COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

Follow-Up to Concluding Observations on the Combined
Eighth and Ninth Periodic Reports of Kenya
CERD/C/KEN/CO/8-9

SUPPLEMENTARY SUBMISSION

By

IMPACT Kenya

An Indigenous Peoples' Lens on Kenya's Follow-Up Report

Submitted to the Committee on the Elimination of Racial Discrimination
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I. Context

1. This submission responds to Kenya's Follow-Up Report (CERD/C/KEN/FCO/8-9, January 2026) and supplements it with an analysis grounded in the rights of Indigenous Peoples. It addresses the priority recommendations issued by the Committee in paragraph 30(e) access to justice and implementation of regional decisions for Indigenous communities. This submission prioritizes paragraph 30(e), which the Committee also flagged as a matter of particular importance under paragraph 40.
2. The submission advances a central argument that the absence of a legally operative, enforceable framework for free, prior and informed consent (FPIC) fails to translate acknowledged legal obligations into lived realities for Indigenous Peoples. Kenya's reply reflects genuine institutional effort in some areas, but this effort remains fragmented, process-oriented, and largely disconnected from outcome-based accountability. The Committee is respectfully invited to press for systemic reform rather than incremental compliance.
3. Kenya is home to communities including the Ogiek, Endorois, Sengwer, Maasai, Turkana, Borana, El Molo, and others who self-identify as Indigenous Peoples within the meaning of international law and the African Commission on Human and Peoples' Rights' (ACHPR) working definition. These communities share the characteristics of distinct identity, historical continuity with pre-colonial societies, special relationship with land and territory, and experiences of marginalisation relative to dominant groups in society. [1]

> The Committee is reminded that Kenya has not yet enacted stand-alone FPIC legislation, has not ratified ILO Convention No. 169, and has not acceded to the 1954 Convention on Statelessness — each of which the Committee recommended in paragraphs 18(a), 33 and 35 of CERD/C/KEN/CO/8-9.

II. The FPIC Framework: Partial Legislation, Absent Enforcement

4. Kenya's reply relies substantially on the Community Land Act 2016, the Mining Act 2016 (Cap. 306), and the Forest Conservation and Management Act 2016 (Cap. 385) as the domestic legal basis for FPIC. Each of these instruments contains relevant consultation and consent provisions. However, the submission conflates the existence of these provisions with their meaningful operationalization. The evidence from the affected communities indicates a persistent gap between text and practice.

5. The Community Land Act requires community assemblies to consent before any dealing in community land. Yet registration of community land the prerequisite for the Act's protections to attach remains profoundly incomplete. The National Land Commission's own data indicate that fewer than 10 percent of community lands were formally registered as of 2024.[2] Until registration is complete, the consent architecture of the Act is structurally inaccessible to the communities most in need of it.

   Similarly, acquisition of community land for investment purposes routinely proceeds without community consent, leaving affected communities no meaningful role in the decision and no recourse beyond merely negotiating compensation after the fact for displacement, loss of livelihood, and environmental and social harm that are by then already underway. The gap between FPIC design and its actual reach is not a technical deficiency awaiting administrative correction; it is a structural condition that systematically exposes the most marginalized communities to the very dispossession.

6. The Forest Conservation and Management Act 2016, cited by Kenya's reply as embedding FPIC in forest management, has in practice been invoked to manage and in some cases to restrict the presence of Indigenous communities within forest reserves rather than to affirm their territorial rights. The evictions of Ogiek from the Mau Forest and Sengwer from the Embobut Forest complex, carried out in the name of conservation, occurred within the legal life of this Act and under the institutional watch of the Kenya Forest Service. This is not a peripheral concern, the ACHPR, the African Court on Human and Peoples' Rights, and the UN Special Rapporteur on the Rights of Indigenous Peoples have all documented these evictions and found them inconsistent with FPIC standards.[3]

7. What is missing from Kenya's legal architecture creates a cause of action for communities whose FPIC rights are violated.

   The Committee recommended the adoption of such legislation in paragraph 18(a). Kenya's reply does not address this recommendation directly.

III. Paragraph 30(e): Access to Justice and Regional Decisions

8. Kenya's reply highlights the Endorois Biocultural Protocol (2023) as evidence of FPIC operationalization. The Protocol, developed by the Endorois community itself, is a significant community-driven instrument for asserting sovereignty over biodiversity and cultural heritage at Lake Bogoria. The benefit-sharing arrangements with Baringo County Government mentioned in Kenya's reply, while welcome, address economic entitlements arising from the African Commission's decision in Communication 276/2003; they do not resolve the underlying question of land restitution, which the decision expressly requires.[4]

9. The Committee is respectfully asked to note that the African Commission's decision in ***Endorois Welfare Council v. Kenya*** has been awaiting full implementation since 2010. Kenya's reply refers to the registration of the Endorois Welfare Council and to initiation of benefit-sharing arrangements. These are procedural steps. What has not occurred is the legally required restitution of the Endorois' ancestral land around Lake Bogoria, the development of the community's land for grazing in accordance with customary practice,

and compensation for losses suffered. We invite the Committee to seek a clear timeline with measurable milestones.

10. Paragraph 30(e) of the Concluding Observations calls on Kenya to fully implement: the ACHPR decision in Endorois Welfare Council v. Kenya (Communication 276/2003); the African Court judgment in African Commission on Human and Peoples' Rights v. Kenya (Application 006/2012) concerning the Ogiek; and the High Court decision concerning the Sengwer people. Kenya's reply addresses each of these through a common lens of process compliance: registration of the Endorois Welfare Council, a National Land Commission determination on Ogiek verification and registration, and invocations of the Forest Act as a consultative framework for the Sengwer. This submission respectfully contends that process compliance, while necessary, is not the standard against which paragraph 30(e) should be assessed.

11. The Committee is invited to apply a coherent, outcomes-oriented framework when evaluating Kenya's implementation. For each decision, the relevant question is not whether a process has been initiated but whether the substantive rights recognized in the decision; land, restitution, compensation, cultural integrity, benefit-sharing, non-discrimination have been restored or meaningfully advanced. Assessed against that standard:

    – **Endorois:** The land around Lake Bogoria has not been restituted. Compensation for historical losses has not been paid. Benefit-sharing is at an early and limited stage. Core obligations under Communication 276/2003 remain unimplemented sixteen years after the decision.
    – **Ogiek:** The African Court's 2017 judgment on violation and its 2022 reparations judgment (ordering symbolic and material compensation, official apology, collective land title, and cultural protection measures) have not been fully complied with. The NLC determination of March 2024 on fresh verification of unserved Ogiek members, while a positive procedural step, does not resolve the question of collective territorial recognition and titling required by the Court.[5]
    – **Sengwer:** The Kenya High Court's interim orders restraining forced evictions from the Embobut Forest were followed by further reported evictions. No durable legal framework securing Sengwer territorial rights within or adjacent to the forest has been established. The Kenya Forest Service's operations continue to pose a threat to Sengwer habitation and livelihood.

12. Taken together, these cases reveal a pattern of juridical recognition without territorial restoration. Kenya has demonstrated a capacity to engage with quasi-judicial and judicial processes to submit reports, participate in hearings, and implement narrow procedural orders. What has proven more resistant is the substantive transfer of land rights, compensation, and institutional recognition that the decisions require.

A. Discrimination Against non- registered Customary Rights

13. International law recognizes that indigenous peoples have the right to conserve their lands and resources according to their traditional practices. Kenya, however, continues to privilege registered rights over non-registered customary ones. This is precisely the problem that CERD identified in paragraph 30(b) of its concluding observations, where it urged Kenya to harmonise customary law with the ordinary justice system in line with international human rights law.

14. Kenya's own Supreme Court has rejected the idea that customary rights are extinguished by land registration, calling that notion a product of colonial policy. The Constitution recognizes "ancestral lands and lands traditionally occupied by hunter-gatherer communities" as a distinct category of community land. The Land Registration Act also provides that registered land remains subject to "overriding interests" such as customary trusts, even if those trusts are not noted on the register. Customary trusts can be proven through rightful possession or actual occupation, and registered owners cannot escape their obligations as trustees. Despite this legal framework, state institutions continue to disregard customary rights.

15. The Committee is asked to recommend that Kenya utilise its existing statutory framework to immediately recognise and protect indigenous customary land rights by applying sections 28 of the Land Registration Act and 17 of the Community Land Act, which provide that all registered land is subject to overriding interests including customary trusts and any rights provided under written law, including UN treaties, even without being noted on the register.

IV. The National Land Commission: Structural Constraints

16. Kenya's reply presents the National Land Commission (NLC) as the primary institutional vehicle for implementing the regional decisions. The NLC does possess the legal mandate to investigate historical land injustices and to make recommendations on restitution. However, the NLC is not a judicial body. Its determinations and recommendations require adoption and action by the national executive particularly the Ministry of Lands and the Ministry of Interior to be given effect. When those ministries are slow to act, the NLC's work is functionally suspended regardless of its quality. The Committee observed slow progress under the NLC in paragraph 19 of the Concluding Observations; Kenya's reply does not address this structural constraint.

17. **The Committee is asked to recommend that Kenya establish an NLC Historical Land Injustices implementation plan with sufficient allocated resources; and to operate alongside the Office of the Attorney General.**

V. Disaggregated Data

18. Notwithstanding the Committee’s clear recommendation in paragraph 6 of its concluding observations, Kenya’s follow-up report of January 2026 is entirely silent on the issue of disaggregated statistics. The Committee had expressly requested that Kenya intensify efforts to collect reliable, self-identified data on the demographic composition of its population, including ethnic groups, Indigenous Peoples, and non-citizens such as migrants, refugees, asylum-seekers, and stateless persons, and to produce disaggregated statistics on their socioeconomic conditions in relation to work, social security, housing, water and sanitation, health, and education. Kenya’s reply fails to provide any such data, does not address the acknowledged inconsistency between ethnic self-identification codes used in the 2019 census and those applied in the public sector, and offers no information on how Indigenous Peoples or non-citizens are now identified or counted. This omission is not merely procedural; it renders the State party’s claims of progress unverifiable, obscures the distinct situation of indigenous communities such as the Ogiek, Endorois, and Sengwer, and leaves invisible the racial discrimination that may be faced by refugees and stateless groups like the Nubian community.

19. **The Committee is asked to compel the Kenyan government to establish a disaggregated data implementation plan that aligns all public sector ethnic codes with the 2019 census and introduces distinct, self-identified statistical categories for Indigenous Peoples'.**

References and Notes

[1] African Commission on Human and Peoples' Rights, Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples, 41st Ordinary Session (May 2007); ACHPR, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005).

[2] Kenya National Land Commission, Annual Report 2023–2024; see also CERD/C/KEN/CO/8-9, para. 17(b).

[3] African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights v. Republic of Kenya (Ogiek Case), Application No. 006/2012, Judgment on Merits (26 May 2017); Reparations Judgment (23 June 2022); UN Special Rapporteur on the Rights of Indigenous Peoples, Report on Kenya, A/HRC/33/42/Add.3 (2016).

[4] African Commission on Human and Peoples' Rights, Endorois Welfare Council v. Kenya, Communication 276/2003, Decision (2010), operative paragraphs 298(a)–(g).

[5] African Court on Human and Peoples' Rights, African Commission v. Kenya (Ogiek), Reparations Judgment (23 June 2022), paras. 126–198; ordering inter alia symbolic compensation, material compensation, collective land title, and recognition of the Ogiek's cultural, religious, and social practices.

6 CERD Concluding Observations on Kenya (2024), CERD/C/KEN/CO/8-9, paragraph 30 (e)

7 Constitution of Kenya, article 63.2 d (ii)

8 Land Registration Act section 28 and Community Land Act section 17

9 Supreme Court of Kenya: Kiebia v M'lintari & another(Petition 10 of 2015) (2018) (Judgment) sections 7 of preface & 41