquired'.

46. "Commodification of property rights can be a source of exclusion and increase insecurity of tenure" and "States shall ensure that any titling process [...] protects the rights of those most at risk of marginalization and discrimination, while addressing historical injustices". (98)

UN Human Rights Commissioner has noted that also in case of "conflict between those who depend on land for subsistence and other stakeholders who may want to use natural resources for other purposes, including for profit", states have to secure that "in no case [...] a people be deprived of its own means of subsistence, including those deriving from land". (99)

When "deprivation of indigenous peoples' land, territories and resources, the prevalence of [...] homelessness" result from development projects or investments to their area, such impacts "prevent individuals from enjoying their right to life with dignity" (100) also as "the lack of alternatives to subsistence livelihoods may place individuals at a heightened risk of vulnerability". (101)

47. Without discrimination of their life-heritage or culture of land use Kenya has to secure also for them all protections provided through the Constitution including also for their customary rights by African and international human rights treaties - and not only the 'protection of right to property' under the Kenyan Constitution's article 40 but also the protections of its articles 26, 28, 31, 39, 40, 42, 43, 44, 60.1, 60.2 and 66.2.

Kenyan constitution also recognises that "ancestral lands and lands traditionally occupied by hunter-gatherer communities" "shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest" (102) - rather than according to the forest's exchange value.

48. Indigenous peoples have "the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources" (103) and with "the right to autonomy or self-government in matters relating to their internal and local affairs" (104) such as their local means of subsistence. When indigenous people "have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent", states have to act "to return those lands and territories" to the indigenous people. (105)

"Land conflicts, especially those relating to structural unequal distribution of land tenure coming, for example, from colonial [...] systems, can be one of the root causes or a trigger of the conflict" which may again "lead to forced displacements, land grabbing and land dispossession, especially for populations in vulnerable situations, such as [...] Indigenous Peoples, ethnic minorities". (106)

49. "The collective ownership of lands, territories and resources of Indigenous Peoples shall be respected, which implies that these lands and territories shall be demarcated and protected by States parties" (107) including where "indigenous peoples [...] have lost their land and resources to colonists, commercial companies and State enterprises". (108)

III. On Kenya's false claims of protection of land, forest, water & climate in indigenous communities

III (1) How Kenya's approach to protect environment by forced evictions damages environment

50. Kenya's president and government have threatened to forcibly evict Ogiek, Sengwer and other indigenous peoples without their consent in name of conservation of hill forests as 'water towers', biodiversity and carbon sinks for climate change mitigation - even though in reality oppositely:

a) The more Kenya has taken its indigenous forests away from their indigenous inhabitants, the more it has opened forests for roads, logging and monoculture plantations and the more forests have got rapidly lost and degraded as taken under state's and corporations' commercial control and management in name of 'development', 'conservation of water towers', biodiversity or for climate change mitigation, etc.

b) Kenyan president announced last year that his government will "lift a ban on logging" in hill forests and "open up the forest and harvest timber" as "that will boost the economy" (109) so that hill forests will be logged for timber but must be strictly 'protected' as 'water towers' by eviction of indigenous forest communities, who have lived there for centuries with regenerating hill forests.

c) The government said "protecting our water towers is non-negotiable. We will spare no effort to

conserve our forests; encroachers will be removed" by forced eviction (110) - even though such evictions have already earlier led to killing of people and even though the state continues to profit by logging and destroying itself such hill forests which conserve the water sources

d) The government wants thus to take the 'water towers' under the commercial control away from the indigenous forest communities who have sustained them. As forest related administration like Kenya Forest Service and Kenya Wildlife Service have been corporatised, they manage and 'conserve' the forest, wildlife and water towers as property of their corporate business by which they can profit.

e) As they officially "may utilise protected water towers for commercial purposes" (111), they can use their authority to 'conserve' the 'water towers' as their sources of short-term profit and power - even if the biodiverse forest ecosystems degrade

So people in such 'water towers' who have lived there sustainably the life of the forests get evicted as if being 'encroachers' of 'water tower' if their presence could reduce the quick profits or income, which the administrative corporation can get from such 'water tower'.

Thus what gets 'conserved' as 'water tower' is not the biodiverse hill forest ecosystem which sustains sources of water but the colonially inherited rule how the area serves as a source of quick profit

f) The roads which the government builds and maintains in or near the forest areas - both for needs of forestry, forest administration and in name of conservation - open access both for legal and illegal logging, monoculture plantations and other commercial forest use. (112)

g) "evicting communities whose way of life depends on the well being of their forests leaves their lands open to exploitation by outsiders, including by those in government agencies who are supposed to be protecting such lands. Such agencies are supported - and funded - by European and International donors, despite the fact that when land traditionally occupied by the Sengwer is under their control, it is better conserved and more biodiverse than other areas." (113)

h) While state profits by taking the forests for industrial or commercial use, also the forest guards can profit by allowing illegal loggers and other outsiders to come exploit the forest. It is easier for the forest guards to profit by selling access to outsiders if they blame the forest communities for the forest loss and evict them so that the communities cannot witness the corrupt selling of forest

i) Evictions measures destroy forests also directly and increase carbon emissions when thousands of indigenous huts, shelters, fences and other village structures are burned and smoldering fire often "spreads even to other places thus causing more destruction to the forest ecosystem" than conservation even after the forest guards have left the site where they have burned the huts. (114)

"This uncontrolled burning has been blamed for large scale destruction that has been witnessed in various sections of the forest " (115) and such destruction of houses, schools and other buildings of the forest communities leads also to more construction for which trees need to be felled to build more new houses, shelters, schools, fences etc. (116)

j) When indigenous forest dwellers are evicted, they get forced to move into towns, industries or agribusiness where their life tends to keep more forest displaced or degraded and cause more carbon emissions than their traditional forest life, which allowed the forest to regenerate.

One possibility left for their survival is how some of them - even if their family lives elsewhere - try to use their traditional forest glades in Embobut as pastures for grazing goat, sheep or cattle. For

that they have made some fences for the animals to their traditional lands and get milk from the animals for the needs of their family and sell some of it. They stay overnights in small temporary huts in the glades. Forest administration describes this as "unregulated fencing of the forest land for commercial grazing" (117) which may prevent the forest from growing to the glades.

Both these conditions to which the forced eviction leads are less self-reliant and less sustainable than their earlier forest life and tend by their overall impacts keep forests displaced and increase market consumption, industries, transports, fossil fuel use, emissions and erosion.

k) As for this eviction there are no legal requirements to transparently prove whether the forest would be more conserved after than before the eviction, the eviction is not based on conserving the forest but is thus set to be carried out to prevent what is assumed to be 'unlawful' occupation of land - even if that occupation would have conserved the forest better than the other use under which the land will be set after that.

l) While the ways how forests, biodiversity, water sources have regenerated in indigenous communities have not destroyed them from elsewhere, the modern 'nature conservation' needs huge continuous financing from industries, which drive the biodiversity loss, emissions, erosion, etc. around the globe - but are ignored in assessing and verifying 'conservation's' impact on environment.

51. Similar type of agendas, narratives and impacts have prevailed since colonial time for the last 130 years and have led to a rapid loss and degradation of forest biodiversity and water catchment. By evicting indigenous forest communities as 'encroachers' in name of forest, biodiversity, water, climate, etc. the state takes the forest areas under commercial interests - of logging, plantations, agribusiness, infrastructure, conservation tourism, nature entertainment and other industries.

So Kenya "periodically carries out raids and burns the structures" of forest dwellers by the KFS (118) and continues to advertise these forced evictions as if they were environmental protection of forest, biodiversity, water and climate, etc. required by its international obligations and commitments. (119)

But in reality the more indigenous communities have got evicted and displaced from the forests which have been taken away from them, the more the indigenous forest biodiversity has become lost and degraded when transferred under the commercial control away from these communities who have been adapted to live by and with the regenerating diversity of life of the forest.

III. (2) How Kenya neglects its responsibilities to preserve sustainable indigenous life

52. Also the African Court has reminded that "the main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions" (120) and not the impacts of indigenous communities' life on forests.

As the life of indigenous communities has contributed the least to the environmental crisis which the current modern life has caused, the protection of environment - land, forest, biodiversity, water & climate - would require crucially the protection of the ability of people to live in relation to the environment such sustainable life which the indigenous communities have lived.

53. States would thus need to support such ways of holding and using the land with which lands and forests have survived in indigenous communities and their habitats better than in areas and habitats used, held or affected by other communities.

The Kenyan government however presents the forced evictions of indigenous forest dwellers often as if they were for public interests of environmental conservation and/or development required to fulfil Kenya's constitutional and international obligations and commitments. In name of environmental 'conservation' and public interest the lands and forests are often captured under commercial control in ways which damage environment and sustainability of human life.

54. Kenya tries to falsely justify forced evictions by claiming them to be necessary means to fulfil Kenya's constitutional, regional and international environmental obligations and commitments - even though the UN and African treaty monitoring mandate holders confirm that forced evictions do not fulfill but violate Kenya's treaty obligations.

Kenya's international obligations and commitments would require indigenous people's free, prior and informed consent for any relocation of their communities instead of their forced evictions and that in such lands also:

- the measures of development have to respect their priorities of development of such lands which they have traditionally used and public interests have to respect their own means of subsistence of their traditional economic activity and their rights to enjoy their cultures and their ways of life in their communities
- the measures of conservation have to respect their traditional knowledge and practices with which they have been conserving such areas and their productive resources there and to support their customary sustainable use of biodiversity with their involvement.

As forest biodiversity has survived better under indigenous communities' non-possession based tenures of their forest habitats, tenures would have to be determined and demarcated to sustain and protect people's ability to live indigenous forest life in ways which allow its diversity to regenerate.

55. As in hunter gatherers' areas there are still forests - which have regenerated for ages under their non-possession based tenures better than under other communities possession based tenures - why would the state want to transfer these indigenous communities' regenerating forests under possession based tenures - under which Kenya's forests have got rapidly vanished or degraded?

The Constitution orders also that "All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals" (121) so that "Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the [...] security of land rights". (122)

56. Kenya has thus to respect and protect indigenous local communities' customary rights to use and occupy land in sustainable and equitable way, taking into account also that if it wants to evict indigenous people in name of development or conservation of the land or territory where they have lived, it has to comply also with its obligations and commitments to ensure that:

a) "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 "right to determine and develop priorities [...] for the development or use of their lands or territories and other resources."(123)

Kenya is obliged to determine 'public interests' in accordance with that what the UN conventions and respective international obligations require in order to protect forest, water sources, biodiversity, climate and all environment in indigenous communities or to fulfil their right to development equally

b) "Indigenous peoples shall not be forcibly removed from their lands or territories" or relocated "without the free, prior and informed consent of the indigenous peoples" affected. (124)

Forced evictions of Sengwer, Ogiek or other indigenous communities do not comply with Kenya's international obligations on how to conserve forests, water or climate in indigenous communities.

c) Kenya's obligations under the CBD, African Charter, African Convention on the Conservation of Nature, Paris Agreement, etc. require it to respect such communities' traditional knowledge, innovations and practices by which they have conserved their areas' diversity of plants, trees, animals and fungi in their customary sustainable use ensuring that indigenous communities free, prior and informed consent for how these are used, held and affected by others is required.

d) "Respect for indigenous peoples and local communities" requires taking into account "customary laws, community protocols and practices of indigenous peoples and local communities". (125)

The more Kenya has evicted indigenous forest communities and taken the forests away from them under the forest administration, the more forests have been lost and degraded in terms of biodiversity, water catchment, carbon sinks and fertile soil.

57. As indigenous communities' forest life has allowed the forests to survive for ages up to this day, such communities are needed to help to conserve the forests also to the future and have right to continue that distinctive life of the area by which human collectives have adapted to subsist by the natural wealth and resources of the land where they live.

Why have however the evictions of the indigenous forest communities been an integral part of the expanding destruction of Kenya's indigenous forests since the colonial takeover?

Kenya's biodiverse indigenous forests have become increasingly lost and degraded after the forest administration has taken them away from indigenous communities and this appears to continue.

Kenya has continued forced eviction of indigenous communities and expanding destructive take-over of their forests so that under the Kenyan laws the land and forest are treated and governed and even assumed to be conserved primarily as commercial entities in accordance to how they are acquired and titled under commercial procedure.

58. So even by the "conservation of land based natural resources" state is set to reserve such resources in terms of commercial purposes and to provide incentives for measures "to invest in income generating natural resource conservation". (126)

Under the procedures where lands get classified according to the "methods of acquisition of title to land" (127) Kenyan forests and their regenerating indigenous biodiversity have become increasingly lost and degraded and forest communities' human rights and sustainable life-heritages violated - for producing commercial profits by leases, licenses or other commercial ways to hold and use forests.

The ways how the government of Kenya has claimed 'public interests' in Embobut or other 'water tower' hill forests in forced evictions do not comply with its obligations and have not fulfilled the conditions for how evictions can be legally carried out for public purpose.

Commercial rights which have not been adapted to sustain the local diversity of life have shaped

land and forest use to become treated, governed and even assumed to become conserved according to how they are acquired and titled according to the commercial priorities. From the colonial takeover onwards indigenous forest communities' evictions have been carried out continuously as an integral part of the expanding destruction of Kenya's indigenous forests.

59. So people's ability to live sustainably with and by the regenerating forest how they are adapted to live the life of such forest, gets displaced when Kenya allows others to take over the area for other, commercial purposes. The more people are not allowed to live with and by the regenerating forest, the more they lose their ability to do so and the more forests loss grows.

The more Kenya's forests have been taken away from the indigenous communities and have become registered, governed and titled to be commercially managed in name of conservation, climate, water or development, the more Kenya has lost, displaced and degraded its biodiverse indigenous forests also by logging, monoculture plantation, industries, agribusiness, ranches, infrastructure and tourism.

Cooperation with projects, businesses and policies for which Kenya forcibly evicts its indigenous peoples or exploits their traditional lands and forests for unsustainable profits without their free, prior and informed consent must be avoided and prevented in accordance with the international obligations on how human rights, biodiversity, climate, water and environment must be protected in indigenous communities' traditional lands.

How Kenya carries out forced evictions of its indigenous peoples - and tries to falsely justify them by treating the indigenous inhabitants of the forest areas as if they were 'encroachers', 'squatters' or 'unlawful occupants' of their own ancestral forests - violates both the rights of indigenous peoples and the obligations to protect biodiversity, climate or ecosystems in indigenous communities areas.

60. Kenya's president and government have threatened to forcibly evict Sengwer, Ogiek and other indigenous peoples without their consent in name of conservation of hill forests as 'water towers', biodiversity and carbon sinks for climate change mitigation - even though in reality on the contrary:

The more Kenya has taken its indigenous forests away from their indigenous inhabitants, the more it has opened forests for roads, logging, monoculture plantations and the more forests have got rapidly lost and degraded as taken under state's and corporations' commercial control and management in name of 'development', 'conservation of water towers', biodiversity or for climate change mitigation.

Cooperation with projects, businesses and policies for which Kenya forcibly evicts its indigenous peoples or exploits their traditional lands and forests for unsustainable profits without their free, prior and informed consent must be avoided and prevented in accordance with the international obligations on how human rights, biodiversity, climate, water and environment must be protected in traditional indigenous lands.

61. As evictions have various adverse impacts on forests' own self-regenerating biodiversity and on how it can store water and carbon in self-regenerating way and as Kenya has adopted no requirements to monitor, secure and prove evictions' overall impacts to protect forest, climate or water, the evictions tend on the contrary to have adverse overall impacts on these.

The forced evictions are ordered to remove indigenous forest communities simply by labeling them as 'unlawful occupants', 'encroachers' or 'squatters' of their ancestral lands, where they have lived for centuries or millenniums.

The eviction is thus enacted to be carried out here to prevent indigenous 'unlawful' occupation of land - even if that occupation would have conserved the forest ecosystem, biodiversity, water tower or carbon sink much better than the other use under which the land will be set after the eviction.

But in order to advertise this eviction as publicly justified, the government declares the eviction being carried out in name of protecting forest, water tower or climate and counts some selected samples of trees/plantations as carbon stocks etc. - without verifying the wider overall adverse impacts to the ecosystems and their indigenous biodiversity.

III (3) Conservation and obligations on rights of marginalised communities and indigenous women

62. The Kenyan government has claimed that "The Forest Conservation and Management Act 2016, protects forests that form the habitat of indigenous people and provides for community participation in forest management". (128) Under that Act the "community forests include" also "forests on ancestral lands and lands traditionally occupied by huntergatherer communities". (129)

But forests where indigenous communities have traditionally lived Kenya has in practice rarely approved as their community forests. And even if a community gets approved a 'community forest' (130) under the current law, it can "protect, conserve and manage the forest" only according to how it agrees with the Kenya Forest Service (KFS) these to be conducted - in accordance with KFS's commercial interests. (131)

63. If a community or its forest association must agree with KFS on how forest has to be used in "collection of medicinal herbs", "harvesting of honey", "timber or fuel wood", "grass harvesting and grazing" - which traditional community practices the KFS has continuously restricted for "collection of forest produce for community based industries" (132) - that is not "consistent with the traditional forest user rights" (133) which the KFS has tried to eliminate as 'encroachment'.

Kenya is obliged to cooperate with and to support its indigenous peoples to protect their ancestral forests like also Sengwer Council of Elders representatives who have presented rights based plan for conservation of Embobut. (Find attached)

64. In order to protect indigenous forest communities, "States shall ensure that any titling process that involves determining competing claims to land protects the rights of those most at risk of marginalization and discrimination, while addressing historical injustices" and "that titling programmes are not implemented solely to support the sale of land and the commodification of land tenure." Otherwise "titling of pre-existing, customary forms of tenure may result in more conflicts" and "less security [...] with a negative impact on" human rights as a whole. (134)

65. Under the Kenyan Constitution "all State organs and all public officers have the duty to address" the specific needs and rights of the vulnerable, "minority or marginalised communities, and members of particular ethnic [...] or cultural communities". (135)

The Kenyan government has informed the CCPR that it would be "protecting the rights of minorities and marginalized communities" (136) according to how:

- "The Constitution recognizes that indigenous people form part of marginalized communities who must be protected through specific affirmative action designed to ensure that they enjoy their human rights and fundamental freedoms on an equal footing with others. Their rights to land are

recognized and protected under the Community Land Act" also "in relation to unregistered community land. All dealings with community land can only be conducted with the consent and participation of communities." (137)

- "The Kenyan constitution prohibits all forms of discrimination on any ground, including ethnicity [...] and culture. Indeed, non-discrimination and protection of the marginalized is emphasized as a central national value and principle of governance which must permeate all spheres of the development agenda". (138)

Also "in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of" the human rights in respect to "the vulnerability of particular groups or individuals". (139)

66. "The Government has an obligation to all these communities to ensure inclusion and non-discrimination" (140), including also to any "indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy". (141)

But when the KFS just came and burned the houses of Sengwer there were no procedures for identifying the vulnerability or respective protections for the Sengwer or the state representatives responsible for the evictions or the presentation of the formal authorizations of the eviction to the Sengwer or specific protections for the property or possessions for the vulnerable. There was no protection for vulnerable and Sengwer had to flee away from their homes in their ancestral land as otherwise they could have got injured, arrested by the KFS and jailed.

67. Kenya neglected also CCPR recommendation to ensure "specific measures [...] to promote and protect the rights of indigenous women" (142) on their traditional community lands, habitats and territories - which would have required according to CEDAW also the state of Kenya to:

- "recognize the rights of Indigenous Peoples and women to [...] collective ownership and control over lands encompassed by their customary land tenure systems" and to "prevent and regulate activities by businesses, corporations and other private actors that may undermine the rights of Indigenous women and girls to their lands, territories and environment, including measures to punish [...] and prevent the repetition of these human rights violations". (143)

- "ensure the free, prior and informed consent of Indigenous women and girls in matters affecting their environment, lands, cultural heritage and natural resources, including any proposal to designate their lands as a protected area for conservation or climate change mitigation purposes or carbon sequestration and trading or to implement a green energy project on their lands, and any other matter having a significant impact on their human rights". (144)

This is crucial also for "sound conservation and protection of ecologically sensitive areas" and "transparent and cost effective administration of land" which Kenyan Constitution requires (145) recognising that "ancestral lands and lands traditionally occupied by hunter-gatherer communities" "shall vest in and be held by communities identified on the basis of ethnicity, culture". (146)

68. In practice Kenya has not implemented its obligations on rights of indigenous women related to land tenure and evictions. Kenya seems to treat the ancestral lands and forests of its indigenous peoples as targets of being invested to be transferred into sources of corporate profits, away from being homes of indigenous peoples' sustainable life.

To avoid violating human rights and its obligations, Kenya has to ensure that all state and business actors "respect the principle of free, prior and informed consent of indigenous peoples in relation to all matters that could affect their rights, including their lands, territories and resources that they have traditionally owned, occupied or otherwise used". (147)

Notes and references

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5. CESCR, General comment 26 on land and economic, social and cultural rights, E/C.12/GC/26, paragraph 23 and CESCR General comment No. 4: The right to adequate housing, paragraph 8 a
6. CESCR, General Comment 20 on non-discrimination, E/C.12/GC/20, paragraphs 25, 34-35
7. CESCR, General comment 26 on land and economic, social and cultural rights, E/C.12/GC/26, paragr 25-26
8. Reparations 2022, paragraph 106
9. CESCR, General comment 26 on land and economic, social and cultural rights, E/C.12/GC/26, paragr. 16 and UNDRIP articles 10 and 27.
10. UNDRIP, article 27
11. Kenyan Constitution, article 40.6
12. *ibid.*
13. Kenyan Constitution article 61.1 see also article 40
14. Kenyan Constitution, articles 60.1, 60.2 and 66.2
15. Kenyan Constitution, article 40.6
16. Kenyan Land Act, articles 152 A-B
17. Kenyan Constitution, articles 67.2 c and 67.3
18. Kenyan Land Act, article 155.1
19. Kenyan Land Act, article 155.1
20. Kenyan Land Act, articles 155.2, 155.5 and 152 A-B
21. Kenyan Land Act, article 155.1
22. Kenyan Land Act, article 155.1
23. *ibid*
24. Kenyan Land Act, article 152 A-B
25. Kenyan Land Act, article 155.9 b
26. Kenyan Land Act, articles 155.2, 155.5 and 152 A-B
27. Kenyan Land Act, article 152 I
28. Community Land Act, articles 14.1 and 34.1
29. Community Land Act, articles 13.3 and 29.1
30. CCPR/C/KEN/FCO/4, paragraph 26
31. Kenya's Land Laws (Amendment) Act section 152 G (1), paragraphs a, b & c
32. Kenya's Land Laws (Amendment) Act section 152 G (1), paragraphs c and i. And also under the section 152 I, where any "unauthorized" building was to be demolished, a "competent officer" was to order the one responsible for building it "to demolish the building" oneself.
33. Kenya's Land Laws (Amendment) Act section 152 G (1), paragraph f
34. Kenya's Land Laws (Amendment) Act section 152 G (1), paragraph g
35. Kenya's Land Laws (Amendment) Act section 152 G (1), paragraph e
36. Kenya's Land Laws (Amendment) Act section 152 G (1), paragraph h
37. Kenya's Land Laws (Amendment) Act section 152 G (1), paragraph d
38. CCPR/C/KEN/FCO/4, paragraph 26
39. CCPR/C/KEN/CO/4, CCPR, Concluding observations on Kenya, paragraph 41 e
40. CCPR/C/KEN/CO/4, CCPR, Concluding observations on Kenya, paragraph 51 c

41. CCPR/C/KEN/4, 26 April 2019, Fourth periodic report submitted by Kenya under article 40 of the Covenant, paragraphs 4 and 5
42. CCPR/C/KEN/4, 26 April 2019, Fourth periodic report submitted by Kenya under article 40 of the Covenant, paragraph 127
43. Community Land Act, article 14.(2)
44. Constitution of Kenya, article 40 (6)
45. Constitution of Kenya, article 2 (4)
46. Kenyan Land Act, articles 152 A-B
47. Community Land Act, article 14.1 c
48. *ibid*
49. African Court on Human and Peoples Rights, Ogiek case, Reparations 2022, paragraph 105
50. African Court on Human and Peoples Rights, Ogiek case, Reparations 2022, paragraphs 160 x and xi
51. African Court on Human and Peoples Rights, Ogiek case, Reparations 2022, paragraph, 160 iv
52. African Court on Human and Peoples Rights, Ogiek case, Reparations 2022, paragraph 109
53. CESCR, General comment 26 on land and economic, social and cultural rights, E/C.12/GC/26, paragraph 23
54. CESCR, General comment 26 on land and economic, social and cultural rights, E/C.12/GC/26, paragr. 24
55. *ibid*
56. ICESCR articles 2.1 and 4 and CESCR, General comment 26 on land and economic, social and cultural rights, E/C.12/GC/26, paragraph 23
57. *ibid*
58. ICESCR article 4 and CESCR, General comment 26 on land and economic, social and cultural rights, E/C.12/GC/26, paragraph 23
59. CERD General recommendation XXIII on the rights of indigenous peoples (Fifty-first session (1997)), paragraph 4 c
60. CESCR, General comment 26 on land and economic, social and cultural rights, E/C.12/GC/26, paragraph 11 and UNDRIP, articles 3 and 4
61. UNDRIP, article 32.1
62. UNDRIP article 20.1
63. CCPR/C/KEN/4, Fourth periodic report submitted by Kenya under the ICCPR, paragraphs 29-30
64. Ogiek judgment, 194
65. CCPR/C/KEN/4, Fourth periodic report submitted by Kenya under the ICCPR, paragraphs 29-30
66. CCPR/C/KEN/4, Fourth periodic report submitted by Kenya under the ICCPR, paragraph 30
67. E/C.12/KEN/6, Sixth periodic report submitted by Kenya under articles 16 and 17 of the Covenant, due in 2021, 14 November 2022, paragraphs 36-37
68. CCPR/C/KEN/4, Fourth periodic report submitted by Kenya under the ICCPR, paragraphs 29-30
69. Kenyan Constitution, article 21.4
70. Kenyan Constitution, articles 2 (5) and 2 (6) and CCPR/C/KEN/4, paragraph 28
71. *ibid*
72. Kenyan Constitution, article 2 (3)
73. Kenyan Constitution, article 2
74. Kenyan Constitution, articles 2 (5) and 2 (6) and CCPR/C/KEN/4, paragraph 28
75. Kenyan Constitution, articles 2.5, 2.6, 21.4
76. Kenyan Constitution, article 132(5)
77. Vienna Convention on the Law of Treaties 1969 article 27
78. CCPR/C/KEN/4, Fourth periodic report submitted by Kenya under the ICCPR, paragraph 37
79. CESCR General Comment 9, The domestic application of the Covenant E/C.12/1998/24, paragraph 6 & 8
80. CESCR General Comment 9, The domestic application of the Covenant E/C.12/1998/24, paragraph 3
81. *ibid*, paragraph 15
82. CESCR General Comment 9, The domestic application of the Covenant E/C.12/1998/24, paragraph 15
83. Kenyan Constitution, article 2(4)
84. ICCPR article 47
85. ICCPR articles 1.2 and 47 and ICESCR, articles 1.2 and 25 and CESCR, General comment No. 26 (2022) on land and economic, social and cultural rights, E/C.12/GC/26, paragraph 11 and CCPR, General comment 12: Article 1 (Right to self-determination) Twenty-first session (1984), paragraph 1 and CESCR

86. Ogiek judgment, 196
87. Ogiek judgment, 194
88. Ogiek judgment, 198-99
89. UN General Assembly resolution 2625 (XXV) on Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the UN Charter
90. ICCPR article 47
91. ICESCR, article 1.2 and ICCPR, article 1.2
92. UNGA Third Committee, 674th meeting Monday, 28 November 1955, paragraphs 12 and 33
This legislative intent was first expressed in the UN human rights covenants' negotiations in 1955 and what was approved, namely "that all peoples had the right to self-determination did not imply that they were already exercising it" but that they have "the right to do so eventually".
Under the ICESCR states "shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the" UN Charter (ICESCR 1.3) which requires that in "territories whose peoples have not yet attained a full measure of self-government" states have to advance "the well-being of the inhabitants of these territories" and "to ensure, with due respect for the culture of the peoples concerned [...] their just treatment, and their protection against abuses" compliant to what human rights require "according to the particular circumstances of each territory and its peoples". (UN Charter 73)
93. UNDRIP article 20.1
94. 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
95. Ogiek judgment, paragraph 110
96. Endorois decision, paragraph 263
97. CCPR/C/132/D/2552/2015, 21 September 2022, communication No. 2552/2015, paragraph 8.6
Community needs "internal self-determination under article 27, read in the light of article 1, of the Covenant" as "the rights of members of the community to enjoy their own culture [...] in community with the other members of their group, are not enjoyed merely individually" (CCPR/C/124/D/2950/2017, communication No. 2950/2017, 18 December 2019, paragraph 9.9)
98. CESCR, General comment 26 on land and economic, social and cultural rights, E/C.12/GC/26, paragraph 31
99. E/2014/86 UN High Commissioner for Human Rights, paragraphs 4 and 22
100. CCPR General Comment 36, Right to life, paragraph 26
101. CCPR/C/127/D/2728/2016 , concerning communication No. 2728/2016, 23 September 2020, paragr. 9.9
102. Kenyan constitution article 63. Community land, paragraphs 1 and 2 d (ii))
103. UNDRIP article 32 1
104. UNDRIP article 4
105. CERD General recommendation XXIII on the rights of indigenous peoples (Fifty-first session (1997) paragraph 5
106. CESCR, General comment 26 on land and economic, social and cultural rights, E/C.12/GC/26, paragr. 48
107. CESCR, General comment 26 on land and economic, social and cultural rights, E/C.12/GC/26, paragr. 11
108. CERD General recommendation XXIII on the rights of indigenous peoples (Fifty-first session (1997) paragraph 3
109. <https://www.climatechangenews.com/2023/08/29/kenya-ruto-logging-ban-africa-climate-summit/>
110. <https://www.citizen.digital/news/ruto-tells-those-who-have-encroached-mau-forest-to-leave-immediately-n328462>
111. The Wildlife Conservation and Management (Joint Management of Protected Water Towers) Regulations, 2017, paragr. 4.2 and The Wildlife Conservation and Management Act, 2013 articles 6.2 b-c & 7 d
112. <https://apnews.com/article/kenya-aberdare-forest-park-road-ac61ebda80bb9895fbbacab2aa3f5774>
113. <https://www.forestpeoples.org/en/lands-forests-territories-rights-based-conservation-rights-land-natural-resources/news-article/2024>
114. Kenya National Commission on Human Rights: An interim report of the high-level independent fact-finding mission to Embobut forest in Elgeyo Marakwet county a KNCHR report, April 2018, page 47, paragraph 76, https://www.eeas.europa.eu/sites/default/files/report_knchr-_14_june-official_0.pdf
115. *ibid*, page 47, paragraph 76,

116. *ibid*, page 48, paragraph 80

117. <https://nation.africa/kenya/counties/elgeyo-marakwet/government-defends-decision-to-evict-sengwer-community--4617338>

Note that a researcher describes this grazing practice by saying that people "build small structures there in order to shelter from the rain and sleep at night, keeping watch over their livestock" "within or nearby the individual's pre-eviction compound" with "the bare minimum of possessions is taken to the shelter [...] and some containers for collecting and storing milk" to sell it "to a commercial centre outside the forest block approximately an hour and a half away." "notions of territory are still important inside the forest block" and "if a piece of land that does not belong to you seems suitable for grazing, permission has to be asked from community elders who used to live in a desired location."

(<https://discovery.ucl.ac.uk/id/eprint/10113950/1/Beyond%20the%20Ruins%20of%20Embobut.pdf>, page 27-29)

118. <https://discovery.ucl.ac.uk/id/eprint/10113950/1/Beyond%20the%20Ruins%20of%20Embobut.pdf>, page 27

119. The government of Kenya says it "is obliged to protect and conserve" areas as "strictly a nature reserve" under its national laws as well as under the African Convention on Conservation of Nature and Natural Resources" (Ogiek judgment, paragraph 220)

120. African Commission on Human and Peoples' Rights v. Republic of Kenya application no. 006/2012 judgment, paragraph 130

121. Kenyan Constitution article 61.1 see also article 40

122. Kenyan Constitution, articles 60.1, 60.2 and 66.2

123. UNDRIP articles 29.1 and 32.1

124. UNDRIP article 10

125. CBD Mo'otz Kuxtal Voluntary Guidelines for the development of mechanisms, legislation or other appropriate initiatives to ensure the "prior and informed consent", paragraph 8

126. Kenyan Land Act, articles 15 and 19.2

127. Kenyan Land Act, article 7

128. CCPR/C/KEN/4, 26 April 2019, paragraph 6 and CERD/C/KEN/8-9, February 2022, paragraphs 49 & 51

129. The Forest Conservation and Management Act 2016, article 30.3 e

130. The Forest Conservation and Management Act, article 47.4

131. The Forest Conservation and Management Act, article 49.1 a

132. The Forest Conservation and Management Act, article 49.2 a-e

133. The Forest Conservation and Management Act, article 49.1 b-c

134. E/C.12/GC/26, paragraph 31

135. Kenyan Constitution article 21.3

136. CCPR/C/KEN/4, 26 April 2019, Fourth periodic report submitted by Kenya, paragraph 4

137. CCPR/C/KEN/4, 26 April 2019, Fourth periodic report submitted by Kenya, paragraph 5

138. CCPR/C/KEN/4, 26 April 2019, Fourth periodic report submitted by Kenya, paragraph 175

139. Kenyan Constitution, article 20.5 b

140. CERD/C/KEN/8-9, 16 February 2022, paragraph 48

141. Kenyan Constitution article 260 (c)

142. CCPR/C/KEN/CO/4 , CCPR, Concluding observations on Kenya, paragraph 51 e

143. CEDAW General Comment 39, Rights of Indigenous Women, CEDAW/C/GC/39, paragraph 57 a & d

144. CEDAW General Comment 39, Rights of Indigenous Women, CEDAW/C/GC/39, paragraph 61 d

145. Constitution of Kenya, articles 60.1 a-e

146. Constitution of Kenya, article 63, paragraphs 1 and 2 d (ii)

147. CESCR General Comment 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities E/C.12/GC/24, paragraph 12