Follow-up on Kenya's Implementation of the CERD Concluding Observations

by Friends of the Earth Finland

CERD requested Kenya to reply how it will "fully implement" the judgement of the African Court on Human and Peoples' Rights on Ogiek (006 /2012) and the decisions of the African Commission on Endorois (276/2003) and of the High Court on Sengwer, "ensuring their participation and free, prior and informed consent". (1)

Kenya however continues to violate their rights, their FPIC and its treaty obligations – and tries even to justify that.

I. How has Kenya implemented the decisions of the African Court, African Commission and domestic Court

1. African Court's Judgement on Ogiek

Kenya has not duly implemented or complied with any of the requirements of "the African Court on Human and Peoples' Rights judgment […] regarding the Ogiek people" (2) - as the African Court itself verified just recently in its December 2025 Compliance Order, ordering Kenya after its delayed reporting "to immediately":

- "take all necessary steps, be they administrative, legislative or otherwise to remedy all the violations established in the Judgment on the Merits" (3)

- "to identify, in consultation with the Ogiek [...] and delimit, demarcate and title Ogiek ancestral land and to grant collective title to such land" (4)

- "initiate the necessary processes to ensure the resolution of claims relating to Ogiek ancestral lands occupied by third parties" (5)

- "recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs" on "all development, conservation or investment projects on Ogiek ancestral land." (6)

- "implement necessary measures to ensure the full consultation and participation of the Ogiek, in accordance with their traditions/customs, in the reparation process as ordered in the Judgment on Reparations." (7)

- "take steps to pay KES 57 850 000 for material prejudice and KES 100 000 000 for moral prejudice which the Court ordered as remedies for the violation of the rights of the Ogiek" (8) and "to establish the Fund and the committee for the management of the fund as ordered in the Judgment on Reparations." (9)

- "guarantee full recognition of the Ogiek as an indigenous people of Kenya in an effective manner […] according full recognition to the Ogiek language and Ogiek cultural and religious practices" (10)

- "take steps to ensure publication of the Judgment on Merits and the Judgment on Reparations and their summaries as ordered in the Judgment on Reparations." (11)

- "implement necessary measures be they legislative, administrative and/or any other measures to give full effect to […] the Court's decisions as a means of guaranteeing the non-repetition of the violation". (12)

Kenya has shown also by forced evictions of Ogiek in 2023 that even after the 2022 judgement on reparations it may continue to repeat the violations as if it could justify them domestically.

As Kenya tends to re-interpret how it would implement and comply with its international obligations and African Court's orders by just continuing under new names/modifications to fulfil basically similar domestic laws/policies which led to the violations, without actually correcting them but giving them new domestic justifications, the African Court reminded Kenya in 2025 about "the general principle of international law that a State cannot invoke its domestic laws to justify a breach of its international obligations" (13) and ordered:

- Kenya "to stop and desist from any actions/conduct that may in any way undermine the terms of both the Judgment on the Merits as well as the Judgment on Reparations" (14)

- Kenya "to file, within six months of notification of this Order, a report on the implementation of the Court's decisions to include a clear and specific indication of state of implementation of all the orders issued by the Court in this matter" (15) "the steps being taken and/or planned for the full implementation of all the orders issued by the Court" "to ensure systematic follow up on the implementation". (16)

But now six months will have passed in early June and so far the Kenyan government has not demonstrated advance in implementation

2. African Commission's Decision on Endorois

Where the African Commission decision required Kenya to "Restitute Endorois ancestral land" and recognise their rights (17), their ancestral land has not been restituted and their rights not duly recognised

As Kenya was to "ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle" (18), their access remain restricted in many ways.

As Kenya was to "pay adequate compensation to the community for all the loss suffered" (19), adequate compensation has not been paid.

As Kenya was to "pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve" (20), royalties and employment have been inadequate

As Kenya was to "engage in dialogue with the Complainants for the effective implementation of these recommendations" (21), the effective implementation or dialogue within it have not taken place

As Kenya was to "Report on the implementation of these recommendations within three months from the date of notification" (22), after over 50 years from eviction and over 15 years from African Commission decision on it to be repaired there is very little implementation to report

As ancestral Endorois lands on shores of lake Bogoria and in Mochongoi forest have got acquired or registered to commercial rights and property of others "continued dispossession and alienation from their ancestral land continues to threaten the cultural survival of the Endorois' way of life".(23)

Indigenous peoples' rights are violated if they would "have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands" but their displacement "from those lands has caused special and grave difficulties to obtain food, primarily because the area where" they got forcibly settled "does not have appropriate conditions […] to practice their traditional subsistence activities". (24)

Thus, when "the Endorois were relegated to semi-arid land, which proved unsustainable for pastoralism" which has been crucial part of their own means of subsistence and "no collective land of equal value" for their pastoralist means of subsistence "was ever accorded" to them (25), this violated their rights as it "had a negative effect on the right of the members of the community to a decent life, because it deprived them of the possibility of access to their traditional means of subsistence". (26)

As "in no case may a people be deprived of its own means of subsistence" and as thus also in case of indigenous peoples, they also "have the right […] to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities" (27), also CERD has urged in situations where these rights are threatened by deprivation that:

States have "to prevent the forced displacement" and "define, in consultation with […] Indigenous Peoples whose territories and resources are affected, appropriate measures to ensure the protection of their lands, territories and resources so that they can be secure in the enjoyment of their own means of subsistence and development". (28)

When indigenous lands get registered or acquired to be property according to commercial rights of others, Endorois' "traditional means of subsistence – through grazing their animals – has been curtailed due to lack of access to the green pastures of their traditional land". (29)

As such property rights of other foreign life-heritages in ancestral Endorois lands threatens to deprive the rights of Endorois to their own, self-determined means of subsistence, Kenya has "a duty to evaluate whether a restriction of" such other "property rights is necessary to preserve the survival of the Endorois community". (30)

As far as Kenya has not done even this, the situation remains that "Endorois have the right to freely dispose of their wealth and natural resources" (31) even though Kenya continues to violate this right.

3. Kenyan High Court level and Appeals Court decisions threatening and/or protecting Sengwer

Forced evictions of Sengwer from their ancestral lands and burning of their houses have further continued, violating the 2014 High Court injunction and the 2021 Appeals Court conservatory order which ordered that no new evictions of Sengwer from the places in Embobout where they lived in 2021 shall take place.

From 29 April 2024 onwards over 150 Kenya Forest Service (KFS) guards forcibly evicted the Sengwer (and also some other families) from their homes in Kapkok Glade during few weeks. More than 800 houses were burned or razed to the ground and thus human rights of thousands of people to home, tenure security, adequate living standards, livelihood and education were adversely affected.

On 18-19 February 2026 the Kenya Forest Service (KFS) started again to forcibly evict the Sengwer in Kapkok and Koropkwen glades in Embobut **and continued on 6th March** in Kapkok by burning/destroying altogether 30 Sengwer houses and by arresting 8 Sengwer. Court processes on these cases are now continuing.

Kenya has built conditions to make the forced evictions of Sengwer and violations of their rights to appear as if they could be justified by Kenya's domestic measures, which violate also the CERD recommendations:

CERD observed already in its June 2017 Concluding Observations that "the Sengwer people are [...] forcibly evicted from their traditional forest lands in the Embobut Forest, in violation of a High Court injunction"(32) of 2014. It urged Kenya to "ensure legal acknowledgement of the collective rights of the Sengwer" to their lands "according to customary laws and traditional land-tenure systems" so that projects using "indigenous ancestral land or its natural resources" would need to "obtain the free, prior and informed consent of indigenous communities before implementing such projects." (33)

What Kenya has done since then is the opposite as it not only continues to forcibly evict Sengwer and burn their homes on their ancestral lands but has also demanded domestic Environment and Land Court (ELC) to remove from Sengwer the 2014 High Court protection which CERD required Kenya to respect. Kenya requested its domestic ELC (for which it has given High Court level status) to justify forced eviction of Sengwer from their traditional lands, violating its obligations.

As the Constitution of Kenya recognises ethnic groups' community rights to "ancestral lands and lands traditionally occupied by hunter-gatherer communities" (34) and as Sengwer are presented also in the historical government documents as hunter-gatherers who traditionally occupied Embobut hills' forests and lived there when the colonial government gazetted Embobut as government forest, the Sengwer have requested the court to examine how their constitutional right to such "ancestral lands and lands traditionally occupied by hunter-gatherer communities" (35) has to be respected by Kenya in compliance with its human rights obligations under the UN treaties and African Charter.

But about this how Kenya would respect, protect or implement this constitutional right to such "ancestral lands and lands traditionally occupied by hunter-gatherer communities" (36) which Kenya is also internationally obliged to implement in compliance with its UN and African Charter human rights obligations, neither the court, nor the Attorney General of Kenya in the court said anything about how Kenya's would comply with its constitutional and international obligations on indigenous peoples' ancestral lands or lands traditionally occupied by the hunter-gatherer communities.

The Attorney General noted instead only that as Embobut was "promulgated and declared a national forest and gazetted as such by the colonial administration through Legal Notice No. 26 of 1954" and "then declared a Central Forest vide Legal Notice No. 174" in 1964, "and is therefore protected" as state forest land (37) and that the "claim that Embobut Forest is a community forest, or community land or ancestral land for the Sengwer community is not true" but "the forest was unlawfully invaded and inhabited by […] Sengwer"- even though they had lived there much before any state of Kenya existed. Court judged that the Sengwer do not have "any evidence to show or suggest that the said land had been legally, and procedurally degazetted […] or procedurally and legally alienated to them as the Sengwer community". (38)

As such Kenyan government's statements in domestic courts express what it actually demands to be done within the Kenyan law and justice, they may give a realistic picture also about how it intends to act on its treaty obligations. For this prevailing Kenyan justice it does not matter if Sengwer have traditionally occupied an area as their ancestral land or if the Constitution provides for ethnic groups community land right to such "ancestral lands and lands traditionally occupied by hunter-gatherer communities" which Kenya is obliged to respect, protect and fulfil under its treaty obligations.

In this Kenyan justice which the Attorney General worked to implement and the Environment and Land Court at Eldoret ordered in 2020 to prevail, what is respected as justice is how the lands must be held according to such colonially imposed European models of property and tenure which the colonial laws and registrations ca. 70 years ago ordered.

While KFS has also continued to repeatedly shoot and injure Sengwer in context of armed evictions and finally Robert Kirotich got killed by a gunshot in 2018, Kenya refused to investigate the killing - even when urged to investigate it by Kenya National Commission on Human Rights (KNCHR) and KNCHR-led High Level Independent Fact-Finding Mission to Embobut, carried out with Amnesty International, many institutes, and African Human Rights Commission observer.(39)

As Kenya did not act at all when the KNCHR - which the Constitution set for "ensuring compliance with obligations under treaties"- urged Kenya to investigate the killing, Kenya's means to ensure it complies with its human rights obligations do not function properly. Evidence was available to investigate, "a post mortem […] carried out by the Hospital pathologist

who concluded that Robert Kirotich died from excessive bleeding that was caused by a gunshot wound". Fact-Finding Mission said "the KFS rangers […] in the operation on the said date stand accused for" the death and injury. It urged "independent and swift investigations promised by the Government spokesperson" to the killing of Sengwer. (40)

Why did Kenya refuse to investigate the killing – even though also CERD had in 2017 "urgently called" Kenya to "prevent, investigate, prosecute and sanction acts threatening the physical security and property of the Sengwer" (41) and the EU stopped its Kenya water tower project funding after the Fact Finding Mission's findings on killing and forced evictions?

After Kenya ensured that the killing and KFS use of firearms in context of eviction are not investigated, its Attorney General stated in 2020 at the Eldoret ELC Court with the KFS, that "no complaints have been received about the alleged fatal shooting and injury of Robert Kirotich and David Kosgei Kiptikesi […] and therefore the said incidents did not occur" (42) - even though the post-mortem confirmed Kirotich was killed by gunshot and witness could have been interviewed. It is highly improper for the court to address state's refusal to investigate a killing by judging that "in the absence of any documented evidence of any death, injury or damage to property having been documented with the appropriate Government agencies […] then the Court finds that" the claims on killing and shooting "remain without proof". (43)

This High Court status Environment and Land Court 2020 judgement, which violates Kenya's treaty obligations in various ways was however appealed by Sengwer in Appeals Court, who considered in 2021 that "it is not disputed that the Sengwer community are hunters and gatherers, who have been living mainly in the forest. There is a dispute as to whether members of the community are currently lawfully residing in the forest". (44) For the period to investigate this, the Appeals Court issued "a conservatory order that pending the hearing and determination of the appeal, the status quo in Embobut forest as of today, do remain in force, which means 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". (45)

After that the KFS has still continued to carry out forced evictions, burning Sengwer homes, arresting Sengwer in spring 2024 and in spring 2026. Appeals Court may soon have further hearing/ruling of the matter. Danger of evictions prevails.

II. Problems of Kenya's replies to the CERD on implementation of Concluding Observations' paragraph 30(e)

While Kenya has not actually implemented any of the 3 judicial decisions on Indigenous peoples rights to their ancestral or traditionally occupied lands, it has presented now in January 2026 in its reply to CERD many assumptions on how it could implement them by some measures which it would undertake. But Kenya does not make explicit how exactly the proposed measures would implement those judgements and decisions and as Kenya has also earlier presented different measures as if they would implement the African Court/Commission judgements or decisions but in reality its measures have not advanced the implementation, we analyse here below the problems we see in measures which Kenya proposes:

1. Kenya proposes that "the determination of the National Land Commission of 15 March 2024, directed the Ministries of Lands and Interior to undertake fresh verification and registration of unserved members of the Ogiek community" is "to expedite resettlement in accordance with the judgment of the African Court on Human and Peoples' Rights".(46)

While the Kenyan government claims that this "demonstrates Kenya's commitment to implementing regional judicial decisions concerning Indigenous peoples"(47), it does not in fact demonstrate anything about that how this would implement the concerned regional judicial decisions. Even though Kenya and its law portray the National Land Commission as an independent body which would monitor, control and address land justice related decisions - on historical land injustice, on forced eviction, on compulsory land acquisition, etc. - independently from the colonial inheritance which prevails inside the provisions and structure of the Kenyan law, land registration and administration, in reality however:

- The government can implement the recommendations of the National Land Commission (NLC) as it likes – a bit similarly like the recommendations of the National Human Rights and Equality Commission. So, rather than allowing the NLC to change what the government actually does with/to the land, the government uses NLC recommendations to present state's decisions as if their justification would have been independently monitored or verified by the NLC involvement.

- Kenya can follow the colonial heritage how locally adapted indigenous African ways to hold the land can be displaced/ replaced by colonially imposed European ways to hold/control lands commercially as registered/acquired property

While the NLC is constitutionally named as an independent organ to correct the historical land injustices but is in practice constituted and built to function only in ways which cannot change such colonially inherited structures of land registration, land laws or case law which the government prefers to maintain, this leads to such severe problems that:

- The existence of NLC is used by the government and courts to justify why they don't need to correct colonially inherited unjust structures of law and justice, as the mandate and task to address such historical injustice belongs constitutionally to the NLC as independent - not to the government or courts, who claim they must therefore refuse from implementing obligations, tasks or requests which require addressing historical injustice in the prevailing law or land governance.

- When the state or domestic courts refuse to address colonially inherited injustice within the prevailing law, case law or land registration/governance and refer such issue to belong to the mandate of the independent NLC, the NLC procedures as independent body allow it to leave such matters unaddressed - and particularly so as the Constitution does not mandate the NLC to correct Kenyan laws and their implementation to comply with Kenya's treaty obligations.

So for example the Environment and Land Court at Eldoret judged in 2020 that as its judgements apply the existing law and do not judge how law could be wrong, it cannot determine whether the takeover of the Sengwers' ancestral Embobut Forest away from them into a public forest through the colonial law may have violated rights of Sengwer, but that:

”the Sengwer community, should consider pursuing their claim before the National Land Commission” who can ”initiate investigations [...] into present or historical land injustices, and recommend appropriate redress, should they consider the proclamation of Embobut Forest as a forest reserve in 1954, and its subsequent gazettement as a central forest in 1964, took away their ancestral land”. (48)

According to this court advice the Sengwer made their claim (49) to the NLC with a vast documentation how Embobut had been identified as ancestral Sengwer land also by the colonial rule before it captured Embobut to be state forest.

But after the claim was in process for 7 years, the NLC gave a public reply to say only that the issue should be first decided in the court process of Eldoret ELC no.15 of 2013 - where the court however had already just said it can be decided only by the NLC, who anyway said the opposite, namely that:

”The claims by the Claimants touching Embobut Forest and Kabolet Forest are sub judice and res judicata by dint of the court decisions in Eldoret ELC no.15 of 2013 […] and the commission will therefore down its tools and not proceed to make any determination on the two public forests”. (50)

Similarly, while according the Land Act, the forced evictions and compulsory acquisitions should be first prepared, processed and decided by the National Land Commission, in practice the KFS has repeatedly carried out forced evictions and burning of homes of Sengwer without required NLC process. Thus government's use of the advice from the NLC - whose mandate is not to determine how state is to implement its treaty obligations and whose advise the state may apply as it likes - may not be effective to get Kenya to comply with its treaty obligations or to implement regional court decisions.

2. Kenya also ”highlights the enactment of the Community Land Act, 2016 (Cap. 11C), which requires community assemblies and land management committees to obtain the consent of members before any dealings in community land. This statutory framework embeds the principle of free, prior and informed consent (FPIC) into Kenyan law, ensuring that communities are consulted and give their consent before land transactions or allocations are undertaken.” (51)

But what happens to indigenous communities and their internationally recognised rights under the Community Land Act, is very different from that how their Free Prior and Informed Consent (FPIC) is required to be sought and respected under the international law, because:

Indigenous communities have a right to their FPIC to be required for any (state/corporate/other) measures which may affect their rights on those areas or the lands or resources, which these communities have traditionally occupied or used.

Under the Community Land Act (CLA) on the contrary Kenya mandates any interest group with shared ”socio-economic or other similar common interest” - including thus also any non-indigenous business interest groups - to apply indigenous ancestral lands to become registered as any such socio-economic (business/other) interest group's 'community land'.(52)

As the registrar is to consider such applications ”for registration and may issue a certificate of registration in the name of the community […] subject to such conditions, limitations or exemptions as the registrar considers appropriate” (53), the CLA sets for the registrar no obligations to ensure that indigenous communities' rights to their traditionally occupied lands would be respected or protected when such land gets registered in some ”socio-economic” interest group's name.

Any ”socio-economic” (business or other) interest group - no matter whether indigenous or not - would be registered as a ”community” so that **”upon registration the community** [...] **shall —** (a) **be a body corporate”** to own the land ”capable of [...] acquiring, holding, charging or disposing of movable or immovable property” and doing anything “which may lawfully be done by a body corporate” (54) - also by using indigenous ancestral land as its corporate property to exploit.

No FPIC of any indigenous community of that area is required for such registration of its ancestral land to become a corporate property of others.

As Kenya told the CERD that CLA requires ”community assemblies and land management committees to obtain the consent of members before any dealings in community land”, it means that only the consent of members of such ‘socio-economic’ interest group who gets a land registered as its corporate property is asked for ”dealings in community land”. (55)

Some members of such group may be indigenous but that depends on what kind of groups happen to apply ownership of the land and which group's application the registrar may approve. Indigenous community can of course - in theory - try to make a competing claim before the registration so as to get its ancestral land registered as its own corporate property.

But ancestral land is not corporate property and CLA has no means to ensure that indigenous peoples' FPIC or rights to their traditionally occupied lands get respected or protected in that how their ancestral/traditional lands get registered.

3. Kenya claims also that the Forest Conservation and Management Act, 2016 and of the Mining Act, 2016 would "operationalize FPIC in sectors that directly affect Indigenous communities" (56) but these Acts do not secure that indigenous communities' FPIC would be respected in measures by which these Acts allow indigenous communities to be affected. (Kenya has earlier claimed also on its other Acts and policy measures that they would respect indigenous communities' FPIC, like e.g. if they are registered owners of land, Land Act requires their consent for acts that affect their property)

4. Kenya claims also that: "The Endorois Biocultural Protocol, developed in 2023, affirms the community's rights to sustainable biodiversity management and benefit sharing, while safeguarding access to sacred sites for cultural and religious rites. These measures, together with consultations facilitated by the National Land Commission, are applied to ensure the participation and FPIC of the Endorois, Ogiek and Sengwer communities in the implementation of the decisions of the African Commission, the African Court on Human & People's Rights, and the High Court of Kenya." (57)

Good if the government would start to actually respect the Endorois Biocultural Protocol and other Biocultural Community Protocols (BCPs), which many indigenous communities in Kenya have created. **BCPs could help "to ensure the participation and FPIC of the Endorois, Ogiek and Sengwer communities in the implementation"** of the court decisions on their rights **if Kenya would duly respect indigenous communities' Biocultural Community Protocols**, their traditional knowledge, innovations and practices of their customary sustainable use/conservation of their biocultural diversity.

But unfortunately Kenya's new "Environmental Management and Co-ordination (Access to Biological Resources and Benefit Sharing) Regulations" (2025) does not respect even what is most crucial for the integrity of the BCPs and for equal rights of indigenous conservation of biocultural diversity, because:

a) While these Kenya's Regulations admit that ""Community Protocols" means a broad range of practices or procedures […] developed by indigenous people or local communities in relation to their traditional knowledge, territories and associated biological resources"(58) and while its obligations under the Nagoya Protocol indeed require accordingly that Kenya shall support **"the development by indigenous and local communities** [...] **of Community protocols"**(59), then:

Why does Kenya still order in its Regulations on the contrary that not indigenous communties but "**each County Environment Committee shall,** in consultation with indigenous and local communities in the County**, develop and submit to the Authority community protocols** for user engagement of biological resources"(60)?

Indigenous communities must have rights and authority as authors of their local traditional knowledge and of their community protocols. Such rights and authority can not be hijacked into hands of County Committees or national Authorities.

b) It has to be the right of indigenous communities to decide how their FPIC has to be required for measures which affect their biocultural life-heritage of their traditionally occupied indigenous community habitats or their customary sustainable use of their traditional habitats' biological resources.

Why do Kenya's Regulations order instead state's "National Competent Authority" to determine whose consent would be required and how for the access to the biological resources in the lands and habitats, where indigenous communities have traditionally lived?

The regulations order that a National Environment Management Authority , a bureaucrat called **"Competent National Authority" "shall develop a community biodiversity register comprising of indigenous and local community practices** for conserving biodiversity and uses of various biological resources" (61) and shall establish measures for "monitoring and tracking the status and the components of biological resources […] associated with traditional knowledge". (62)

"Any person who intends to access biological resources […] associated with traditional knowledge in Kenya shall apply to" (63) this **Competent National Authority** who **"shall guide the applicant on the relevant biological resource providers from whom Prior Informed Consent is to be obtained."** (64)

As this national bureaucrat will decide which communities' "Prior Informed Consent is to be obtained" to allow outsiders' to gather and use areas' biological resources, what are the criteria for this whom such Authority selects to be "the relevant biological resource providers from whom Prior Informed Consent is to be obtained"?

As the "resource provider" whose consent is required includes also "indigenous community and local community, where the resource is on land to which they have a right" or "where they are the holders of the biological resource associated with traditional knowledge" (65), how is the 'Competent National Authority' then to assess whose claims of being "holders" of area's resources are valid under the international law to have an established right to grant access to the area ?

If there are several communities - including some more mainstream communities – who claim themselves as holders of the area and its resources and some of them can show registered land right to the area, whose PIC would the Authority guide the applicants to search under Kenya's regulations?

Such Authority appears being authorised to identify "from whom Prior Informed Consent is to be obtained" according to what criteria such Authority may impose. If an indigenous community has ancestrally/ traditionally used the area, but has no registered right to the area, what would prevent the Authority from guiding the applicant to obtain the Prior Informed Consent from the registered owner of the land rather than from the indigenous community whose ancestral land it is?

Under the international law it is on the contrary the right of each indigenous community who traditionally lives in an area to require its FPIC to anything which affects its habitat's biological resources even when the "Competent National Authority" would not guide the applicant to search such community's FPIC. Kenya's regulations violate this right to FPIC.

5. Regarding Kenya's statement that "the Government facilitated the registration of the Endorois Welfare Council", it is true that Kenya approved to register "the Endorois Welfare Council" ca. 20 years ago. (66) But when Kenya says that "benefit sharing arrangements have been initiated with the Baringo County Government to ensure that the Endorois community derives equitable benefits from tourism and natural resources around Lake Bogoria" (67) one may wonder how it has been measured what is assumed to be "equitable"?

III. Discrimination against non-registered indigenous customary land rights and indigenous conservation

What seems common to all above addressed Kenya's failures to implement judicial decisions on rights of Ogiek, Endorois and Sengwer as well as to its repeated failure to apply their FPIC or to recognize indigenous BCPs, is Kenya's pervasively all-encompassing discrimination against non-registered customary indigenous African ways to sense, hold, use and sustain lands, forests and their life's biocultural diversity – even when these are more sustainable than the registered ways.

The Kenyan state, law and statutory justice (/caselaw) system were created, built and structured only ca. 130 years ago to take over the indigenous African land and its indigenous African diversity of life by making them ruled and registered to be held, used and controlled by European ways of holding the land for European type of purposes (as commercially exchangeable property, raw material for industry, etc.). The implementation of the law in Kenya has been thus deeply structured to undermine non-registered indigenous African customary rights to hold, use and conserve lands, forests and their life's biocultural diversity. The laws of 1902 and 1915 Crown Land Ordinance subordinated all customary rights to land under the imposed land ownership rights and "nullified all legal right to land ownership for the native Africans". (68)

While forests had survived better as held by indigenous communities' customary laws and tenures in customary trust from generation to generation for centuries/millennia, forests got destroyed in few decades as taken under European modes of statutory/registered property or tenure and "colonial policies relating to land ownership and resource use altered the traditional norms of native communities and their relationship with the forest ecosystems they inhabited".(69) As massive tracts of most fertile, biodiverse, forested High Lands of Kenya were cleared to establish large-scale European coffee, tea and other cash-crop and exotic tree plantations, timber concessions, etc., thus over 40% of Kenya's montane forest cover was lost during ca. 60 years colonial laws and further 26 % after that has been lost under the colonially imposed and inherited European forms of statutory/registered land titles and tenures. (70)

The more the African lands and forests have been taken under the colonially imposed European official, registered modes of land and forest tenures and management and kept away from the locally adapted indigenous African ways to understand, hold, use and sustain the forest, the more their indigenous African biodiversity has got undermined.

In East Africa at least 75 % "of tropical forest in East Africa has been lost since the start of the 20th century" and "this forest degradation and loss continues […] despite these forests being under government and state protection": Even as "75–80% of African forests are under state protection, this has not seemed to stop accelerations in forest loss."(71)

As "deeply rooted historical patterns where state institutions, emerging from colonial systems, have set a precedence for forest degradation while sidelining traditional forest management practices", what is needed instead, is "ensuring genuine local stewardship and incorporating traditional practices in use and management of forest resources", (72) because:

- Indigenous peoples' traditional cultural practices have sustained the regenerating diversity of life of the areas which their life has influenced often better than how the mainstream life has sustained the diversity of life and genetic resources of the areas which mainstream life has influenced.

- International law has recognised indigenous communities' rights to protect their human rights and biodiversity in their communities' traditionally occupied/used lands and habitats not only according to what a state has registered or statutorily enacted on such lands but equally also according to how these communities have traditionally occupied, held or used such lands in their life-heritages in ways which protect human rights and Earth's biodiversity in their habitat.

Kenya has to secure indigenous peoples' "right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources" according to such their traditional cultural practices and support "such conservation and protection, without discrimination" (73) according to how it has conserved diversity of life.

As Kenyan state, law and case law appear being built and structured in ways, which do not enable Kenya to treat equally the ways how human rights and biodiversity can be protected by indigenous people's non-registered customary rights, tenures and indigenous significance that sustains their habitats' indigenous diversity of life under customary law, thus:

The problems of Kenya's follow-up reply to CERD's Concluding Observations' paragraph 30 (e) and of its non-implementation of the judicial decisions on indigenous people's rights derive from its lack of respect for internationally recognised "functions, competencies and responsibilities of customary law" in protection of human rights and biodiversity and from the lack of harmonizing these "with the ordinary justice system, ensuring alignment with international human rights law" (74) This lack CERD has correctly requested Kenya to correct in Concluding Observations' paragraph 30 (b).

Also the Supreme Court of Kenya has noted that an assumption that "customary rights were extinguished upon registration of land" "was a jurisprudence borne out of colonial land tenure policy" (75) which did not understand the African land tenure. (76) And the Constitution of Kenya has recognised the category of customary community land right to "ancestral land and land traditionally occupied by the hunter-gatherer communities" as categorically distinct from those categories of community land whose content is derived from registration or statutory determination. (77)

As the content of this Constitution's community land right category of "ancestral land and land traditionally occupied by the hunter-gatherer communities" comes from that how the land has been traditionally held and customarily inherited/ transmitted in ancestral community custom or life-heritage to the next generations, the Supreme Court has judged that:

Regarding the obligation "to give effect to rights under African customary law" insofar as they have "already been recognized by the Constitution" (like also ancestral/ traditionally occupied land), such rights "would have to be recognized somehow" also under statutory law in such "fluidity and complexity of these rights" which "could not be noted on the register" (78) or when "the enjoyment of the rights is dependent on the fulfilment of certain conditions unique to the group unit" or "customary law does not vest "ownership" in land in the English sense" (79) including "such rights, interests […] in respect of the land as may, under the African customary law […] be vested in any tribe, group, family". (80)

Kenya could start to implement its constitutional and international obligations to respect, protect and fulfil indigenous communities' land rights to "ancestral land and land traditionally occupied by the hunter-gatherer communities" also according to the following provisions of its existing statutory law of its Community Land Act and Land Registration Act:

Under the Community Land Act "the rights of a registered community as proprietor" are "subject to […] such overriding interests as may affect the land and are declared by section 28 of the Land Registration Act" (81) under which "all registered land shall be subject to the […] overriding interests" such as "customary trusts" and "any other rights provided under any written law"- including also UN human rights treaties - even "without their being noted on the register".(82)

According to the Supreme Court, registered owners' obligations to respect "customary trusts" as "overriding interests" are logically "traceable to such "rights, interests, or other benefits under African customary law"" (83) how land has been held, cultivated or used under customary trust as "not subject to interference or disturbance such as by eviction". (84)

Registered rights do not "relieve a proprietor from any [...] obligation to which the person is subject to as a trustee". (85) One "can prove the existence of […] a customary trust" also by "rightful possession or actual occupation of the land".(86)

While registration and statutory measures regarding lands concern that how justice over such lands can be standardised/ generalised in national terms, the diversity of meanings which constitute customary trust are based on the contrary on how each area or environment and diverse life with which people are adapted to live there, are unique - designing it as habitat held in customary trust, carrying area's local diversity of life to next generation.

As also Biocultural Community Protocols (BCPs) express the unique local conditions how area's life can be sustained as carried to the next generations, they also help to demonstrate the customary trust how habitat can be held and trusted.

How indigenous communities are to be allowed to live in their habitats was also the legislative intent of the CBD obligations when Rio Conference recognised indigenous communities role "in environmental management" and the need to manage "the interactions between the components of biodiversity and their sustaining habitats" (87) and recognised:

Indigenous people's "rights to utilization and protection of their habitats on a sustainable basis" (88) to "ensure sustainable utilization of biological resources and conservation of [...] the traditional forest habitats of indigenous people" (89) – which rights on their habitat need thus to be respected in order to respect their indigenous knowledge, innovations and practices of in situ conservation (90) and to "'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use". (91)

Thus also in ensuring such "access to genetic resources" which is "taking into account all rights over" "any material of plant, animal, microbial or other" living resources (92) CBD obliges Kenya to respect Kenya's such "obligations […] deriving from any existing international agreement" whose exercise would not "cause a serious damage or threat to biological diversity"(93), including its obligations to respect and protect indigenous people's rights to customary sustainable use of biological resources – and particularly where their access to plant, animal, microbial or other living resources belongs also to their habitats' natural wealth as their own means of subsistence of which they shall be "in no case" deprived. (94)

But while on access to “genetic resources” the CBD obliges states to be “taking into account all rights over” ”any material of plant, animal, microbial or other” living origin (95), Kenya orders instead, that ”Genetic Resource shall mean information contained in any genetic material or their derivative” under the ”Mutually Agreed Terms” (96) which it imposes communities to agree, depriving indigenous communities of diverse rights they have to genetic resources under the CBD.

As Kenya shall be ”ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources” (97), they have a constitutionally established right to hold their **”ancestral lands or lands traditionally occupied by hunter-gatherer communities”** (98) **in customary trust, which constitutes** over registered rights an **”overriding interest”** (99) to control the access to resources of their traditional habitats by their customary law and tenure.

Thus in the implementation of its Nagoya Protocol obligations, Kenya ”shall in accordance with domestic law” on customary trust on such ancestral lands observe ”indigenous and local communities’ customary laws, community protocols and procedures […] with respect to traditional knowledge associated with” (100) ”any material of plant, animal, microbial or other” living resources (101) and “shall […] not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities.” (102)

Notes and references

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24. African Commission decision on Endorois (276/2003), paragraph 285
25. African Commission decision on Endorois (276/2003), paragraph 286
26. African Commission decision on Endorois (276/2003), paragraph 287
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28. CERD/C/VEN/CO/22-24, paragraph 23
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32. CERD/C/KEN/CO/5-7 paragraph 19
33. CERD/C/KEN/CO/5-7 paragraph 20
34. Constitution of Kenya, article 63.2 d (ii)
35. Constitution of Kenya, article 63.2 d (ii)
36. ibid
37. Environment and Land Court at Eldoret, David Kiptum Yator & others vs. Attorney General & others, 13th May, 2020, ELC Petition no 15 of 2013 as Consolidated with ELC Petition no.3 of 2018 under Court Order of 22 May 2019, section 5 a
38. ibid, section 7 c
39. High Level Independent Fact-Finding Mission to Embobut Forest 2018, paragraphs 67-68
40. ibid
41. CERD/C/KEN/CO/5-7 paragraph 20
42. Environment and Land Court at Eldoret, David Kiptum Yator & others vs. Attorney General & others, 13th May, 2020, ELC Petition no 15 of 2013 as Consolidated with ELC Petition no.3 of 2018 under Court Order of 22 May 2019, section 5 k

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