Mandates of the Special Rapporteur on the rights of indigenous peoples; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context and the Special Rapporteur on the situation of human rights defenders

REFERENCE:
AL KEN 3/2020

19 August 2020

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the rights of indigenous peoples; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context and Special Rapporteur on the situation of human rights defenders, pursuant to Human Rights Council resolutions 42/20, 37/8, 34/9 and 43/16.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the evictions of some 100 indigenous Ogiek families from the eastern Mau Forest and the demolition of some 28 Sengwer properties in the Embobut Forest by the Kenya Forest Services in June and July 2020. We have furthermore received information indicating lacking progress in the implementation of the 2017 African Court on Human and Peoples' Rights judgement recognising the Mau Forest as the ancestral land of the Ogiek people**.

The Ogiek are an indigenous forest community of hunter-gatherers living in the Mau Forest in the Rift Valley, while the Sengwer traditionally occupy the Embobut Forest along the slopes of the Cherangany Hills and live from hunting,gathering and bee keeping. Both the Ogiek and the Sengwer communities also engage in subsistence agriculture and certain livestock keeping. Indigenous peoples in Kenya have faced repeated evictions from their traditional lands, while their forests have been gazetted as public lands for conservation or allocated to other non-indigenous communities who have used it for commercial purposes, including logging.

Communications regarding previous forced evictions of the Ogiek and Sengwer peoples and attacks against their community leaders were sent to the Government of Kenya on 10 January 2018 (UA KEN 1/2018), 26 April 2017 (UA KEN 7/2017), 13 January 2017 (UA KEN 1/2017), 4 May 2016 (UA KEN 2/2016), 10 January 2014 (UA KEN 1/2014) and on 15 October 2009 (AL KEN 5/2009). We regret that to date we have not received any response from the Government.

According to the information received:

Situation of Ogiek people in eastern Mau Forest:

Since 2 July 2020, the Kenya Forest Services has evicted more than 1000 Ogiek from their homes in Mariashoni, Logoman, Kiptunga and Nessuit Forests located in Eastern Mau (Nakuru County) and around 150 Ogiek have been evicted (or are on the verge of being evicted) in Nkareta located in Maasai Mau (Narok County). More than 300 houses were demolished as have fences for homesteads, farms and livestock. The evictions reportedly have occurred without prior notice, during COVID-19 pandemic lockdown measures, and in spite of a moratorium on evictions pronounced on 11 May 2020 by the Cabinet Secretary of the Ministry of Interior.

Ogiek families were allegedly not provided with alternative housing and had to abandon crops and grazing lands for their livestock, thus depriving them of their means of subsistence. Affected families were put up by neighbours in overcrowded living conditions, which fell short of COVID-related recommendations on physical distancing measures. On 20 July 2020, the Land and Environment Court of Nakuru, answering a petition by a member of the Nakuru County Assembly, issued an urgent order barring the government from evicting people from the Eastern Mau Complex.

Between 27 and 29 July 2020, inter-ethnic violence erupted in Olpusimoru (Narok County) and spread to Mariashoni and Nessuit (Nakuru county) on 29 July. Ethnic clashes persisted until 2 August 2020 and were reportedly motivated by the Kenya Forest Service's (KFS) recent evictions of Ogiek and non-Ogiek residing on the fringes of the Mau Forest. Kenyan government officials have reportedly stated that these evictions are being undertaken as a precursor to implementation of the 2017 African Court judgment in the Ogiek case and to halt further destruction of the forest. These evictions have stoked underlying ethnic tensions among non-Ogiek communities settled on Ogiek traditional lands who fear that the implementation of the 2017 African Court judgment in favour of the Ogiek may result in their removal.

Information received indicates that three Ogiek youth were killed, twenty Ogiek were injured and three were hospitalised with injuries, and approximately fourteen Ogiek were arrested and subsequently released on bail. Ogiek community representatives were allegedly intimated and threatened with arrest by local police.

Local law enforcement have threatened and harassed Ogiek leaders, who are reportedly being blamed for inciting violence without evidence of their involvement. Concerns have been raised that these acts form part of a pattern of violence, harassment and intimidation targeting the Ogiek community members and human rights defenders, which allegedly has escalated since the 2017 judgment.

On 26 May 2017, the judgement of the African Court on Human and Peoples' Rights found that the expulsion of Ogiek from their forest against their will and without prior consultation constitutes multiple violations of their rights under the African Charter on Human and Peoples' Rights. The Court recognised that the Ogiek people shall occupy, use and enjoy the Mau Forest as part of their collective right to their ancestral lands. The Court found that the degradation of the Mau Forest could not be attributed to the Ogiek, and that their eviction could not be justified by the need for preservation of the ecosystem.[1] In October 2018, a taskforce was set up by the Cabinet Minister for Environment and Forestry to advise the government on how to implement the Ogiek judgement. The task force did not include a representatives of the Ogiek community and it is alleged that the task force has only carried out minimal consultation with the communities concerned.

Situation of Sengwer people in the Embobut Forest

On 10 July 2020, Kenya Forest Service guards allegedly burned down 28 houses belonging to the Sengwer people in the Kapkok Glade in Embobut Forest. The operation reportedly took place while inhabitants were away searching for food and they were unable to salvage their belongings.

On 16 July 2020, the Kenya Forest Service published a response to the allegations, claiming that Sengwer had temporarily erected structures in several glades that were previously reclaimed by the Government in anticipation of the field visits by a task force by the Ministry of Environment and Forestry, which was working on a roadmap to unlock the suspended European Union funding for a conservation programme (the Water Towers Protection and Climate Change Mitigation and Adaptation Programme). The Kenya Forest Service claim that attempts by the Sengwer to 're-invade' the forest eco-system are a threat to forest protection and conservation in the Embobut Forest.

Forced evictions and intimidation of the Sengwer were exacerbated by conservation projects led by the World Bank between 2007 and 2013. In 2014, the World Bank's Inspection Panel found that the Bank violated its safeguards in a conservation project affecting the rights of the Sengwer in the Cherangany Hills in Kenya.[2]

In January 2018, the EU funded Water Towers Protection and Climate Change Mitigation and Adaptation (WaTER) project in Embobut Forest was suspended following forced evictions of Sengwer communities and violence which led to the killing and injury of Sengwer representatives. The project was explicitly

[1] Judgment of 26 May 2017 by the African Court on Human and Peoples' Rights App. N° 006/2012; para 128-130.

[2] https://www.inspectionpanel.org/sites/www.inspectionpanel.org/files/ip/PanelCases/84%20-%20Investigation%20Report%20%28English%29.pdf

suspended following a communication by UN Special Procedures mandate holders.[3]

In March 2018, the Kenyan National Commission on Human Rights (KNHRC) conducted a fact-finding mission, the report of which noted the failure to learn from the previous World Bank project and to involve and consult the Sengwer in the development of the Water Towers project. Furthermore, the KNHRC report called on Government policy to be restructured to work with traditional forest dwelling communities and underlined that forest conservation must respect human rights, the rule of law and the rights of the forest dwelling communities.

Without prejudging the above, we are concerned that the forced evictions of the Ogiek and Sengwer peoples from their lands of traditional ownership, occupation and use are continuing to take place, and in spite of the judgement by the African Court on Human and Peoples' Rights in May 2017 with regard to the Ogiek, the interpretation of which is applicable to other indigenous forest peoples in the region. We are furthermore gravely concerned that Ogiek community members and human rights defenders are being threatened and intimidated by police.

We deeply regret that your Excellency's Government still has not adopted an approach to conservation that recognises indigenous conservation skills and has failed to take measures to work collaboratively and in good faith with indigenous peoples who live and protect the forest on their traditional lands.

We would like to highlight that conservation projects are likely to fail when imposed with a top-down approach without consideration to indigenous culture, knowledge and skills, and without a rights-based approach. In this respect, we are seriously concerned over by the continued denial of indigenous hunter-gatherers' rights by the Ministry of Environment and Forestry and the Kenya Forest Services. We are troubled over the continued insecurity of tenure that indigenous peoples face to their traditional lands, while their forests continue to be carved out for non-indigenous private and commercial interests.

We are furthermore concerned over the situation of the hundreds of Ogiek and Sengwer peoples rendered homeless in the Mau and Embobut Forests, in spite of the rainy season and the risks linked to COVID-19 pandemic. The occurrence of these forced evictions even during the COVID-19 pandemic makes it particularly difficult for communities to protect themselves.

In connection with the above alleged facts and concerns, please refer to the **Annex on reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

[3] https://eeas.europa.eu/headquarters/headquarters-homepage/38343/eu-suspends-its-support-water-towers-view-reported-human-rights-abuses_en

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Please provide information on the measures taken to provide alternative shelter and other basic needs as well as compensation to the Sengwer and Ogiek families affected by the forced evictions.

3. Please provide information on the steps taken by the government to collaboratively work in good faith with the Ogiek and Sengwer peoples for the preservation on the Mau Forest Complex and Embout Forest in a view to conserving the ecosystems within their traditional lands as well as indigenous skills and traditional knowledge of conservation.

4. Please explain the measures that your Excellency's Government has taken towards a rights-based approach and to ensure that free, prior and informed consent is obtained from indigenous peoples during the planning of projects relating to conservation and climate change adaptation and mitigation measures on indigenous traditional lands.

5. Please provide information on the status of the report of the Task Force set up to advise the government on the implementation of the Ogiek judgement of 26 May 2017. Please specify the reason why the report has not yet been made public and steps taken to ensure the affected populations have been duly included in the work of the Task Force.

6. Please provide information on steps to be taken to demarcate and allocate collective land rights to indigenous forest communities in accordance with the judgment of 26 May 2017 rendered by the African Court on Human and Peoples' Rights so as to provide them with inalienable security of tenure of their traditional lands.

7. Please indicate what measures have been taken to ensure that human rights and environmental defenders, including those defending the rights of indigenous peoples, are able to carry out their legitimate work in a safe and enabling environment in Kenya, without fear of threats or acts of persecution and harassment of any sort.

This communication and any response received from your Excellency's Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

We may publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of our highest consideration.

José Francisco Cali Tzay
Special Rapporteur on the rights of indigenous peoples

David R. Boyd
Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Balakrishnan Rajagopal
Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Mary Lawlor
Special Rapporteur on the situation of human rights defenders

Annex
Reference to international human rights law

In connection with above alleged facts and concerns, we would like to draw your Excellency's Government's attention to the applicable international human rights norms and standards, as well as authoritative guidance on their interpretation.

We would like to draw your Excellency's attention to article 11(1) of the ICESCR on the right to housing. In its General Comment No. 4, the CESCR affirmed that the right to housing includes legal protection against forced evictions, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection. It also declared that forced evictions are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances.

Also in relation to article 11(1) of the ICESCR, the Committee stated on its General Comment No. 7 that indigenous peoples suffer disproportionately from the practice of forced eviction. Therefore, States parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies. States parties must also see to it that all the individuals concerned have a right to adequate compensation for any affected property.

In a report to the United Nations General Assembly (A/74/183), the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, called Member States to declare a moratorium on forced evictions affecting indigenous peoples, until national legislation governing eviction and resettlement has been adopted that is fully compliant with international human rights standards and that allows for recourse before independent judicial institutions. The Special Rapporteur also stated that, prior to carrying out any evictions, States must ensure that all feasible alternatives are explored in consultation with the indigenous communities affected. Indigenous peoples must not be rendered homeless as a result of evictions, nor should they be made vulnerable to the violation of other human rights. Where the affected communities are unable to provide for themselves, States should take all appropriate measures, to the maximum of its available resources, to ensure access to adequate alternative housing, resettlement or access to productive land, as appropriate. States should also monitor and prevent forced evictions carried out by private persons or other third parties.

We furthermore wish to refer to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the General Assembly in 2007, which elaborates upon existing binding rights in the specific cultural, historical, social and economic circumstances of indigenous peoples. These fundamental human rights include equality and non-discrimination, life and personal integrity, culture, health and property, all of which are recognized in the principal human rights treaties ratified by Kenya. In

particular, we would like to recall article 7 of the UNDRIP which provides that indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

With respect to their rights to property in the form of land and natural resource rights, article 26 states for the right of indigenous peoples to 'the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired' and for legal recognition of those rights 'with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.' Article 10 affirms that indigenous peoples 'shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.'

Furthermore, the UNDRIP provides for the rights of indigenous peoples to redress for actions that have affected the use and enjoyment of their traditional lands and resources. In that regard, article 28 states that 'indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.'

We would also like to refer your Excellency's Government to the 1998 Guiding Principles on Internal Displacement, which establishes that all authorities shall respect their obligations under international law, including human rights and humanitarian law, to prevent and avoid conditions that might lead to displacement of persons. We moreover stress that according to the Guiding Principles, every human being shall have the right to be protected against being arbitrarily displaced from his or her home including due to gross human rights violations, discrimination and fear of persecution (Principle 6). This therefore strongly relates to the allegations above that persons have been forced to flee due to human rights violations or fear of violations and discriminations. We would like to particularly draw your attention to Principle 9, which highlights that States are under a particular obligation to protect against the displacement of indigenous peoples and minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

It is necessary that those persons internally displaced are assisted and supported by the government until such time that they achieve durable solutions. Guiding Principle 28 establishes that "[c]ompetent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of 9 the country. Such authorities shall endeavor to facilitate the reintegration of returned or resettled internally displaced persons." Where return to places of origin is deemed unsafe, alternative solutions must be found in consultations with affected communities and until such time that safe and dignified return is possible. Moreover, Guiding Principle 29 states that

"[c]ompetent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation". Furthermore, Principle 8 of the Pinheiro Principles explicitly calls on states to alleviate the situation of displaced persons living in inadequate housing. In regard to the requirement to ensure durable solutions for IDPs, we furthermore recall the provisions of the IASC Framework on Durable Solutions for Internally Displaced Persons.

Lastly, we would like to refer your Excellency's Government to the the United Nations Basic Principles and Guidelines on Development-based Evictions and Displacement (A/HRC/4/18, Annex 1) which specify that evictions can only take place in 'exceptional circumstances'; that they must be authorized by law, and ensure full and fair compensation and rehabilitation. The Guidelines also state that any settlement agreement must satisfy the criteria of adequacy, accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education. The Guidelines further states that States should explore fully all possible alternatives to evictions. All potentially affected groups and persons, have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider. In the event that agreement cannot be reached on a proposed alternative among concerned parties, an independent body having constitutional authority, such as a court of law, tribunal or ombudsperson should mediate, arbitrate or adjudicate as appropriate. Moreover, the Guidelines states that States must give priority to exploring strategies that minimize displacement. Comprehensive and holistic impact assessments should be carried out prior to the initiation of any project that could result in development-based eviction and displacement, with a view to securing fully the human rights of all potentially affected persons, groups and communities, including their protection against forced evictions. "Eviction-impact" assessment should also include exploration of alternatives and strategies for minimizing harm.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.