

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS (KNCHR)



THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

SUBMISSIONS TO THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES ON ACTIONS TAKEN OR PLANNED RELATED TO THE RECOMMENDATIONS OF THE PERMANENT FORUM, IMPLEMENTATION OF UN DECLARATION ON INDIGENOUS PEOPLES AND THE OUTCOME DOCUMENT OF THE WORLD CONFERENCE ON INDIGENOUS PEOPLES.

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Recommendations of the UN Permanent Forum on Indigenous Issues

At its 2016 session, the Permanent Forum recognized “*the contributions of national human rights institutions in the promotion and protection of human rights, including the rights of indigenous peoples, and welcomed their participation in future sessions of the Forum*”.¹

- a) The theme of the 2016 session was “*Indigenous peoples: conflict, peace and resolution*” (paragraphs 49-64). Please provide information on how your Human Rights Institution is working on issues related to conflict, peace and resolution for indigenous peoples. Where possible, please include information on the situation of indigenous women in your responses.
- The Kenya National Commission on Human Rights (KNCHR) is planning to conduct Alternative Dispute Resolution (Mediation) between forest dwelling communities (The Ogiek of Chepkitale and Sengwer of Mau Forest) who lay claim, as their ancestral lands and current homes, some areas that have since been gazetted forest areas.
 - Since 2014, KNCHR has held several consultative meetings with the National Land Commission, The Kenya Forests Service (KFS), and respective County Governments and Indigenous community representatives in a bid to manage potential conflicts between the communities and KFS.
 - Further, KNCHR is part of a legal team that is petitioning the judiciary to give an interpretation to the rights of members of the Ogiek community who are being threatened with permanent eviction from the ancestral lands in Chepkitale area of Mt. Elgon in Bungoma County. The community has faced repeated evictions the most recent being during the rainy season in July 2016 when their homes and properties were burnt and destroyed. Many still live in caves where they escaped to date and some have since moved back and started reconstructing their homes, albeit with the attendant insecurity.
 - The KNCHR shall continue to receive, analyse and process, including conducting investigations on reported Human Rights violations by the indigenous communities (**Investigations have so far been conducted on violations of the rights of the Sengwer of Embobut forest and the Ogiek of Chepkitale, Mt.Elgon**
- b) The 2017 session will include a focus on indigenous human rights defenders. Please provide information on the work of your commission/institution in relation to indigenous human rights defenders?
- The KNCHR has through a participatory approach developed a Human Rights Defenders policy and will advocate for its adoption by the state.
 - The Commission has so far trained and thereby enhanced the capacity of a Human Rights Defender from Sengwer Ward to effectively defend the rights of the community.

¹ Permanent Forum on Indigenous Issues: Report on the fifteenth session (E/2016/43-E/C.19/2-16/11), para 23

- Further, KNCHR plans to target, profile and train Human Rights Defenders from Indigenous communities. Frequent meetings will be held with the HRDs and relevant duty bearers to discuss existing challenges and chart the way forward for effective protection of rights.
- In addition to the above, KNCHR, during its public inquiry on Insecurity in the North Rift and Coast regions of Kenya in 2015 (Findings yet to be published) received representations and petitions from Human Rights Defenders of Indigenous communities.

2. Promoting and protecting indigenous peoples' rights

The UN Declaration on the Rights of Indigenous Peoples was adopted in 2007. To mark the tenth anniversary, and assess gains and achievements, please provide further information on the following:

a) What are the main activities carried out by your institution/commission at the national and/or regional level to implement the UN Declaration on the Rights of Indigenous Peoples?

- Training/ holding public as well as community engagement forums for the indigenous people on their rights to enhance public awareness on their rights and empower them to demand the rights.
- Conducting strategic Public Interest Litigation (PIL) to claim and assert the rights of indigenous people (the Ogiek community) to their ancestral lands as protected under Article 10 of the Declaration. In particular, the PIL seeks to forestall threatened eviction of the Ogiek from Chepkitale.
- Participating in cultural activities organized by the indigenous communities
- Providing equal employment opportunities and ensuring deliberate efforts to target indigenous persons in recruitments at the Commission

b) What are the main constitutional, legislative and/or administrative developments taken or planned to promote and/or implement the UN Declaration on the Rights of Indigenous Peoples in your country? Has your institution/commission been involved in these processes, and if so how?

The Constitution of Kenya which was promulgated in 2010 provides a progressive framework for the protection of the rights of minorities and marginalized communities in Kenya. Although the constitution does not make specific reference to indigenous people, these provisions of the constitution highlighted herein accord protection to indigenous people and coincide with the principles set out in the United Nations Declaration on Indigenous People.

Article 10 of the Constitution which binds all public and state officers and all state organs outlines participation, accountability, non-discrimination, social justice, inclusiveness, protection of the marginalised, sustainable development as principles which must be upheld in development and delivery of services.

Article 21 of the Constitution of Kenya requires state organs to observe, respect, protect, promote and fulfil the rights in the Bill of Rights and requires the state to take legislative, policy or other administrative measures to ensure progressive realization of socio-economic rights protected under article 43 which include the right to the highest attainable standards of health, the right to education, the right to accessible and adequate housing and to reasonable standards of sanitation, the right to be free from hunger, the right to social security and the right to education. The implementation of these rights lies with County governments which are supposed to promote and protect the interests and rights of minorities and marginalise communities when providing socio-economic services.

Article 27 of the Constitution of Kenya guarantees all persons the right to equality and prohibits discrimination on grounds of ethnic or social origin, belief and culture.

Article 44 protects the right of every person including indigenous people to use the language and participate in the cultural life of the person's choice. The article further states that a person belonging to a cultural or linguistic community has the right, with other members of that community to enjoy the person's culture and use the person's language.

Article 56 of the Constitution upholds the rights of minorities and marginalised groups and obligates the state to put in place affirmative action programmes designed to ensure that minority and marginalised groups:

1. Participate and are represented in governance and other spheres of life;
2. Are provided special opportunities in educational and economic fields;
3. Are provided special opportunities for access to employment;
4. Develop their cultural values, languages and practices; and have reasonable access to water, health services and infrastructure.

The Constitution under Article 260 in its definition of marginalised communities includes an *'indigenous community that has retained and maintained its traditional lifestyle and livelihood'*.

The KNCHR is mandated under Articles 59 and 249 of the Kenyan Constitution to ensure the promotion and protection of human rights and secure the observance of principles outlined in Article 10. In this endeavour, the Commission has the power to receive and investigate complaints of alleged human rights abuses, to seek appropriate redress for the violations, to educate the public on their rights, to research and advise the government on their human rights obligations and to ensure state compliance with regional and international human rights treaty obligations.

In addition to the rights provided for under the Bill of Rights, the Constitution lists ancestral lands and lands traditionally occupied by hunter-gatherer communities as community land, a form of landholding tenure recognised in Kenya. Kenya has further enacted the Community Land Act, 2016 which provides for the framework for registration and management of community land.

c) Has your institution/commission been engaged in the process for the Universal Periodic Review, and the work of the special procedures and treaty bodies? If so, did this include specific reference to indigenous peoples?

Yes. The Kenya National Commission on Human Rights has a Constitutional mandate to ensure state compliance with Regional and International Human Rights Treaty and Convention obligations. In ensuring state compliance, the Commission lobby's for the ratification of Regional and International Human Rights Treaties and Conventions, researches on the status of implementation of various Conventions and Treaties, engages with Treaty Bodies and Committees, monitors and advises the state on compliance with recommendations/concluding observations of Treaty bodies and Committees.

The commission engages with Treaty Body Mechanism and the Universal Periodic Review through submission of Alternative Reports on the status of implementation of treaty and convention obligations as well as participating in the physical review of Kenya's Periodic Reports or National Reports when being considered by the Treaty body Mechanisms.

The Commission has and continues to champion for the rights of indigenous peoples within its Alternative Reports and urges the government to implement both legislative and administrative measures geared towards the protection of rights of indigenous people. The table herein below captures some of the issues raised and recommendations given by the Commission to Treaty Body Mechanisms in relation to Indigenous Peoples' rights:

No	Treaty Body Mechanism	Report under consideration	Issue	KNCHR's Recommendation to Treaty Body Mechanisms and UPR concerning Indigenous Peoples' Rights
1.	Committee on the Rights of the Child	Combined Third to Fifth Periodic Report reviewed on 21 January 2016	Denial of nationality and access to birth registration documents to children belonging to marginalized or indigenous groups. Consequently this has affected the ability of such children to access education as school enrollment is pegged on presentation of birth registration documents.	<p>The state should implement the decision of the African Committee on the Rights and Welfare of the Child in the case of Institute for Human Rights and development in Africa and Another (on behalf of Children of Nubian Descent in Kenya) versus Kenya which recommended that Kenya;</p> <ul style="list-style-type: none"> • Take legislative, administrative and other measures to ensure children of Nubian descent in Kenya who are stateless can acquire nationality and proof of such nationality

No	Treaty Mechanism	Body	Report consideration under	Issue	KNCHR's Recommendation to Treaty Body Mechanisms and UPR concerning Indigenous Peoples' Rights
					<ul style="list-style-type: none"> Implement its birth registration system in a non-discriminatory manner
2.	African Commission on Human and Peoples' Rights	Combined Eighth to Eleventh Periodic Report of the state reviewed in April 2015	Discrimination of women from indigenous communities in terms of access to basic needs and services	The state should take measures to ensure that indigenous peoples' specific needs related to land, health, education, employment are fulfilled. In addition the state should ensure that affirmative action policies and programs adopted should effectively and adequately benefit indigenous communities	
			Violence suffered by indigenous communities as a result of inter-communal violence and forced evictions	The state should take measures to protect indigenous peoples and ensure their security, investigate and act upon cases of harassment, assault, violence and forced evictions	
			Implementation of the African Commission on Human and Peoples' Rights decision in the case of <i>Center for Minority Rights Development versus Kenya</i> concerning the right of ownership and restitution of ancestral land to the Endorois Community	The state should implement the Endorois decision	
			Political participation of indigenous communities	The state should ensure political participation of indigenous communities in all arms of government	
3.	Committee on Economic Social and Cultural Rights	Second to Fifth Periodic Report of the state reviewed on 25 th and 26 th February 2016	Implementation of the decision of the African Commission on Human and Peoples' Rights in the case of <i>Center for Minority Rights Development versus</i>	The state should put in place measures to ensure the African Commission Endorois Decision is fully implemented	

No	Treaty Mechanism	Body	Report consideration under	Issue	KNCHR's Recommendation to Treaty Body Mechanisms and UPR concerning Indigenous Peoples' Rights
				<i>Kenya</i> concerning the right of ownership and restitution of ancestral land to the Endorois Community	
4.	Universal Review	Periodic	Kenya's Second UPR National Report reviewed by the UPR working group during the 21 st session of the Human rights Council between the 22 nd and 27 th January 2015	Forced eviction of indigenous communities from their ancestral lands. In some cases the evictions are carried out in the face of court orders stopping the eviction	<ul style="list-style-type: none"> • The state should ratify the ILO convention 169 on Indigenous and Tribal Peoples • The state should take steps to implement the United Nations Declaration on the Rights of Indigenous People • The state should enact the Community Land Bill (which is now law), the Eviction and Resettlement Procedure Bill. • The state should fully implement the <i>Endorois decision</i> and the Prevention, Protection and Assistance to Internally Displaced and Affected Communities Act.

d) Please provide information on any activities and programmes that your institution/commission carries out or plans to that are specific to indigenous peoples.

- Strategic Public Interest Litigation to assert the land and other rights of the Ogiek of Mt.Elgon;
- Alternative Dispute Resolution on land rights of the Sengwer and Ogiek communities;
- Investigations on violation of rights of the indigenous communities;
- Public forums to enhance legal and human rights awareness (with specific emphasis on the Community Land Act 2016, Mining Act 2016); and
- Trainings/community engagement forums with Traditional Justice Mechanism actors within the indigenous communities to promote the infusion of human rights principles and standards in their justice mechanisms

e) Has your institution/commission been engaged in protecting the rights of indigenous peoples, with particular reference to their lands, territories and resources?

The Commission has been engaged in protecting of rights of indigenous people's to land, territories and resource through three key strategies

1. **Complaints handling, investigations &Redress-** the commission has a constitutional mandate to 'receive and investigate complaints on alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated.' Amongst the complaints received and investigated by the Commission includes the harassment, arrest and forceful eviction of indigenous populations from ancestral lands. The Commission is currently investigating a complaint from the Sengwer Community concerning their forceful eviction from the Embobut Forest (which they claim to be their ancestral land) by Kenya Forest Services. The investigations are being carried out with the aim of establishing the human rights situation with respect to the complaint lodged and making recommendations to the state on how best to protect the rights of indigenous people. The commission will use the findings to continue advocating for the endorsement of the United Nations Declaration on the Rights of Indigenous People and ratification of the ILO Convention 169 on Tribal and Indigenous People. The commission is currently engaged in a PIL (to be filed in January 2017 to assert the rights of the Ogiek Community to their ancestral lands in Chepkitale area of Mt. Elgon)

In addition to the above, the Commission has held consultative meetings with the National Land Commission and the Kenya Forests Service on securing the ancestral land rights of the Ogiek and Sengwer community members

2. **Advocating for law reform-** the Commission has been advocating for the legal and policy reform toward the recognition and protection of indigenous land rights. In this endeavour the Commission has been involved in the review of the Community Land Bill and pushing for its enactment into law. The Community Land Act which was enacted in August 2016

provides for the framework of protection of community land which includes ancestral claims to land by indigenous community. The act further provides for the establishment of appropriate community governance structures, the management of natural resources and investment on community land and the settlement of disputes relating to community land.

3. **Supporting the Implementation of the African Commission on Human and Peoples' Rights decision in the Endorois Case-** the Endorois community filed a communication before the African Commission on Human and Peoples' Rights seeking restitution of land including their right to dwell on access and benefit from their traditional lands. The Commission in finding that Kenya has violated the African Charter on Human and Peoples' rights recommended that Kenya pay adequate compensation to community for loss suffered and allow the Endorois community access to Lake Bogoria. The state in an attempt to implement the decision of the Commission has formed a taskforce which includes both the Commission, state and non-state actors. The taskforce is currently compiling its report to present to the President for further action.

3. Follow up to the World Conference on Indigenous Peoples

The UN organized the First World Conference on Indigenous Peoples in September 2014. At the World Conference, Member States made a number of commitments that are of relevance to human rights institutions. Please provide information on measures taken or planned by your institution to support the following:

- a) **To develop and implement national action plans, strategies or other measures, where relevant, to achieve the ends of the Declaration, in cooperation with indigenous peoples, through their own representative institutions;**²

The KNCHR, National Gender Commission (NGEC) and National Lands Commission together with Indigenous Persons' representatives and relevant governmental agencies are in the process of developing a National Action Plan to implement Declaration.

- b) **To intensify efforts, in cooperation with indigenous peoples, to prevent and eliminate all forms of violence and discrimination against indigenous peoples and individuals, in particular women, children, youth, older persons and persons with disabilities, by strengthening legal, policy and institutional frameworks;**³

KNCHR together with other stakeholders are working on Article 100 (of the Constitution of Kenya) Legislation which provides for Affirmative Action for political representation of Minorities, women, Youth and Persons with Disabilities (PWDs)

In addition is civic education amongst indigenous persons.

- c) **To establish at the national level, in conjunction with the indigenous peoples concerned, fair, independent, impartial, open and transparent processes to acknowledge, advance and adjudicate the rights of indigenous peoples pertaining to lands, territories and resources.**⁴

² A/RES/69/2, para 8.

³ Ibid, para 18.

⁴ Ibid, para 21.

- KNCHR participated in the formulation of both the Community Lands Act, 2016, Mining Act 2016 and advocated for the establishment of the devolved system of government and the National Lands Commission.
- Alternative Dispute Resolution is also a feature of our Constitution and KNCHR also seeks to infuse traditional justice mechanisms with compliance with international human rights standards and gender equity.