

**ALTERNATIVE REPORT TO THE COMMITTEE ON THE ELIMINATION OF
RACIAL DISCRIMINATION (CERD)**

MINORITY RIGHTS GROUP INTERNATIONAL

REVIEW OF THE PERIODIC REPORT OF KENYA

92nd session of CERD
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Minority Rights Group International (MRG) is an international non-governmental organisation working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. MRG works with over 150 organisations in nearly 50 countries. MRG has consultative status with the United Nations Economic and Social Council, observer status with the African Commission on Human and Peoples' Rights, and is a civil society organisation registered with the Organization of American States.



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I. PURPOSES OF THIS SUBMISSION

1. This report is submitted by Minority Rights Group International (MRG) in advance of the review of the periodic report of Kenya by the Committee on the Elimination of Racial Discrimination (CERD) at its 92nd session. It addresses three crucial areas of minority rights protection: the elimination of racial discrimination, the right to communally owned property and the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution. In this respect, it summarises MRG's observations on the progress and shortcomings of Kenya in relation to the implementation of relevant articles of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), in particular with regard to the situation of the indigenous peoples of Kenya, and it includes MRG's recommendations on how CERD should encourage the Government of Kenya to address these issues.
2. MRG runs a Strategic Litigation, Advocacy and Capacity Building Programme in Kenya aimed at combating violations of the rights of minority and indigenous communities, through holding the governments directly to account before regional and international human rights mechanisms. Currently, MRG partners include the Endorois Welfare Council and Ogiek Peoples' Development Program, community organizations for the Endorois and Ogiek respectively. The Endorois are a semi-nomadic pastoralist community found in Baringo County, and the Ogiek are a hunter-gatherer community whose ancestral territory is the Mau Forest complex in Rift Valley, Kenya.

II. BACKGROUND AND FRAMEWORK

A. INTRODUCTION

3. Discrimination based on ethnicity is deeply embedded in the political, legal, educational and social framework of Kenya and has remained a major generator of human rights violations to date. Legitimized by a political system based on a "tyranny of numbers", in which ethnic communities group vote as a block,¹ ethnic divisions pervade all spheres of public life, and the discrimination inherent in the political structure reinforces discrimination against pastoralist and hunter gatherer communities² in access to education, employment, health care, housing and other social and public services.
4. The report of the National Cohesion and Integration Commission, a statutory body established under the National Cohesion and Integration Act of 2008, on *The Status of Social*

¹ Nicholas Githuku, VOTES THAT BIND: ETHNIC POLITICS AND THE TYRANNY OF NUMBERS, Institute of African Studies, Colombia University, 17th March 2013 at

² Article 260 of the Constitution of Kenya 2010 defines marginalized communities and marginalized groups.

*Cohesion in Kenya 2013*³ and *Ethnic Diversity Audits* at the county level⁴ evidence the continued discrimination and lack of opportunities for marginalized communities in Kenya.

5. The 2010 Constitution of Kenya defines marginalized communities as “a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole; a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or pastoral persons and communities, whether they are nomadic; or a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.”⁵ Marginalized communities in Kenya include the Endorois and Ogiek communities among others.
6. The Constitution, as well as various other laws in Kenya, expressly prohibits racial as well as other forms of discrimination. Laws protecting marginalized communities like the Endorois and Ogiek communities are also being enacted at county levels since the establishment of county governments after the general election in 2013.⁶ However, reports by the National Gender and Equality Commission, a Constitutional commission established by an Act of Parliament,⁷ show that implementation of these laws remains weak and is hampered by poverty, identity dilemma, political exclusion and discrimination, under-representation in decision making arms of government, negative stereotypes and corruption among others.⁸

B. CONSTITUTIONAL FRAMEWORK

7. Article 27 of the 2010 Constitution of Kenya, specifically outlaws discrimination on the basis of race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life in Kenya.

³ National Cohesion and Integration Commission, *The Status of Social Cohesion in Kenya*, 2013 at <https://www.cohesion.or.ke/images/downloads/Cohesion%20Index%20Status%20of%20Social%20Cohesion%20in%20Kenya.pdf>

⁴ Downloadable at <https://www.cohesion.or.ke/index.php/resources/downloads>

⁵ Article 260, Constitution of Kenya 2010

⁶ See for example, *The Nakuru County Minorities and Marginalized Groups Bill*, 2014 at <http://assembly.nakuru.go.ke/?wpdmact=process&did=MzE5LmhvdGxpbms>

⁷ National Gender and Equality Commission at <http://www.ngeckenya.org>

⁸ National Gender and Equality Commission, *Flares of Marginalization among Select Minority Communities in Kenya*, April 2014 <http://www.ngeckenya.org/Downloads/flares-of-marginalization-in-Kenya.pdf>

8. Article 260 of the Constitution of Kenya 2010 also specifically recognizes marginalized communities like the Endorois and Ogiek⁹ and provides for affirmative action that includes the recognition of communal property rights and ancestral occupation as a basis of land title, participation and representation in governance and other spheres of life, provision of special opportunities in educational and economic fields, access to employment and in the development of their cultural values, languages and practices and that the communities have reasonable access to water, health services and infrastructure.
9. A major constitutional milestone for marginalized communities and other marginalized groups generally is the national values and principles of governance enshrined in Article 10 of the Constitution, which include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. The national values and principles of governance bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the constitution, enacts, applies or interprets any law or makes or implements public policy decisions.

III. HUMAN RIGHTS VIOLATIONS

1. Article 2: Measures for Condemning and Seeking Elimination of Racial Discrimination

- a) Though Kenya has adopted various law and policy measures to address discrimination against marginalized communities and other marginalized groups as outlined in the state report, MRG notes that some of the measures are inadequate and may perpetuate further discrimination against the communities/groups. MRG further notes the establishment of various institutions and funds like the National Gender and Equality Commission, Kenya National Commission on Human Rights, the National Land Commission, the National Council for Persons with Disabilities, the Women and Youth Enterprise Funds and the Equalization Fund, which aim to ensure equality in Kenya. However, MRG is concerned that these institutions and funds do not have adequate resources to deliver on their mandates and complaints from the communities indicate that the programs are not reaching them.
- b) Further, the Government of Kenya has delayed the operationalization of the Equalization Fund that is provided for by the Constitution¹⁰ to provide basic services including water, roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation, so far as possible. MRG is concerned that, once operationalized, hunter-gatherer communities in Kenya, including the Ogiek, may not benefit from these fund as the beneficiaries seems to be pastoralists communities with systems for inclusion of hunter

⁹ Article 260, Constitution of Kenya 2010

¹⁰ Article 204, Constitution of Kenya, 2010

gather communities still remaining unclear. The fund was launched at a pastoralist parliamentary group meeting with no representatives of hunter gather communities invited. Only Members of Parliament from pastoralist communities were present during the President's launch of the fund.¹¹ Consequently, as hunter-gatherer communities, like the Ogiek, lack political representation at both the national and county government levels, there is a risk that they may not benefit from the objectives of the fund, resulting in discrimination.

- c) The National Cohesion and Integration Commission's *Ethnic and Diversity Audit of the County Public Service*¹² did not include in its geographic scope, for unclear reasons, either Baringo, the ancestral area of the Endorois, nor Nakuru and Narok, the ancestral home of the Ogiek community. However, the report rightly points to the fact that employment in the counties is skewed towards the dominant groups in the county.¹³ Since the establishment of County Governments, the Endorois and Ogiek in their respective counties have repeatedly complained of being discriminated against in the distribution of government jobs, services and contracts at the county government level and also at the national government.

2. Article 5 (b): The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution

- a) The Government has also failed to comply with Article 5 (b) of the Convention by failing to guarantee the Endorois the right to security of person and protection against violence or bodily harm by armed bandits from the Pokot community. Over the last few years, armed cattle rustlers from the Pokot community, have attacked Endorois villages in Baringo South. An unknown number of Endorois, including women and children, have been killed and maimed. Thousands of Endorois livestock have also been stolen and hundreds of Endorois have left their homes for fear of attacks by Pokot raiders. Many Endorois children are unable to go to school while the security situation has also impacted on the Endorois enjoyment of other rights like right to education and health as access to school and health centers has been rendered more difficult by the insecurity.

3. Article 5 (d)(v): The right to own property alone as well as in association with others

- a) Racial discrimination is still manifested in the failure of Kenya's laws and policies to effectively guarantee communal property rights of marginalized and/or indigenous

¹¹ Daily Nation, Uhuru launches Sh6bn fund to uplift poor regions, 12th March 2016 at <http://www.nation.co.ke/news/Uhuru-launches-Sh6bn-fund-to-uplift-poor-regions/1056-3113656-r4qya8z/index.html>

¹² National Cohesion and Integration Commission, *Ethnic and Diversity Audit of the County Public Service*, 2015 at <https://www.cohesion.or.ke/images/downloads/Ethnic%20and%20Diversity%20Audit%20of%20the%20County%20Public%20Service%202016.pdf>

¹³ *Ibid* at page 221

communities. Though a Community Land Act was finally adopted in September 2016, parliament had deliberately delayed the adoption of such a law within the constitutional stipulated period of five years after the adoption of the constitution. When the Act was finally adopted, a year after the Constitutional deadline, it designates most of community land as public lands by declaring that “*any land which has been used communally, for public purpose, before the commencement of this Act shall upon commencement of this Act be deemed to be public land vested in the national or county government, according to the use it was put for.*”¹⁴ Given that the same Act defines communal use of land as holding or using land in undivided shares by a community, there is a high risk that communities will lose their communally owned grazing areas, shrines, cultural sites and other areas which have since been designated as national forests, game reserves or for mining.

- b) Parliament has also been delaying the enactment of key legislations on the sharing of benefits accruing from the utilization of natural resources in marginalized communities’ territories. These include the Natural Resources Benefit Sharing Bill, 2014 and the Local Content Bill, 2016 among others. The failure to enact those bills means that marginalized communities do not benefit from the utilization of resources in their territories consequently impacting on their ability to provide for their economic, social and political wellbeing.
- c) Court decisions issued between 2011 and 2015 have also tended to further discriminate against marginalized communities in Kenya. In *Joseph Letuya v Attorney General*,¹⁵ the High Court in Nakuru recognized the Ogiek as indigenous and minority community but failed to recognize Ogiek land rights on the basis of ancestral title, despite Constitutional recognition of ancestral occupation as a basis of land ownership. The decision infringes on Ogiek property rights, economic, social and cultural rights, right to associate with other Ogiek, rights to housing, health and medical care among others.
- d) The Government of Kenya has also failed to implement the provisional measures order of the African Court of Human and Peoples in respect of the Mau Forest, the ancestral home of the Ogiek.¹⁶ In March 2013, the African Court ordered the government of Kenya to halt parceling out land in the Mau Forest area pending the determination by the Court of case filed by the African Commission on behalf of the Ogiek.¹⁷ Out of concern that government's actions might violate the Ogiek's right to the enjoyment of their cultural and traditional values, their right to property, as well as their right to economic, social and cultural development, the Court also ruled that the Kenyan Government must

¹⁴ Section 13 (2), Community Land Act, 2016

¹⁵ *Joseph Letuya & 21 others v Attorney General & 5 others* [2014] eKLR

¹⁶ Minority Rights Group International, African Court Issues Historic Ruling Protecting the Rights of Kenyan Ogiek Community, March 2013 at <http://minorityrights.org/2013/03/20/african-court-issues-historic-ruling-protecting-rights-of-kenyas-ogiek-community/>

¹⁷ APPLICATION 006/2012, AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS V. THE REPUBLIC OF KENYA. Available at http://en.african-court.org/images/Cases/Case%20Summaries/APPLICATION_006_OF_2012_CASE_SUMMARY.pdf

refrain from taking any action, which would harm the case, until it had reached a decision in the matter. Instead, the Government of Kenya is proceeding with plans to process title deeds for Mau Forest¹⁸ and continues to fail to ensure adequate security for Ogiek land rights activists in the Mau Forest.¹⁹

- e) The Government of Kenya is also perpetuating its discrimination against the Endorois community by failing to implement the African Commission on Human and Peoples Rights' decision in Communication 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*.²⁰ The Commission had ruled that the Government of Kenya recognise and restitute Endorois land rights over Lake Bogoria National Reserve and compensate them for all the loss suffered as a result of denial of their communal land and other rights. The only step that the Government has taken since the ruling was issued in 2010, is to establish a Task Force in September 2014 to study the implications of implementation of the decision. The Task Force could not discharge its mandate for lack of funding and no substantive progress towards implementation has been made. The Government did not include the Endorois in the Task Force. The Endorois have not received restitution of their land, nor have they received any compensation for the violation of so many of their rights.

Therefore, MRG requests the Committee to make the following recommendations to the Government of Kenya:

- 1) The Government of Kenya undertake legal reform to strengthen communal property rights and address the conflict between ancestral occupation as a basis of land title and other forms of accruing land title in Kenya. The government should also undertake capacity building of the executive, legislature and judiciary on international human rights on indigenous peoples' land rights.
- 2) The Government of Kenya undertakes urgent steps to implement the African Commission decision in communication 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* by establishing an implementation committee comprising of representatives of the national and county governments, the Endorois communities, Kenya National Commission on Human Rights, the National Gender and Equality Commission, Minority Rights Group and other relevant stakeholders.

¹⁸ Sunday Nation, Mau forest titles being processed, 13th July, 2014 at <http://www.nation.co.ke/counties/Mau-forest-titles-processed/1107872-2381818-10f9j27/index.html>

¹⁹ Minority Rights Group, MRG condemns targeted attacks on Ogiek Activists, 3rd March, 2011 at <http://minorityrights.org/2011/03/03/mrg-condemns-targeted-attacks-on-ogiek-activists/>

²⁰ 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*

- 3) The Government of Kenya provides desegregated data on Endorois and Ogiek access to government jobs and other services in education and health and access to government contracts and funds including the women and youth funds and funds for the elderly at both the national and county government's levels.

- 4) The Government of Kenya urgently address the security challenges experienced by the Endorois and other indigenous/marginalized communities' territories for the communities to be able to enjoy their rights guaranteed by the constitution and other human rights instruments that Kenya is party to.

- 5) The Government of Kenya enacts, without further delay, the Natural Resources Benefit Sharing Bill 2014 and the Local Content Bill 2016 to ensure that communities benefit from the utilization of natural resources in their territories.