



FAMILIES TORN APART

FORCED EVICTION OF INDIGENOUS PEOPLE IN
EMBOBUT FOREST, KENYA

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1. EXECUTIVE SUMMARY

As this report goes to print, families in Embobut forest, in the North Rift Valley of Kenya, are losing their homes, livelihoods, and access to cultural practices. They belong to the Sengwer Indigenous People and Embobut is their ancestral home. The Kenya Forest Service (KFS) has been carrying out forced evictions in the forest since the 1980s; however on Christmas Day 2017 it began a new campaign, burning 341 houses and leading to the killing of one Sengwer man and the hospitalisation with gunshot wounds of another. The European Union (EU) suspended €31 million (\$38 million USD) of funding for a climate change mitigation project, citing concern over human rights violations in the forest.

The government of Kenya claims that the Sengwer were consulted, agreed to leave the forest, and were given cash compensation to enable them to buy new plots of land. But the process was opposed by community representatives who went to court to stop it. The court ordered the process to be put on hold pending a hearing of the petition; however the government went ahead and burned an estimated 800 - 1500 houses in January 2014. The compensation process, marred by allegations of corruption, excluded significant numbers of legitimate forest residents.

Sengwer men and women who are now living outside the forest, some of whom reported that they were not compensated, are living in appalling poverty; in one case eight people were living in one room. The eviction has dispersed the community, separating them from their spiritual and cultural practices in the forest; many feared it would lead to the disappearance of the unique culture and identity of the Sengwer.

METHODOLOGY

Amnesty International's research explored violations by the Government of Kenya of the human rights of Indigenous people in Embobut forest. In particular, we examined violations of their land rights; the failure to consult them and obtain their free, prior and informed consent; their right to culture and identity; forced evictions; arrests solely on the grounds of being in the forest; gender-based discrimination; use of excessive force; and intimidation of human rights defenders.

Amnesty International's research examines a government-run consultation between 2009 and 2013, which resulted in a decision to carry out mass forced evictions in January 2014. Field interviews were conducted between March 2015 and April 2018, exploring the ongoing impact of the 2014 evictions as well as more recent forced evictions by the KFS up to the present day.

Amnesty International researchers interviewed 114 Sengwer (61 men and 53 women) either currently living in Embobut forest, or who now live outside the forest having lived there prior to their forced eviction. Of these, 82 were semi-structured individual interviews; the remainder were focus group discussions. We spoke to six community leaders (five men and one woman). Finally, we spoke to 50 decision-makers at local and national government level, and experts with specific knowledge of the alleged human rights violations, such as civil society activists and academics.

THE SENGWER, LAND RIGHTS AND CONSERVATION

The Sengwer identify as an Indigenous People, having a cultural and spiritual attachment to Embobut forest. Mount Kaptagon, in Embobut forest, is sacred to the Sengwer, who carry out rituals there. The right of the Sengwer to their land in Embobut is protected by the Constitution of Kenya, which defines "ancestral lands

and lands traditionally occupied by hunter-gatherer communities” as community lands. This right is also protected by international human rights law.

Embobut forest lies in Elgeyo Marakwet County, in the North Rift Valley, and covers almost 22,000 hectares. It was registered as a protected public forest in 1954. It is part of the Cherangany Hills complex, and is a water catchment area for large parts of Kenya. In 2009, the government determined that deforestation had endangered the viability of the water catchment, and that all forest residents must be resettled outside the forest. The Sengwer state that, having lived for many generations in the forest, they conserved it successfully, before the arrival of other communities created greater pressure on natural resources due to increased population. The government did not differentiate between Indigenous and newly arrived communities and how their different livelihoods and cultural identities interacted with their environment.

Conservation experts have concluded that where Indigenous Peoples are present, they are best placed to promote the conservation of their ecosystems as owners/co-managers. A 2014 review of research in this field “provides evidence that community tenure over forests can result in more forest cover and more species-rich forests, less deforestation and degradation, and fewer fires than some other approaches to protecting forests. These beneficial forest outcomes are more likely if communities are ‘traditional’ or have a long term relationship with their natural resources, if the forest provides them with some livelihood options, and if community forest rights are secure and enforced”.

A recent case at the African Court on Human and Peoples’ Rights addressed a situation very similar to that of Embobut forest, that of the eviction of the Ogiek of Kenya’s Mau Forest. The Court found that the government had violated the rights of the Ogiek to their land and to the enjoyment of their culture, and that the eviction “cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest.”

In April 2018, a Task Force set up by government to assess government efforts to conserve Kenya’s forests, concluded that the KFS had colluded in extensive illegal logging. However it recommended to continue with the policy of evicting all communities from designated endangered forests.

CONSULTATION AND EVICTION 2009-2014

In 2009, the Kenyan government established the Embobut Forest Task Force, a body comprising local politicians, forestry officials, community representatives and civil society, to determine how to implement the decision to resettle all forest residents. The Task Force was mandated to assess the current state of the forest, and to consult with forest residents through public meetings, in order to compile lists of those eligible for resettlement, to be presented for the consideration of the government. It released an initial report of findings in 2010, including a list of eligible residents.

The Sengwer were, according to the report, “the largest and most deserving category of forest residents who do not have an original home other than the forest... Relocation and resettlement of these groups was considered to be urgent.”

Officials of the Ministry of Environment and Forestry and KFS insist that the Sengwer were fully consulted, via the Embobut Forest Task Force process, and that they consented to the eviction. However, the Task Force report, and three members of the Task Force interviewed by Amnesty International, confirm that the decision to evict the Sengwer, and all other occupants of the forest, had been taken in advance of the Task Force consultations. Sengwer representatives, in a petition filed in court in the community’s name in March 2013, to challenge the eviction, claimed that in a consultation meeting, local government officials had threatened “unnamed dire consequences” if they did not comply with the decision. This constitutes a violation of the rights of Indigenous Peoples, whose free, prior and informed consent must be obtained if they are to be relocated from their ancestral land.

The Task Force did not engage with the Sengwer community’s traditional decision-making structures, and instead worked with local government structures to convene the community for consultations. Twenty-two community members interviewed said that they were not informed about consultation meetings. In some cases, forest residents were informed of the time, place and subject matter of meetings by word of mouth only, and only the day before the meeting, not allowing sufficient time to make arrangements (for example for childcare). Forest residents interviewed by Amnesty International reported a high degree of confusion and ignorance over the purpose of the process, the details of what was being proposed and what was ultimately agreed.

One former Task Force member did not seem to realize how inadequate this methodology was: “[the Task Force] just told people there is a *baraza* [gatherings of community members to discuss matters of concern]. People could find out even if they only announced it the day before, with no publicity. You would be amazed at how many people would come – between 200 and 300”.

In 2013, after the Task Force had made two failed attempts to identify parcels of land to which forest residents could move, central government intervened and imposed instead an offer of cash compensation (400,000 Kenyan Shillings, approximately \$4,585 USD in 2013) to registered individuals (in most cases heads of families). Three Task Force members interviewed by Amnesty International stated that the Task Force opposed this decision.

“It was wrong to go from 10 acres to 400,000 Shillings, they are not equivalent. It was based on the figure that victims of post-election violence got. It led to a negative social impact. It reduced [the forest residents] to poverty levels – it removed them from their homes, they lost family income, even children dropped out of school.”

Member of Embobut Forest Task Force

“The government rolled out cash instead of land, and that has very much been a problem to us. Land is better, cash is evil, you can take it and squander it, it may not benefit you, very few used it wisely. Some of those that never benefited from the compensation are living in potato stores.”

Beatrice Cheruyot Kimutai, Sengwer woman

Two officials - a senior local government official and a Task Force member - confirmed that many legitimate beneficiaries had been missed off the list of those eligible for compensation, although they were not able to quantify exact numbers. Thirty-nine Sengwer interviewed by Amnesty International stated that they were not compensated despite being legitimate beneficiaries.

There was significant evidence that the consultation and compensation process excluded women. The Task Force report states: “The number of Sengwer (Kimala) presented in this report indicate the number of individual adults (men) [who] can be considered for resettlement” (verbatim). According to an assessment of the cash payments list undertaken by Sengwer activists, 2,077 of those registered are men and 797 (approximately 28%) are women.

CHALLENGING THE EVICTION

On 22 March 2013, Sengwer representatives submitted a petition at the High Court of Eldoret, seeking a declaration that evictions would violate the petitioners’ constitutional right to land and to protection of their culture, and calling on the court to stop the evictions. On 26 March 2013, the court issued an injunction requiring government agencies not to interfere “with the petitioners’ occupation, control and quiet enjoyment of the land they and the members of the Sengwer community enjoy at the Embobut forest”. By the time of the events of December 2017, the court had not yet ruled on the petition.

The injunction was in force at the time of the mass forced evictions of January 2014, and has been reinstated at regular intervals since that time. However, the KFS has disputed the interpretation of the injunction, arguing that it may still evict and arrest anyone found in the forest.

FORCED EVICTIONS IN EMOBUT FOREST

On 12 December 2014, at the culmination of the Embobut Forest Task Force process, a notice was issued by the County Commissioner to all forest residents to vacate the forest by 3 January 2014, despite the injunction ordered by the High Court of Eldoret, which was in place until 6 February. KFS guards and police moved in to the forest to carry out mass forced evictions on 5 January. The house burnings affected between 800 and 1,500 homes and went on throughout the months of January and February. A World Bank official, who visited the forest at the time, told Amnesty International that “the whole of Embobut was on fire”. A Task Force member stated that, at this point, some residents had still not received compensation.

Evictions have continued until the present day. Since the mass forced evictions of January and February 2014, Sengwer representatives have reported 1031 house burnings by the KFS. According to Sengwer members interviewed, no advance warning is ever given of these evictions. Amnesty International has obtained extensive video and photographic evidence of the burnings. These show KFS guards setting fire to

houses, and carrying away household goods that they find in them. In order to remove Sengwer structures, the KFS is legally required to get a conviction for illegal occupation of the Forest and give a deadline to the person to remove the structure. Only then, on the inhabitant failing to remove the structure, can the KFS destroy it. Amnesty International interviewed 18 Sengwer respondents who stated that the eviction had come with no advance notice and that they had had no time to save personal property inside the house.

On Christmas Day 2017, the KFS began its latest wave of forced evictions of the Indigenous Sengwer people in Embobut forest, after a period of calm lasting almost nine months. Between December 2017 and April 2018, community representatives reported that armed KFS guards burned 341 houses. Sengwer elder Paul Kiptuka was shot at by forest guards, who have also burned down his house twice since December 2017. On 16 January 2018, community representatives reported that KFS guards shot and killed Robert Kirolich Kibor and seriously injured David Kosgei Kiptilkesi in Embobut forest. On 18 January, a government spokesman announced an investigation into the killing of Robert Kirolich. On 21 January, the Elgeyo Marakwet County Commissioner announced that operations would continue to flush out “armed criminals currently undertaking illegal logging and cattle theft”, stating that “anyone who will be found inside the forest will be deemed to be a criminal”.

ARRESTS AND ILL-TREATMENT OF THE SENGWER

Fifteen Sengwer interviewed by Amnesty International stated that they or a close relative had been arrested at least once for simply being in the forest. A magistrate interviewed by Amnesty International insisted that, because of the High Court injunction, cases of arrested Sengwer people are dismissed if it is determined that the person is a Sengwer. However, the Sengwer community’s lawyer said the KFS try to have defendants appear in court without a lawyer, where, unaware of their rights, they may plead guilty, and as a result are fined.

Ismail Kirip, a Sengwer man, was beaten by a KFS guard when he went to a KFS camp in July 2015 to negotiate the release of one of his employees who had been arrested in the forest. He obtained a medical report and two witness statements to support his case, and lodged a complaint with the police. At the time of writing, his case has not been heard. On 2 April 2017, Elias Kimaiyo, a Sengwer leader, was filming KFS guards at a distance while they burned houses in Embobut forest. He described what happened next:

“I was spotted by KFS guards who started chasing me and shooting at me. I started running down a hill to evade the bullets whereby I tripped, injuring my knee and I fell down. The shooting stopped but a KFS officer got to where I was lying. He hit me very hard with the butt of a rifle, fracturing my upper right arm. The officer grabbed the bag that contained my two cameras, a laptop, iPad and other personal documents and disappeared into the forest.”

When Elias Kimaiyo went to the police, they refused to register his complaint. Since then, he says he has received a number of phone calls from a contact in the KFS who has warned him that he is under surveillance and should “be careful”.

Amnesty International has submitted three requests to enter the forest to independently investigate allegations of human rights violations without accompaniment of KFS guards; this permission has not been granted.

IMPACT OF THE FORCED EVICTIONS

Sengwer people living in the forest reported that they live in constant fear of repeated forced evictions including through home burnings, and arrests. Twelve respondents interviewed by Amnesty International reported that, instead of building their traditional huts, they now erect fragile makeshift huts from branches and a sheet of polythene. Benjamin Kimutai, his wife and nine of their 12 children live in four tree trunks in the forest:

“My hut is built into a tree, the tree leaves are the shelter. I use bark to replace the corrugated roof. The KFS destroyed it [in December 2015], put it in a pile and burned it. They also burned the enclosure where the animals sleep. There are so many hyenas, they can eat all of your animals if you are not careful. So I have to keep watch full time.”

Amnesty International spoke to a number of Sengwer who were living outside the forest in economically precarious conditions, having been evicted but not having received compensation. Beatrice lives in a one-

room hut which used to be a potato store, near Tangul, with her three children and her mother. Her husband died six months ago. During the interview, the landlord came to her house and demanded unpaid rent; he said she could be evicted at any time. She said:

“This is the sixth place I have lived in since I moved out of the forest. My children face many problems with homework, you can see the capacity of the house is very small. I didn’t get compensation. If I had, I would have bought land... I lacked the money to afford transport to follow up and ensure my name was there [when forest residents were being registered for resettlement or compensation]. I did not complain. If I did that, I would have had to spend a small amount of money, I had nothing”.

Sengwer women interviewed by Amnesty International reported erosion of financial autonomy and deprivation of access to cultural practices, for example practising the roles of *chepsakitia* (person practising traditional medicine) and traditional birth attendant. Women also reported that cash compensation, which in most cases was received by men, had caused tensions between married couples, often leading to husbands leaving their wives; in most cases the woman was left as sole carer of the children, with the husband not contributing financially. One woman reported that in the forest, she shared in the work of looking after animals with her husband, and could sell milk or honey to earn money. Outside the forest, she had not been able to find work and depended on her husband.

The forced evictions have had a significantly negative impact on Sengwer culture, partly because that culture is inseparable from the forest itself, in particular its sacred sites and medicinal roots and herbs, and partly because the cash compensation has resulted in members of the community being dispersed to different locations, even nearby cities, or wherever they can rent or buy land. This impacts on cultural practices that require community collectiveness, such as language and rituals. Many children are going to schools where the majority do not speak Sengwer.

RESPONSIBILITIES OF EXTERNAL DONORS

Embobut forest is included in several externally funded conservation projects. In May 2014, the World Bank’s Inspection Panel, a body set up to receive and investigate allegations of violations of its environment and social safeguards, reported on complaints received from Sengwer representatives. These concerned the World Bank-funded Natural Resource Management Project, a forest conservation and livelihoods project which operated in Embobut forest. The Inspection Panel found that the project violated a number of safeguards, by failing to obtain the support of affected Indigenous Peoples for crucial project elements, and failing to properly assess the risk that the KFS, who received funding for operational activities under the project, would engage in evictions of the Sengwer. The project ended in 2013.

Since 2015, Embobut forest has been included in WaTER, a forest conservation and climate change mitigation project funded by the EU. After initial planning and research activities, implementation on the ground began in 2016, and in December 2016, Sengwer representatives wrote to the EU to complain about human rights violations committed by the project implementers, the KFS, and the failure to consult them within the project framework. It was not until the killing of Robert Kirotych in January 2017 that the EU delegation took decisive action and suspended funding for the project. A letter from the EU Delegation in Nairobi to Amnesty International confirmed that a study in 2010 “looked into the social, environmental, economic and human rights impact of the programme” but that it “did not match the human rights assessment standards that we apply today”. The KFS was due to receive a grant of €4m under the project with no acknowledgement by the EU of its role in evictions going back to 2014, or of the lessons learnt under the World Bank project.

The day after the killing of Robert Kirotych Kibor, citing concern over the use of excessive force and human rights violations against forest residents, the EU announced the suspension of funding for WaTER.

The EU office in Nairobi engaged in negotiations with the Kenyan government to allow an independent fact-finding mission, under the auspices of the Kenya National Commission on Human Rights, to visit the forest and investigate allegations of human rights violations since 25 December 2017. The mission took place from 19 to 24 March; Amnesty International took part as observers. A resumption of the suspended project would be in part dependent on the findings of the mission. The mission report had not been published at the time of writing.

The Government of Finland has also funded the Government of Kenya through the Miti Mingi Maisha Bora programme, a conservation project that covered Embobut forest and provided financial support to the KFS, implemented from 2009 to 2016. The final report of the programme, by the KFS and Finland’s Ministry for

Foreign Affairs, made no mention of Embobut forest, the Sengwer, or forced evictions that took place within the project period. There is no mention of the World Bank's experience or lessons which have been drawn from it. An assessment of the project by an external consultancy, commissioned by the government of Finland, lists the eviction of the Sengwer as a positive step towards resolving problematic forest tenure issues.

External donors have responsibilities to ensure that their projects do not cause or contribute to human rights violations. The EU and the Ministry of Foreign Affairs of Finland wrote to Amnesty International, in response to concerns raised by us, stating that they have human rights frameworks in place to govern the projects that they support. We remain concerned however, that sufficient mechanisms are still not in place to ensure that violations do not happen under externally funded projects in Kenya.

MAIN RECOMMENDATIONS

TO THE GOVERNMENT OF KENYA:

- Immediately cease all evictions, and arrests of Sengwer for the sole reason of being present in Embobut forest;
- Instruct the KFS and other security agencies to stop harassing, threatening and intimidating Sengwer leaders and human rights defenders;
- Ensure that immediate, independent and thorough investigations take place into the forced evictions and violence in Embobut forest since January 2014, in particular the killing of Robert Kirotych and wounding of David Kosgei Kiptilkesi, Elias Kimaiyo and Ismail Kirop, and ensure that those responsible for excessive use of force, including murder, are held accountable in line with due process requirements without recourse to the death penalty;
- Ensure that all Sengwer who have been evicted are allowed to return to their places of dwelling in Embobut forest in safety and dignity, and have access to effective remedies including a public apology, reparation, compensation and guarantees of non-repetition;
- Initiate a proper consultation in accordance with international standards with the Sengwer, ensuring the effective participation of women, and guarantee that their free, prior and informed consent is obtained for a resolution of the issues of the status of Embobut forest, forest conservation, and the injustices suffered by Sengwer members during the forced evictions, including those now living in the forest and those that live outside;
- Recognize the rights of the Sengwer to their ancestral land in Embobut forest and convert Embobut forest to community forest, under conservation conditions, under the Community Land Act 2016 and Forest Conservation and Management Act 2016;

TO THE COUNTY GOVERNMENT OF ELGEYO MARAKWET:

- Engage with the decision-making structures of the Sengwer with regard to any initiative affecting Embobut forest, and obtain their free, prior and informed consent for such initiatives.

TO ALL EXTERNAL DONORS SUPPORTING PROJECTS IN EMOBUT FOREST:

- Ensure that conservation projects in Embobut forest do not cause or contribute to human rights violations, that the free, prior and informed consent of the Sengwer is obtained for any project that will impact on their human rights, and that the consequences of relevant jurisprudence, in particular the Ogiek case at the African Court, are taken into account.

2. METHODOLOGY

2.1 SCOPE OF THE RESEARCH

Amnesty International's research focused on violations of the human rights of Indigenous people in Embobut forest, in particular the violation of their land rights; the failure to consult them and obtain their free, prior and informed consent; violations of their right to culture and identity; forced evictions; arrests solely on the grounds of being in the forest; gender-based discrimination; use of excessive force; and intimidation of human rights defenders.

The research was conducted between March 2015 and April 2018. It also examined a government-run consultation between 2009 and 2013, which resulted in a decision by the government to carry out mass forced evictions in January 2014. The consultation is of great significance to the current situation in Embobut, because it is used by the government to justify removal of Indigenous people from the forest. We therefore collected information about the consultation, and assessed it against human rights norms regarding participation, access to information, and free, prior and informed consent.

Amnesty International researchers interviewed 114 Indigenous people (61 men and 53 women) either currently living in Embobut forest, or having lived there prior to eviction and who now live outside the forest. Of these, 82 were semi-structured individual interviews; the remainder were focus group discussions. We spoke to six community leaders (five men and one woman). Finally we spoke to 51 stakeholders with specific knowledge of the human rights violations in question, which breaks down as follows: national government (14); local government (seven); law enforcement (two); judiciary (one); national human rights institution (one); public service providers (five); diplomatic community / inter-governmental organizations (12); Kenyan civil society organizations (three); academics/researchers (two); church representatives (one); representatives of other communities (one); lawyer for the community (one); and local business (one).

Two ethnic communities – the Sengwer and the Marakwet – have historically lived in and around Embobut forest. The focus of the report is on the Sengwer community because they self-identify as an Indigenous People, their ancestral land is in Embobut forest, and their identity and situation of political, economic and social marginalization is in accordance with international guidelines on identifying Indigenous Peoples in Africa (see box “Recognition of Indigenous Peoples in National and International Law” in section 3.3).¹ We also interviewed Marakwet people who are resident in the forest, and have been victims of forced evictions, and also decision-makers and other prominent individuals from this community.

2.2 RESEARCH METHODOLOGY

Embobut forest is protected for conservation purposes; access is controlled and residency is prohibited. Amnesty International has not been granted permission by the government to enter Embobut forest to interview people there without the presence of Kenya Forest Service guards, which would have made it impossible to freely interview people alleging human rights violations in the presence of the perpetrators. Researchers therefore set up base in Tangul, a village on the edge of the forest, and arranged with community representatives for forest residents to come to meet them. In addition, researchers visited forcibly

¹ Office of the President & Ministry of Water and Irrigation & Ministry of Environment and Natural Resources, 'Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project', 2006 (hereinafter 'Office of the President, Indigenous Peoples Planning Framework') p. 15, pp. 23-28; interviews with local government officials and politicians, Elgeyo Marakwet County, March 2018.

evicted families in their homes in villages surrounding the forest, and visited Maron, on the Eastern escarpment, an area inside the forest where the government has exceptionally and temporarily allowed people to settle.

As is the case with many ethnic communities in Kenya, traditionally men have been more active in speaking for the community, including in research conducted by external organizations. We made extensive efforts to ensure we captured the perspectives of Indigenous women, particularly the specific impacts that forced evictions had on them. For example, we visited forcibly evicted families in their homes outside the forest, where in most cases we found either a woman-headed family, or women present while the men had travelled to the forest to look after their animals. Where possible, these interviews were carried out by a woman researcher, either in a language understood by both interviewer and interviewee, or using a woman interpreter.

Researchers reached out to individuals who had submitted communications to government bodies and international organizations (for example the World Bank) to denounce human rights violations. One government official voiced the opinion that we were not speaking to genuine community representatives.² However, when we asked the Kenya Forest Service to inform us about the community representatives whom they believed were genuine, and to facilitate introductions, we did not get a response. Community representatives who were our main contacts were also those invited to meetings by government and international agencies for consultations on matters affecting them.

In December 2017, researchers organized a meeting in Tangu village with 41 community members (21 men and 20 women), including community elders, to present the findings of our research, and to invite feedback.

Where interviews were granted on the basis that strict confidentiality would be maintained, an alias has been used. Where individuals external to the forest communities were interviewed because of their expertise or professional role, but preferred to remain anonymous, they are quoted by indicating the organization to which the individual belongs, for example: police, local government, or health professional.

These interviews are a primary source of information for this report. All the interviews were carefully recorded, categorized and analyzed. The conclusions set out in this report are based on information that was consistent in key aspects across sufficient numbers of interviews and that could also be verified with data from other sources, such as NGOs, official documentation, reports by international organizations and cases previously documented by Amnesty International.

In addition to the interviews, researchers analysed relevant legal documents relating to the Sengwer case challenging their eviction from the forest, or cases of arrests in the forest (judgments, affidavits by community members, witness statements, medical reports); documentation collected relating to complaints of exclusion from financial compensation; government or foreign donor documents relating to projects in the forest; reports of government consultation processes regarding forest residents; photos and videos collected in the forest, including satellite imagery; and media reports.

Amnesty International held meetings and wrote to the Kenyan Ministry of Environment and Forestry, the European Union (EU), United National Development Programme (UNDP) and the Embassy of Finland in Kenya, detailing the claims made in the report, and the responses received have been incorporated.³

2.3 TERMINOLOGY

Historically, the names Sengwer and Kimala have been used in referring to the Indigenous People living in Embobut forest who are the main focus of this report.⁴ The name Cherangany is still used by some in the community and featured in the 2009 census, and is also the name used for the complex of hills of which Embobut is a part. The spellings “Cherangany” and “Cherangani” are both used in official documents; the former spelling is preferred here except when direct quotes use the latter. In this report, we use the name Sengwer, because it is the name most consistently used when asserting the human rights of the Indigenous People and contesting violations in Embobut forest; however Amnesty International recognizes the right of

² Interview, Director of Kenya Forest Service, Nairobi, August 2016.

³ The Ministry was renamed Ministry of Environment and Forestry in February 2018. It was previously called the Ministry of Environment and Natural Resources, and before that the Ministry of Environment, Water and Natural Resources. It is referred to by the most recent name throughout in this report.

⁴ For example, in the Marakwet East District, ‘Embobut Forest Task Force Report’, 2010, (hereinafter, ‘Embobut Task Force Report’).

peoples to self-identify, and names used in this report should not be interpreted as an imposition of a name on any community.

2.4 ACKNOWLEDGEMENTS

Amnesty International would like to thank all the people who agreed to speak to the organization and who have given permission for their testimony to be included in this document.

3. FORCED EVICTIONS IN EMOBUT

3.1 INTRODUCTION

The Kenya Forest Service (KFS) is a government security agency mandated to manage government forests; its tasks include conservation, commercialization of timber, management of logging licences, and eviction of persons illegally present in forests. On 29 December 2017, the KFS began the most recent wave of forced evictions in Embobut forest, in the North Rift Valley, Eastern Kenya, home of the Sengwer Indigenous People. According to reports of community representatives, KFS guards shot dead one Sengwer man, seriously injured another, and burned an estimated 341 houses. Since then, the EU has suspended funding for a project which supports the KFS and is worth \$38.3million USD, citing concerns over human rights violations in Embobut forest. The project covers 11 counties of which Elgeyo Marakwet, where Embobut forest is located, is just one, and aims to rehabilitate forests and water catchments and provide livelihood benefits for forest-dependent communities. The Government of Kenya, however, has taken an uncompromising stand, viewing the presence of the Sengwer in the forest as illegal, and calling for all “criminals” in the forest to be “flushed out”.⁵

Evictions in Embobut forest are not new; they have been carried out by Kenyan authorities since the 1980s. The state’s justification for evicting the Sengwer – and others living in the forest – is that through over-population, tree-felling and over-grazing by livestock, the forest had become critically degraded. Embobut forest is part of the Cherangany Hills which is a vital water catchment for large parts of Kenya. In 2009, the government established a body, the Embobut Forest Task Force, to find a solution to the problem of deforestation and the humanitarian consequences of the constant cycle of evictions. The Embobut Forest Task Force stated: “The major objective of eviction was to remove people illegally settled in Embobut forest to facilitate restoration of the forest to its former glory as an integral water catchment resource within Cherangany hills water tower”.⁶

⁵ Voice of America, ‘Kenya Flushes out “Criminals” in Forest Dispute after Sengwer Killing’, 18 January 2018.

⁶ Embobut Task Force Report, p. 10.

WHAT IS A FORCED EVICTION?

A forced eviction is the removal of people against their will from the homes or land they occupy without legal protections and other safeguards. The UN Commission on Human Rights has said that forced evictions constitute a gross violation of human rights, in particular the right to adequate housing.⁷

A forced eviction does not refer to any eviction that occurs with the use of force by the state; it refers specifically to an eviction which occurs without complying with due process.

The UN Committee on Economic, Social and Cultural Rights, a body of experts that provides authoritative guidance on the implementation of the International Covenant on Economic, Social and Cultural Rights, defines forced evictions as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection”.⁸

Under international human rights law, evictions may only be carried out as a last resort, once all other feasible alternatives to eviction have been explored and appropriate procedural protections are in place. Such safeguards include:

- An opportunity for genuine consultation with those affected;
- Adequate and reasonable notice for affected people prior to the eviction;
- Information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- Government officials or their representatives to be present during the evictions;
- Anyone carrying out the eviction to be properly identified;
- Evictions not to take place in particularly bad weather or at night unless the affected people consent;
- Provision of legal remedies;
- Provision, where possible, of legal aid to people who are in need of it to seek redress from the courts.

Governments must also ensure that no one is rendered homeless or vulnerable to the violation of other human rights as a consequence of eviction. Adequate alternative housing and compensation for all losses must be made available to those affected prior to eviction.⁹

The Task Force undertook a four-year process of registering and consulting with forest residents. At the end of the process, according to the government, all forest residents consented to leave the forest. However, Sengwer representatives demonstrated their refusal of consent in March 2013, when they launched a petition to the High Court of Eldoret to stop the process and adjudicate their claim to land in Embobut forest.¹⁰ In response to the Sengwer petition, the Court issued an injunction on 26 March 2013, prohibiting state agents from interfering with the Sengwers’ occupation of the forest, pending a hearing of the petition. At the time of writing, the High Court had not yet heard the petition (April 2018).

The Sengwer filed the petition after the government reneged on a promise to allocate a piece of land to which forest residents could move collectively, thus allowing them to continue to live as a cohesive community. Instead the government (contrary to the Task Force recommendation) decided to offer cash compensation of 400,000 Kenya Shillings (approx. \$4,585 USD in 2013) to heads of families, intended to allow the purchase of alternative land. Issuing of compensation cheques began in December 2013; in January 2014, the government pressed ahead with forced evictions and between 800 and 1,500 houses were burned.

While some evictees used the cash compensation to buy land, in some cases it caused tensions within families; a number of women told researchers that their husbands had misused the money as in most cases it went to the male head of the family. Amnesty International documented cases of legitimate beneficiaries

⁷ Commission on Human Rights resolution 1993/77, §1.

⁸ General Comment No.7, § 3.

⁹ UN Committee on Economic, Social and Cultural Rights, The right to adequate housing, General Comment No. 7 on Forced Evictions, paras 15 and 16.

¹⁰ Petition no. 6 of 2013 at the High Court of Kenya at Eldoret (*David Kiptum Yator, Luka Toroitich Kiraton, Joseph Cheptorus v. The Attorney General, the Kenya Forest Service, Zonal Forest Manager (Marakwet District), the District Commissioner (Marakwet East District), the National Land Commission*) 22 March 2013 (hereinafter, ‘Petition no. 6’).

missing out on compensation. A number of government officials attested to the corrupt misdirection of compensation from legitimate beneficiaries to people with no connection to the forest (see Section 4.1.5).

Many Sengwer have insisted on their right to live on their ancestral land, and have stayed in the forest. They are forced to keep one step ahead of forest guards, who arrest them on the grounds of being in the forest and set fire to any structure they find. Increasingly, to avoid detection, the Sengwer live in tree trunks, caves, or build flimsy makeshift homes with a few sticks and a sheet of plastic, at times sleeping in the open if the KFS has set fire to these structures. Community representatives calculate that an estimated 1030 houses have been burned since March 2014. Amnesty International has documented some of these episodes.

Following eviction, some Sengwer moved to surrounding villages and towns. The failure of the Ministry of Environment and Forestry to pay some of them the promised cash compensation has resulted in them living in extreme poverty. For example, one woman, providing for her family on her own, was living in a one-room potato store with her three children and her mother. She had been forced to move six times since her forced eviction from the forest in 2015 as she often fell behind with rent payments (see Section 7.2.).

In response to the December 2017-January 2018 forced evictions, the community lodged a fresh petition on 21 January 2018, contesting the evictions and claiming recognition of its land rights in Embobut. They obtained a new injunction, prohibiting the state from interfering with the status quo in the forest. However, the KFS has continued conducting forced evictions regardless of the injunction.

Embobut forest is described as “scenically beautiful, with undulating forested slopes, cascading rivers and open grasslands filled with wild flowers”.¹¹ It lies in Marakwet East District, in Elgeyo Marakwet County, and covers almost 22,000 hectares. It is home to a number of indigenous tree and plant species, and was registered as a protected public forest in 1954. Embobut forest is part of the Cherangany Hills complex which includes 12 forest blocks, ranges in altitude from 2,000m to 3,365m above sea level, and is a water catchment area for both the Lake Turkana basin to the East, and Lake Victoria to the West. The Sengwer state that, having lived for many generations in the forest, they conserved it successfully before the arrival of other communities which led to over-population and the introduction of different livelihoods. As an Indigenous People, their culture, spirituality, livelihood and identity depend on the forest, and their rights to their ancestral land are guaranteed both by the Kenyan constitution and international human rights law. In more recent times other communities arrived in the forest. Some were internally displaced persons, fleeing natural disasters or the election violence of 2007-8. The increase in numbers led to significant deforestation.¹² The Embobut Forest Task Force did not differentiate between these communities, in particular the different ways in which they interacted with the forest, and their role – if any – in deforestation.

WHO ARE THE SENGWER?

There is documented evidence of Sengwer habitation in the forest going back to the 1920s, but many community members claim longer occupancy going back to the 19th Century. They consist of 21 clans, each headed by elders.¹³ Sengwer medicine women or men – most often women – are called *chepsakitia* and use roots, tree barks and leaves in the forest for medicinal purposes including natural remedies and act as traditional birth attendants.¹⁴ Mount Kaptagon, in Embobut, is sacred to the Sengwer, who carry out rituals there, such as forecasting natural calamities or good harvests. The Sengwer have developed by-laws which set out their traditional governance structures and how they practise their livelihoods to live sustainably with their environment,¹⁵ although these governance structures are currently not active due to the disruption caused by evictions.¹⁶

While in the Sengwer culture women are not prominent in leadership bodies, their role in leadership comes to the fore in specific ways. Women participate in decision-making through *Ipooh Nyi pokwony*, a special committee of women for consensus-building on matters that affect the Sengwer people. In Sengwer culture, women, particularly those over the age of approximately 50, are responsible for propagating and promoting culture and traditions through song and dance, story-telling and ornament

¹¹ Kenya Forest Service, Nature Kenya, Kenya Forestry Research Institute: *Cherangany Hills Forest Strategic Ecosystem Management Plan 2015 – 2040*, September 2015 (hereinafter ‘*Cherangany Hills Forest Strategic Ecosystem Management Plan*’), p. 5.

¹² Hon. Kanda, Daily Hansard (Special Sitting), Elgeyo Marakwet County Assembly Plenary Debates, 2nd Assembly, 1st Session, No. 022, 31 January 2018 (hereinafter ‘*Elgeyo Marakwet County Assembly Special Sitting*’) p. 12.

¹³ Interview, Paul Kiptuka, clan elder, Tangu, December 2015.

¹⁴ Interviews, Maron, September 2016; Tangu, September 2016.

¹⁵ *Sengwer of Embobut Governance Structures and By-Laws for Sustainable Conservation of Forests and all other Natural Resources*, document produced by Sengwer community leaders.

¹⁶ Interview, Elias Kimaiyo, Sengwer activist (by telephone), February 2018.

making. Medicine women (*chepsakitia*) are highly respected for their skills in general healthcare and reproductive health.¹⁷

According to the 2009 census of Kenya, the Sengwer number 33,187, living both inside and outside the forest. Additionally, 15,956 individuals were registered as Cherangany (see section 2.3). The Embobut Forest Task Force registered 1,546 Sengwer individuals in the forest in its first enumeration of those eligible for resettlement or compensation (in 2010), although it is possible that, considering the form of enumeration used by the Task Force, this is a count of heads of families.¹⁸ Current figures for those inside the forest are hard to estimate due to the ongoing forced evictions, and are the subject of disagreement between government and community (see section 3.3).

The Sengwer identify as an Indigenous hunter-gatherer people, having a cultural and spiritual attachment to Embobut forest.¹⁹ Interviewees currently living in the forest identified their livelihood as keeping livestock and/or bees. An official of the Ministry of Environment and Forestry told Amnesty International that the government recognizes the Sengwer as an Indigenous people.²⁰ Consistently, Sengwer representatives have organized, asserting their rights as an Indigenous People, in order to contest initiatives on their land which are launched without seeking their free, prior and informed consent and which pose a threat to their land rights.²¹

3.2 EVENTS SINCE 25 DECEMBER 2017

After a period of nine months with no arrests or evictions in the forest, on 25 December 2017 Sengwer community representatives reported a massing of approximately 100 KFS guards and vehicles at the KFS camp in Tangul village. On 28 December, the Deputy County Commissioner (an administrative representative of central government) issued a verbal order to those resident in the forest to vacate it by 5pm the following day. Seven hours before the announced deadline, at 10am on the following day, KFS guards moved in to the forest and began setting fire to the huts of the Sengwer and firing live ammunition into the air. Community representatives reported that, between 25 December 2017 and the time of writing, 15 separate incidents of house burnings had taken place, involving an estimated 341 houses, resulting in an estimated 600 people made homeless.

As in the case of previous evictions in Embobut forest, none of the procedural and legal safeguards in Kenyan law as well as international law (to which the government of Kenya is bound, see box “Kenya’s obligations regarding the right to adequate housing” in Section 3.4), were put in place prior to carrying out the evictions. The Government of Kenya through the KFS has thus continued to show a blatant disregard for the safety, dignity and human rights of the Sengwer.

On 15 January, three UN human rights experts called on the Kenyan government to halt the forced evictions and the EU to suspend funding for the Water Tower Protection and Climate Change Mitigation and Adaptation Programme (WaTER), a forest conservation and climate change mitigation programme which covers 11 counties, including the Cherangany Hills complex, and directly funds the KFS (see section 9.2).²²

Amnesty International wrote to the Kenyan government and the EU delegation on 8 January 2018 to protest against the evictions and violence against the Sengwer. On 16 January, community representatives reported that KFS guards shot and killed Robert Kirotych Kibor and seriously injured David Kosgei Kiptilkesi, both Sengwer, in Embobut forest. Citing concern over the use of excessive force and human rights violations against the Sengwer people, the EU announced the suspension of funding for the WaTER project on 17 January 2018. Also on 17 January, Amnesty International, the Kenya National Commission for Human Rights, the Katiba Institute and Kenya Coalition for Human Rights Defenders, among others, called for an

¹⁷ Female-only discussion at Maron with 15 women from Koropkwen, Kapkok and Kaptirbai glades, September 2016.

¹⁸ Embobut Task Force Report, p. 20.

¹⁹ Interviews, Sengwer community members, December 2015, August-September 2016, December 2017; Memorandum to Constitution Review Commission, p. 4.

²⁰ Interview, Nairobi, December 2017.

²¹ For example, Letter of Sengwer Ethnic Minority Forest Indigenous Community to President Uhuru Kenyatta, ‘Ref: World Bank Pledge to resolve the Land Issues of the Sengwer Forest Indigenous Community’, 4 October 2014; Letter to Hans Christian Stausboll, Directorate-General for International Cooperation and Development, European Union, ‘Continued Violation of Sengwer Indigenous Peoples Human Rights after EU Suspension of WaTER Towers Protection and Climate Change Mitigation and Adaptation Programme’, 21 January 2018; Request to World Bank Inspection Panel alleging failure to comply with World Bank policies relating to the Natural Resource Management Project ([http://ewebapps.worldbank.org/apps/ip/PanelCases/84-Request%20for%20Inspection%20\(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/84-Request%20for%20Inspection%20(English).pdf)), 13 January 2013.

²² Office of the High Commissioner for Human Rights: ‘Indigenous rights must be respected during Kenya climate change project, say UN experts’, 15 January 2018.

independent investigation by the Kenya National Commission for Human Rights into human rights violations in Embobut forest since December 2017.²³



 ↑ KFS vehicles gathering at Tangul on 25 December 2017. ©Elias Kimaiyo

On 21 January, the Elgeyo Marakwet County Commissioner announced that operations would continue to flush out “criminals” from the forest, with the added deployment of special forces and helicopters if necessary. He referred to “armed criminals currently undertaking illegal logging and cattle theft”. A number of Sengwer community members interviewed by Amnesty International complained of the activity of cattle rustlers in the forest (bands of people often armed with guns, who raid neighbouring communities to steal livestock), but the County Commissioner made it clear that no distinction would be made between Indigenous forest residents and encroaching cattle rustlers, stating that “anyone who will be found inside the forest will be deemed to be a criminal”.²⁴

On the same day Sengwer representatives filed a new petition at the Environment and Land Court of Eldoret, contesting their eviction from Embobut forest and claiming their land rights in Embobut to be recognized. Two days later the court issued an injunction calling for the status quo in the forest to be maintained pending a hearing of the petition.

The EU delegation in Nairobi has been in negotiations with the Kenyan government to allow the independent fact-finding mission, under the auspices of the Kenya National Commission on Human Rights, to visit the forest and investigate events since 25 December. The fact-finding mission took place between 19-24 March. Amnesty International, taking part as observers, were not able to determine the research methodology of this mission, and ideal conditions for independent interviews were not established. KFS guards accompanied some elements of this mission. Sengwer community leaders denounced continuing forced evictions in Embobut forest after the fact-finding mission, and the harassment and intimidation of senior community leaders (see Section 6.2).

At the time of going to press the official mission report had not been published.

²³ Amnesty International Kenya, ‘Excessive force and evictions leads to killings of the Sengwer Community in Embobut forest’, 17 January 2018.

²⁴ *The Star*, ‘Elite security forces deployed to evict Embobut forest dwellers – official’, 22 January 2018.



**DAVID KOSGEI KIPTILKESI
SENGWER MAN**



© ↑ David Kosgei Kiptilkesi © Elias Kimaiyo

Amnesty International interviewed David Kosgei Kiptilkesi after initial treatment following being shot in Embobut forest on 16 January. He said that the KFS guard who shot him was one of a group of about 12 and was armed with a G3 rifle. He stated that he was only carrying a machete, a standard tool which Sengwer use in their daily work in the forest, and that he was not brandishing it in a threatening way when he was shot. He was given no warning or instruction before he was shot. He was with Robert Kirotych Kibor, who he said was also only carrying a machete. Having been shot first, David Kosgei Kiptilkesi was lying on the ground, and therefore did not see Robert Kirotych Kibor being shot; but he learnt afterwards from witnesses that he had been shot nine times and died immediately.

“[The guards] came as we were grazing our cattle in the glades. They came down to the river and attacked us from behind. We were just sitting and telling stories, minding our own business when they started firing shots. I started to run, and was shot and fell down. I told them that my leg was broken. They accused me of having a gun. I told them that I did not have one.

“I was taken by KFS to the hospital but Robert’s body was left in the forest.

“I am at home now but the leg is bad. They inserted a metal plate, it is still inside and there is a lot of bleeding and pain. I cannot walk at all and I have to rely on my children to help me move. All I can do is sleep. I am traumatized and live with fear. I often get flashbacks about the shooting. I recently fell out of bed because of nightmares”.

David Kosgei Kiptilkesi said he had not complained to the police as he was still in a lot of pain at the time of the interview and could not move much.²⁵ On 18 January, a government spokesman announced an investigation into the killing of Robert Kirotych Kibor and affirmed that “any officer who will be found culpable for murder will be charged in a court of law”.²⁶ At the time of publication, the outcome of this investigation was unknown. The post mortem on Robert Kirotych Kibor, after taking note of extensive serious injuries, concluded that he died of “hypovolemic shock [a life-threatening condition that results when a person loses more than 20 percent of their body’s blood or fluid supply] due to massive loss of blood”.²⁷

²⁵ Interview (by telephone), February 2018.

²⁶ Capital News, ‘Probe launched over death of Sengwer community member’, 18 January 2018.

²⁷ Post mortem carried out at AIC Kapsowar Mission Hospital, 23 January 2018 (copy of document on file with Amnesty International).

The suspension of the EU project, which promised funds to county governments but also directly to impoverished communities for livelihoods projects, has caused lively debate in national and local government, and in the media. The Elgeyo Marakwet County Governor called on the KFS to stop harassing forest residents and involve them in conservation, thus making the use of forest wardens unnecessary.²⁸ The Elgeyo Marakwet County Assembly, normally in recess, called an extraordinary session to discuss the issue. A number of members were sympathetic to the concerns of the Sengwer. In the words of one member: “We realize the forest guards have been terrorizing the children and women in the name of removing them from their ancestral land”;²⁹ however the majority of members were above all concerned with allowing the EU funding to resume; some emphasized that it is not just the Sengwer who depend on the forest, but also communities who live in the valleys and depend on water flowing down from the Cherangany Hills. One assembly member pointed to the risk of conflict after a group of Marakwet elders were reported to have called on the Sengwer to be cursed if they did not leave Embobut forest.³⁰

3.3 SENGWER CLAIMS TO LAND RIGHTS IN EMOBOT

Prior to Kenya securing its independence, the British colonial authorities seized land disproportionately from hunter-gatherer communities such as the Sengwer, and pastoralist communities (whose livelihood centres around livestock herding). The 1902 Crown Lands Ordinance prohibited the seizing of land “in actual occupation” by native Africans, but in practice this protection was interpreted to only apply to sedentary agriculturalists. The approach of colonial administrators was informed by racist theories that underpinned the colonialist project – that Indigenous Peoples were primitive, lesser beings.³¹ In the case of hunter-gatherers, their non-hierarchical structure and the lack of value placed on wealth accumulation was seen as evidence of laziness; they were “unlikely to contribute either labour or taxes and other revenues to state coffers”.³²

The Kenya Land Commission (“Carter Commission”) in 1932, a body set up by the British colonial administration to propose recommendations to address the grievances of Kenyans relating to colonial land alienation policies,³³ took the view that the continued existence of smaller forest-dwelling peoples such as the Sengwer was unsustainable, and ordered them to be assimilated into larger neighbouring communities. A Sengwer leader testified to the Commission that their identity was unique and they did not agree to being grouped under the Marakwet, but his plea was ignored.³⁴ The failure to recognize and value the identity of the Sengwer, as is the case with other smaller minority and Indigenous Peoples in Kenya, in particular hunter-gatherer communities and pastoralists, is at the root of their experience of land alienation, and has continued in post-Independence policy and practice.³⁵

RECOGNITION OF INDIGENOUS PEOPLES IN NATIONAL AND INTERNATIONAL LAW

“Indigenous Peoples”, a term in international human rights law, designates peoples to whom, because of their unique characteristics and history, a specific framework applies in order to enable them to access all human rights and live in dignity.³⁶ The Constitution of Kenya of 2010 defines the category of “marginalised community” as including “an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy”.³⁷ During the UN Universal Periodic Review of Kenya in 2015, the government stated that “its Constitution provided several avenues for the protection and strengthening of indigenous peoples’ personal and collective rights.”³⁸

²⁸ *The Star*, ‘Work with locals to protect forests and end animosity, Tolgos tells KFS’, 7 February 2018.

²⁹ Hon. Tanui Vincent, Elgeyo Marakwet County Assembly Special Sitting, p. 4.

³⁰ Hon. Kipyatich, Elgeyo Marakwet County Assembly Special Sitting, p. 5.

³¹ C.J. Cavanagh, ‘Anthropos into humanitas: Civilizing violence, scientific forestry, and the “Dorobo question” in eastern Africa’, in *Environment and Planning D: Society and Space*, Sage Publishing, 2016 (hereinafter ‘Anthropos into humanitas’), p. 6.

³² *Anthropos into humanitas*, p. 10.

³³ P.M. Shilaro, ‘Colonial Land Policies: the Kenya Land Commission and the Kakamega Gold Rush, 1932-4’, in W.R. Ochieng, ed., *Historical Studies and Social Change in Western Kenya: Essays in Memory of Professor Gideon S. Were*, East African Educational Publishers, Nairobi, 2002.

³⁴ Memorandum from Sengwer Ethnic Minority Hunter-Gatherer Indigenous Peoples Presented to Constitution of Kenya Review Commission, pp. 3-8 (hereinafter, ‘Memorandum to Constitution Review Commission’); Interview with researcher on conservation in Kenya, London, June 2017.

³⁵ Office of the President, Indigenous Peoples Planning Framework, p. 24.

³⁶ United Nations Declaration on the Rights of Indigenous Peoples (preamble).

³⁷ Article 260.

³⁸ Report of the Working Group on the Universal Periodic Review: Kenya, UN Doc. A/HRC/29/10 (2015), §25.

The African Commission on Human and Peoples' Rights (a body of the African Union) notes that in Africa, "[t]he question of aboriginality or of 'who came first' is not a significant characteristic by which to identify indigenous peoples", and that "[r]ather than aboriginality, the principle of self-identification is a key criterion". It identifies the characteristics of these peoples as including: a culture and way of life differing considerably from the dominant society; a culture that is under threat, in some cases to the point of extinction; that their way of life depends on access and rights to their traditional lands and natural resources; that they suffer from discrimination being regarded as less developed than more dominant sectors of society; that they often live in inaccessible regions; that they are subject to domination and exploitation within political and economic structures; and that they are prevented from genuinely participating in decisions regarding them.³⁹

Embobut forest was registered ("gazetted") by the British colonial authorities as a protected state-owned forest in 1954, which prohibited occupancy of or activities (for example logging) in the forest without government permission.⁴⁰ However this did not result in the forest being protected from commercial logging and land grabs. The 2007 draft land policy states that the colonial government alienated the lands of ethnic minorities "through forest preservation policies, which effectively rendered them landless as they were denied the right to live in the forests".⁴¹ The situation worsened during the post-Independence period. The report of the Ndungu Commission, a public inquiry into illegal and irregular allocation of public land in Kenya established in 2003, found that "only 1.7% of the 3% of the country which was covered by gazetted forests at independence remains, most of the reduction having come about as a result of illegal and irregular excisions ... the beneficiaries of such excisions include (often private) schools, government institutions, and religious bodies as well as private individuals and companies".⁴² Notably under President Daniel arap Moi, thousands of hectares in the Cherangany Hills (a complex of which Embobut forest is a part) were illegally removed from the gazetted area and allocated to non-Sengwer, "impacting tremendously on water resources and altering the flow regime of major rivers feeding Lake Victoria and Lake Turkana, a trend threatening the stability of the lakes' ecosystem".⁴³

The Constitution of Kenya Review Commission – a body set up by the government in 2000 to undertake public consultations and draft a proposed new constitution – found that in Kenya, "minority communities experience intense pressure – economic, social and political – and are threatened to abandon their cultures, including their languages. Some of these minorities include the *Ogiek, Elmolo, Sengwer, Yaaku* and *Waata*".⁴⁴

Land in Kenya under the 2010 Constitution is classified as either public, private or community land. Public land is owned and administered by the county or national government. The Constitution states that: "Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest." It goes on to define community land, among other things, as "lawfully held, managed or used by specific communities as community forests, grazing areas or shrines" or "ancestral lands and lands traditionally occupied by hunter-gatherer communities".⁴⁵ On the basis of this, the Sengwer (and other forest-dwelling peoples) are demanding that their land, which is currently administered as public land by the KFS, be registered as community land, with the title transferred to the Sengwer.⁴⁶ The newly passed Community Land Act lays down the procedures allowing for this to be done.⁴⁷ The Constitution states that forests which are "lawfully held, managed or used by specific communities as community forests, grazing areas or shrines" are excluded from designation as public land.⁴⁸

KENYA'S OBLIGATIONS WITH REGARD TO INDIGENOUS PEOPLES' LAND RIGHTS

Kenya's national land policy recognizes that minorities "have lost access to land and land-based resources that are key to their livelihoods", due to not being "represented adequately in governmental

³⁹ African Commission on Human and Peoples' Rights / International Work Group for Indigenous Affairs, *Indigenous Peoples In Africa: The Forgotten Peoples? The African Commission's work on indigenous peoples in Africa*, 2006, pp. 10-11.

⁴⁰ By Proclamation Order 26 of 6 November 1954, under the terms of the Forest Act, Chapter 385 of the Laws of Kenya of 1942 (revised in 1982 and 1992), government printer, Nairobi, Kenya; Embobut Task Force Report, p. 9.

⁴¹ Ministry of Lands, *National Land Policy*, 2007, §200.

⁴² R. Southall, *The Ndungu Report: Land & Graft in Kenya*, Review of African Political Economy, 103, 2005, p. 148.

⁴³ J. Kenrick, 'The case of the Cherangany Hills, Kenya - State forest protection is forcing people from their lands', in *Integrated Approaches to Participatory Development*, 2014, p. 3.

⁴⁴ Final Report of the Constitution of Kenya Review Commission, Final Draft, 2005, p. 91.

⁴⁵ Constitution of Kenya, Articles 63(1), 63(2)(d)(i) and (ii).

⁴⁶ Matrix, *From dialogue to problem-solving: Securing forest dweller land rights to secure precious forests in Kenya*, Nanyuki, 2016.

⁴⁷ Community Land Act 2016.

⁴⁸ Constitution of Kenya, Article 62(1)(g).

decision making at all levels since they are relatively few in number”,⁴⁹ and promises that: “Land issues requiring special intervention, such as historical injustices, land rights of minority communities (such as hunter-gatherers, forest-dwellers and pastoralists) and vulnerable groups will be addressed. The rights of these groups will be recognized and protected.”⁵⁰ It recommends “a legislative framework to secure their [minority communities including hunter-gatherers] rights to individually or collectively access and use land and land based resources”.⁵¹

The African Charter on Human and Peoples' Rights, to which Kenya is a party, guarantees the right to property. The African Court judgment in the Ogiek case interprets this provision as guaranteeing the right of Indigenous Peoples to their ancestral lands,⁵² In doing so it draws on the UN Declaration on the Rights of Indigenous Peoples, which states that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”⁵³

The UN Committee on the Elimination of Racial Discrimination (CERD), a body of experts that provides authoritative guidance on the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination, to which Kenya is a party, has called on states parties to “recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.”⁵⁴

The UN Committee on the Rights of the Child, which exercises a similar role with regard to the Convention on the Rights of the Child, to which Kenya is a party, states that “In the case of indigenous children whose communities retain a traditional lifestyle, the use of traditional land is of significant importance to their development and enjoyment of culture. States parties should closely consider the cultural significance of traditional land and the quality of the natural environment while ensuring the children’s right to life, survival and development to the maximum extent possible.”⁵⁵

The government’s position is that, since the gazetting of the forest in 1954, Embobut forest has been public land, now more specifically governed by the newly passed Forest Conservation and Management Act 2016 – and before that, the Forest Act 2005. The Forest Conservation and Management Act 2016 allows for the creation of Community Forest Associations which are formally registered bodies allowing forest users to access the forest and exploit its produce, on condition that such activities do not “conflict with the conservation of biodiversity”.⁵⁶ This is the mechanism proposed by government to allow for communities to participate in forest management. Sengwer representatives have rejected the Community Forest Association model because it only gives them access rights, not tenure, and does not allow them to live in the forest.⁵⁷ They further see it as being “money-oriented”, and therefore encouraging an unsustainable harvesting of forest produce, and accuse the Community Forest Associations of planting non-indigenous trees that interfere with bee-keeping.⁵⁸

However, in addition, the Forest Conservation and Management Act allows for a very different model – conversion of public forests into community forests. The conversion of public land into community land is also provided for in the 2016 Community Land Act. Under this provision, the forest will vest in the community, and the community will draw up a management plan that will govern conservation efforts. The community will also be able to apply for technical advice to help with the implementation of the plan, and also access funds from the Forest Conservation and Management Trust Fund, established under the Act. The forest-dwelling Indigenous Peoples of Kenya have been asking for conversion of gazetted forests to community land since 2016, thus far without any positive response from the government, using the channel of the National Forum for Forest Dependent Communities. This is a process which aims to reach a

⁴⁹ Ministry of Lands, ‘Sessional Paper No. 3 of 2009 on National Land Policy’, 2009, §198-199.

⁵⁰ Ministry of Lands, ‘Sessional Paper No. 3 of 2009 on National Land Policy’, 2009, p. x.

⁵¹ Ministry of Lands, ‘Sessional Paper No. 3 of 2009 on National Land Policy’, 2009, p. 46

⁵² Judgment in *African Commission on Human and Peoples’ Rights v. Republic of Kenya* (Application no. 006/2012), African Court on Human and Peoples’ Rights, 2017 (hereinafter “African Court Ogiek case”), §131.

⁵³ Article 26(1) of the United Nations Declaration on the Rights of Indigenous Peoples (UNGAR 61/295) 2007.

⁵⁴ Committee on the Elimination of Racial Discrimination, General Comment 23, §5.

⁵⁵ Committee on the Rights of the Child, General Comment 11, §35.

⁵⁶ Forest Conservation and Management Act no. 34 of 2016, §49(3)(a).

⁵⁷ Interview, David Kiptum Yator (by telephone), August 2017.

⁵⁸ Letter from Sengwer Indigenous Peoples of Embobut to KFS Director, ‘Ref: Complain on the Planting of Trees on 4th-6th June 2015 at Kaptirbai Glade-Kakisang Area in Embobut’, 6 June 2015.

negotiated solution with government over forest management, conservation and questions of tenure, under the auspices of the National Land Commission (see section 5.2).

The Forest Conservation and Management Act has some protections for the traditional livelihoods of forest communities, for example the right, within certain restrictions, to access forest produce that are part of the customary practices of the community.⁵⁹

But for the Sengwer these concessions, without guaranteeing their tenure rights, are insufficient, hence their legal challenge to contest the evictions and have their land rights recognized (see section 5.1).

The government position, outlined in a letter by lawyers for the KFS to the High Court of Kenya in July 2015, is that the forest is empty of inhabitants, but that some Sengwer are re-entering illegally, having been evicted.⁶⁰ The Sengwer insist that they are in permanent occupancy of the forest. A study published by the KFS, almost two years after the massive forced evictions of January 2014, and two months after the July 2015 High Court letter, supports the Sengwer position: “Embobut forest has a long-standing squatter problem, with approximately 5,000 people living within the forest boundaries.”⁶¹ Since 2014, international media, researchers, development agencies and NGOs have entered the forest and interviewed Sengwer clearly in permanent occupation, in most cases with audio-visual evidence.⁶² An independent consultant working for an international development agency stated: “it is very clear that people have been there for some time, [the government] can’t say they have come back. You could see where there had been houses and where they had been burned or destroyed, I met people who were there who had houses, who were living their lives.”⁶³

TIMELINE OF EVICTIONS

April 2009	After massive evictions cause humanitarian crisis (which have been happening in Embobut since the 1980s, as part of a government forest conservation drive), Minister for Forests and Wildlife tours Embobut forest, announces Embobut Forest Task Force
June-December 2009	Meetings of Task Force with forest residents
January 2010	First Task force report published – recommends providing alternative land
March 2013	Community representatives file court petition calling for stop to evictions; court issues interim injunction calling on process to be suspended; communities reject alternative land in Uasin Gishu
November 2013	President Uhuru Kenyatta presides over ceremony in Embobut forest announcing cash compensation to the community
December 2013- April 2014	Compensation pay-outs
January-February 2014	Mass evictions and burnings; between 800 and 1,500 houses destroyed by KFS
April 2014	National Land Commission publishes statement recognizing Embobut forest as the Sengwers’ ancestral land
2014-2017	76 separate incidents of forced evictions, 2531 houses burned by KFS
September 2015	Sengwer denounce illegal logging by private individuals in the forest, allegedly with collusion of KFS

⁵⁹ Forest Conservation and Management Act, §52.

⁶⁰ Letter, Sifuna & Sifuna Advocates, to the Deputy Registrar of the High Court of Kenya, 30 July 2015.

⁶¹ *Cherangani Hills Forest Strategic Ecosystem Management Plan*, p. 5.

⁶² Amnesty International research mission to Embobut, March 2015; Forest Peoples Programme: ‘Video: The Sengwer home’ (<https://www.forestpeoples.org/en/environmental-governance-rights-based-conservation/news-article/2017/video-sengwer-home>), 29 November 2017; Huffington Post, ‘In Kenya’s Forbidden Forests, Conservation Can Turn Violent’, 2 March 2017; International Consortium of Investigative Journalists, ‘World Bank-Backed Projects Threaten Indigenous Communities’ Ways of Life’, October 2015; researcher for an international conservation research institute (anonymous), interview, Tangul, December 2015; Al Jazeera, ‘Kenya’s indigenous communities threatened’, 17 February 2018 (<http://www.aljazeera.com/news/2018/02/kenyas-indigenous-communities-threatened-180217140512279.html>).

⁶³ Anonymous, interview (by telephone), January 2018

July 2016	National Land Commission hosts first of series of National Forums with government agencies and forest dwelling communities to address land tenure, evictions and historical injustices, announces plan to secure tenure rights of forest communities
August 2016	Sengwer denounce evictions by KFS in violation of agreement at National Land Commission forum
December 2016	Chairperson of the National Land Commission issues 14-day eviction notice to forest residents in Embobut forest
April 2017	Elias Kimaiyo is shot at and beaten by KFS guards while taking photos of them burning huts
December 2017	Hundreds of armed guards enter forest, firing shots, burning houses (341 houses burned by the time of writing)
January 2018	Robert Kiprotich shot and killed, David Kiptilkesi injured, allegedly by KFS guards; EU suspends funding for WaTER climate change mitigation project, citing concerns over human rights abuses
March 2018	Fact-finding Mission, under Kenya National Commission for Human Rights, visits Embobut to investigate human rights violations
May 2018	Task Force set up by government to study forest management, finds rampant collusion of KFS in illegal logging, but recommends continuation of eviction policy towards forest peoples

3.4 FORCED EVICTIONS IN EMOBUT FOREST

“The Committee is alarmed by reports that the Sengwer people are being forcibly evicted from their traditional forest lands in the Embobut Forest, in violation of a High Court injunction. While noting the State party’s position that no forced evictions have recently been carried out, the Committee notes allegations that agents of the Kenya Forest Service have burned dozens of Sengwer homes.”

United Nations Committee on the Elimination of Racial Discrimination, Concluding Observations on Kenya, 2017 ⁶⁴

While the recent events (since 25 December 2017) have attracted significant media attention, forced evictions and arrests in the forest are not a new phenomenon for the Sengwer. Most interviewees identified the 1980s as the starting point of regular evictions.⁶⁵ Since the mass forced evictions of January 2014 (see section 4.2), Sengwer representatives have reported over 2,500 houses burned by the KFS. According to the Sengwer, since 2014, the longest period when the KFS did not carry out forced evictions and house burnings was from April to December 2017. Amnesty International has obtained extensive video and photographic evidence of the burnings. These show KFS guards setting fire to houses, and carrying away household goods that they find inside. The forced evictions have been widely reported on internationally.⁶⁶

Amnesty International interviewed 18 Sengwer respondents who stated that the eviction had come with no advance notice and that they had had no time to save personal property inside the house. One man, who was approximately 110 years old, talked of his forced eviction in 2014: “The KFS came one morning, and said ‘take him out’, and burned the house.” He said that, in a previous house burning by the KFS, his ID card had been burned.⁶⁷

⁶⁴ UN Doc. CERD/C/KEN/CO/5-7 (2017) § 19.

⁶⁵ Interviews, Tangul, December 2015.

⁶⁶ For example T. McDonnell, ‘In Kenya’s Forbidden Forests, Conservation Can Turn Violent’, Huffington Post, February 2017 and International Consortium of Investigative Journalists, ‘World Bank-Backed Projects Threaten Indigenous Communities’ Ways of Life’, October 2015.

⁶⁷ Interview, Tangul, December 2017.

KENYA'S OBLIGATIONS REGARDING THE RIGHT TO ADEQUATE HOUSING

Kenya's 2010 Constitution recognizes several human rights, including the rights to health, food, water, education and housing. The Constitution has also sought to establish new structures and polices to safeguard those rights. Article 43 (1b) of the Constitution of Kenya states: "Every person has a right to accessible and adequate housing and to reasonable standards of sanitation". The High Court of Kenya has, in at least three different cases, interpreted this right to include a prohibition on forced evictions.⁶⁸

Further, according to Article 21 (2) of the Constitution, "[t]he State shall take legislative, policy and other measures, to achieve the progressive realisation of the rights guaranteed under Article 43." Article 2 (6) of the Constitution lays down that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. As a result, rights contained in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights, among other international treaties that Kenya has ratified form a part of the law in the country.

With regard to the prohibition of forced evictions, the Land Laws (Amendment) Act introduces new provisions into the Land Act of 2012, requiring all evictions to comply with the following requirements:

- (a) be preceded by the proper identification of those taking part in the eviction or demolitions;
- (b) be preceded by the presentation of the formal authorizations for the action;
- (c) where groups of people are involved, government officials or their representatives to be present during an eviction;
- (d) be carried out in a manner that respects the dignity, right to life and security of those affected;
- (e) include special measures to ensure effective protection to groups and people who are vulnerable such as women, children, the elderly, and persons with disabilities;
- (f) include special measures to ensure that there is no arbitrary deprivation of property or possessions as a result of the eviction;
- (g) include mechanisms to protect property and possessions left behind involuntarily from destruction;
- (h) respect the principles of necessity and proportionality during the use of force; and
- (i) give the affected persons the first priority to demolish and salvage their property.⁶⁹

Section 157 of the Land Act 2012 identifies offences that may be committed by officials authorised under the Act, including unlawful or forceful entry or unlawful damage to property such as buildings or crops.⁷⁰

In 2012, the Kenyan parliament passed the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act. The Act gives effect to the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons 2006 and the United Nations Guiding Principles on Internal Displacement.⁷¹ Principle 9 of the Protocol lays down that States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.

Under the Forest Conservation and Management Act, in order to remove Sengwer structures, the KFS is legally required to: a) get a conviction for illegal occupation of the forest; b) give a deadline to the person to remove the structure; c) only then can the KFS destroy the structure if the inhabitant does not remove it.⁷²

The Government of Kenya is obligated under a range of regional and international human rights treaties which it has ratified, to respect, protect and fulfil the right to adequate housing.⁷³ The human rights treaties include the International Covenant on Economic, Social and Cultural Rights (ICESCR), which

⁶⁸ Ibrahim Sangor Osman & 1222 Others v the Minister of State for Provincial Administration and Internal Security and 10 Others (2011); Susan Waitthara and 4 Others v the Town Clerk, Nairobi City Council and 2 Others, 2011.

⁶⁹ Land Laws (Amendment) Act No. 28 of 2016, Article 98.

⁷⁰ Section 157 (5) of Land Act 2012.

⁷¹ International Conference on the Great Lakes Region, Protocol on the Protection and Assistance to Internally Displaced Persons, 30 November 2006; Representative of the UN Secretary-General on Internally Displaced Persons, Guiding Principles on Internal Displacement

⁷² Forest Conservation and Management Act 2016, Article 68(2).

⁷³ Article 11 (1) of the International Covenant on Economic Social and Cultural Rights acceded to by Kenya on 1 May 1972; Article 27(3) of the Convention on the Rights of the Child ratified by Kenya on 30 July 1990; Article 5 (e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination acceded to by Kenya on 13 September 2001; and Article 17 of the International Covenant on Civil and Political Rights (ICCPR) acceded to by Kenya on 1 May 1972.

guarantees among others, the rights to health, education, water, sanitation and housing. The right to adequate housing is guaranteed under Article 11(1) of the ICESCR.

The UN Committee on Economic, Social and Cultural Rights (CESCR), a body of experts that provides authoritative guidance on the implementation of the ICESCR, states that the government should respect the right to adequate housing including by refraining from forced evictions, protecting people from interference with their rights by third parties such as landlords, and adopting appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to adequate housing. Governments must prioritize the realization of minimum essential levels of housing for everyone whilst prioritizing the most disadvantaged groups in all programmes when allocating resources. The Committee also calls upon states parties to guarantee the right of people to participate in and be consulted over decisions that will affect them, and to provide an effective remedy if any of these rights are violated.⁷⁴

The Committee further requires that “States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force. States parties shall also see to it that all the individuals concerned have a right to adequate compensation for any property, both personal and real, which is affected. In this respect, it is pertinent to recall article 2.3 of the International Covenant on Civil and Political Rights, which requires States parties to ensure “an effective remedy” for persons whose rights have been violated and the obligation upon the “competent authorities (to) enforce such remedies when granted”.⁷⁵

According to international human rights standards, relocation sites must fulfil the criteria for adequacy of housing under international human rights law. The CESCR has identified the following aspects which are crucial to determine whether any particular form of housing can be considered to constitute adequate housing under Article 11 (1) of the ICESCR: legal security of tenure; availability of services, materials, facilities and infrastructure; location; habitability; affordability; accessibility; and cultural adequacy.⁷⁶

The United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement state that consultations on evictions “should include the following elements: (a) appropriate notice to all potentially affected persons that eviction is being considered and that there will be public hearings on the proposed plans and alternatives; (b) effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups; (c) a reasonable time period for public review of, comment on, and/or objection to the proposed plan; (d) opportunities and efforts to facilitate the provision of legal, technical and other advice to affected persons about their rights and options; and (e) holding of public hearing(s) that provide(s) affected persons and their advocates with opportunities to challenge the eviction decision and/or to present alternative proposals and to articulate their demands and development priorities.”⁷⁷

Article 17 of the International Covenant on Civil and Political Rights (ICCPR), to which Kenya is also a State party, provides protection against arbitrary and unlawful interference with privacy, family and home. The Human Rights Committee established to oversee implementation of the Covenant by states parties has held that forced evictions contravene Article 17 of the ICCPR.⁷⁸

The destruction of property by state officials or agents has also in certain circumstances been considered to be a violation of the right not to be subjected to torture and other ill-treatment. For example, the Committee against Torture has stated that house demolition and “closures” may in certain instances amount to cruel, inhuman or degrading treatment or punishment, in violation of Article 16 of the Convention against Torture.⁷⁹

The African Commission on Human and Peoples’ Rights, a body charged with overseeing the implementation of the African Charter on Human and Peoples’ Rights, has affirmed - in the case of SERAC and the Centre for Economic and Social Rights v. Nigeria - that forced evictions contravene the African Charter, in particular Articles 14 and 16 on the right to property and the right to health, and

⁷⁴ Committee on Economic, Social and Cultural Rights, General Comment 4, §9 and General Comment 7, §13.

⁷⁵ Committee on Economic, Social and Cultural Rights, General Comment No 7, §13

⁷⁶ Committee on Economic, Social and Cultural Rights, General Comment No. 4, §8.

⁷⁷ Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), §37.

⁷⁸ Concluding Observations of the Human Rights Committee: Kenya, UN Human Rights Committee (CCPR/CO/83/KEN), 29 April 2005, §22.

⁷⁹ Concluding Observations of the Committee against Torture: Israel, UN Doc. CAT/C/XXVII/Concl.5 (2001) §6; Hajrizi Dzemajl et al. v Yugoslavia (161/2000), CAT (2002) §9.2.

Article 18(1) on the state's duty to protect the family. In that case, the African Commission stressed that "although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. The combined effect of Articles 14, 16 and 18(1) reads into the [African] Charter a right to shelter or housing."⁸⁰



STELLA SENGWER WOMAN

Amnesty International interviewed Stella with her two-year-old daughter in Embobut forest in 2015. Her house was one of those burned by the KFS prior to a government meeting to promote co-operation with forest communities on forest conservation in March 2015. She described what happened:

"We had look-outs, they had seen the guards in the morning, but they said the guards were going to a different place. But they came again in the afternoon and caught us unawares. I was feeding the animals.

"I saw them coming, 13 of them, including guards and scouts. They were very close so I had to run; I left everything in the hut. I lost everything: blankets, utensils, the plastic roof. They burned 10 houses in this area. They let the animals out of the enclosure, they ran away, and came back in the evening.

"I am feeling very bad and depressed. But I am still living in the same place, I am proud of the place because it is our ancestral land, I inherited it from my great-grandparents. It is better to die here than to go somewhere else. But I won't build a permanent house because I am worried the KFS will come."⁸¹



 ↑ Burned remains of a Sengwer house in Embobut ©Amnesty International

On 29 March 2017, a delegation of the EU (from the EU Nairobi office and its headquarters in Brussels), the Kenya National Human Rights Commission and the Kenya Forestry Research Institute visited Embobut forest. The delegation, organized in response to complaints from Sengwer community leaders that the WaTER project was contributing to KFS efforts to evict them, met with Sengwer forest residents, and saw makeshift accommodation built by them. Four days later, on 2 April 2017, KFS guards burned at least 29

⁸⁰ Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (155/96), §60.

⁸¹ Interview, Embobut forest, March 2015.

Sengwer houses, and community activist Elias Kimaiyo was shot at and beaten for taking photos of the burnings (see section 6.2).⁸²

In a submission to the Environment and Land Court of Kenya (see section 5.1), community leader David Kiptum Yator stated that the KFS violated the injunction, which required state agents not to interfere with the Sengwer in the forest, by:

“[T]hreatening and repeating threats of eviction including in publicly accessible media; executing those threats by entering Embobut forest in the possession of firearms; firing live bullets in the air; verbally ordering occupiers of Embobut forest to leave the forest; entering homes and burning those homes that have been deserted by community members (who have either already fled or who flee when they see the guards coming to burn their homes); and generally spreading fear and panic and causing the petitioners and other members of the Sengwer community to flee the forest out of fear for the safety of their families’ lives, wellbeing, homes and possessions.”⁸³

However, representatives of the KFS and the Ministry of Environment and Forestry continue to deny that house burnings take place.⁸⁴



ISMAIL KIROP SENGWER MAN

On 29 July 2015, Ismail Kirop received a phone call from a friend saying a man that he employed to look after his livestock in Embobut forest had been arrested in Kapkok glade by KFS guards for being present in the forest. He immediately travelled to Maron KFS camp, where his employee had been taken.

On entering the camp, he was approached by a KFS guard. He described what happened next:

“The guard came and slapped me before he even talked to me, grabbed my left hand where I had my cell phone, twisted it behind my back and took the phone. He slapped me on the back of my head, then held me with my hand still twisted behind my back, with both arms around my abdomen. My arm was hurting very much. Then he took the money in my coat pocket (65,000 Kenyan Shillings, about \$640 USD) and pushed me. Another guard came to me and slapped me with tree bark on the side of the head, then pushed me out of compound. I fell unconscious for about 10 minutes.”⁸⁵

Ismail Kirop submitted a complaint to the police on the same day. Amnesty International saw the medical report ordered by the police in response to his complaint; it states that Ismail Kirop has a “soft tissue injury on side of head”, with probable type of weapon causing injury indicated as “blunt - piece of wood”.⁸⁶ Two witnesses also made statements to the police about what they saw. At the time of writing, Ismail Kirop was still waiting to hear from the Director of Public Prosecutions whether a prosecution would be brought against the KFS guard. His employee was released after his case was dismissed in court.⁸⁷

3.4.1 ARRESTS ON THE BASIS OF PRESENCE IN THE FOREST

Fifteen Sengwer interviewed by Amnesty International stated that they or a close relative had been arrested at least once for simply being in the forest. Community representatives have collected the names of 31 Sengwer people arrested in the forest between June 2014 and July 2015 (after the High Court injunction prohibiting arrests was issued), each with an Observation Book number (the number given by the police when they register a complaint) or a court case number. In support of these arrests, the KFS cites Section 64(1)(g) of the Forest Conservation and Management Act (2016): “Except under a licence or permit or a management agreement issued or entered into under this Act, no person shall, in a public or provisional forest... enter any part thereof which may be closed to any person”. The penalty for contravention provided

⁸² *The Star*, ‘Locals burn KFS camps after wardens beat up resident’, 3 April 2017.

⁸³ Supporting affidavit, 18 January 2014, Environment and Land Court Petition No. 15 of 2013, requesting a finding of contempt of court in the 2013 petition challenging the eviction of the Sengwer (see section 5.1).

⁸⁴ Interview, Dedan Ndiritu, Head of Conservancy for North Rift, Kenya Forest Service, August 2016; statement by Permanent Secretary of the Ministry of Environment and Forestry, at International Colloquium on Deepening Dialogue with Stakeholders in the Forest Sector in Kenya, March 2015.

⁸⁵ Interview, Maron, September 2016.

⁸⁶ P3 (Kenya Police Medical Examination Report), issued by O.C.S. Kapsowar, Ref. OB/17/29/7/2015.

⁸⁷ Interview, Elias Kimaiyo, Sengwer activist (by phone), April 2018.

in the Act is a fine of not more than 100,000 Kenyan Shillings (approximately \$990 USD) and/or a prison sentence of not more than six months. Prior to the passing of this act, the Forests Act 2005 contained a similar provision (52(1)(b)). The Sengwer argue that their right to community land under the Constitution and international law, and the High Court injunction, invalidate the application of this provision.

A magistrate interviewed by Amnesty International insisted that, in all cases where it is determined that the person is Sengwer, the case is dismissed.⁸⁸ However, the Sengwer community's lawyer said the KFS try to have defendants appear in court without a lawyer, where, unaware of their rights, they may plead guilty, and as a result are fined.⁸⁹ Under the 2010 Constitution, defendants must be informed of their right to have free legal representation provided by the state.⁹⁰ In December 2015, a lower court heard the case of Paul Komen Cherop, a Sengwer man arrested for being in the forest. Lawyers for the man, and for the KFS, presented their differing interpretations of the injunction. The court ruled that it was for the higher court, which was hearing the petition and had issued the injunctions, to arbitrate on this matter. Until this was done, arrests should not take place. Paul Cherop was released.⁹¹ "We have succeeded in using the precedent of the Cherop case in many cases. The police even tell the KFS to stop bringing cases because they are always dismissed," said the Sengwer community's lawyer.⁹²



THOMAS SENGWER MAN

Thomas was arrested in 2016 in the forest. He stated that his hands were tied, and he was taken to spend the night at Chesoi police post. The following day he was taken to court in Iten.

"There was no lawyer. I was asked to plead [to the charge of unlawful presence in the forest], I pleaded not guilty. I was asked if I had cash for bail, but I had none. I was taken to the cell, and later to Tambach prison. I spent one week in Tambach. Conditions were so bad, I didn't see the sun, was not allowed to exercise. There were 103 people in a cell about the size of this house [where interview was being held – approximately 18m²]. Food was insufficient: one slice of bread two times a day."

After his father paid his cash bail, Samuel Kipchumba was released. He was asked to appear in court a week later but he didn't go, as he did not have the 1,500 Kenyan Shillings (approximately \$15 USD) for transport there and back.

"I know I won't be acquitted, it will just go on. Yes I was caught, but it is my own place, it's not fair, I was born in the forest, I have always lived there. I was not asked in court where I live. I would be happier if I had a lawyer."

A number of Sengwer interviewed stated that they had given money directly to the KFS guards who had arrested them, so that they could be released. They stated that this was a bribe as it was not paid in court. Four respondents interviewed stated that they had had to pay 5,000 Kenyan Shillings (approximately \$50 USD) to forest guards to be released.

OBLIGATIONS CONCERNING FREEDOM OF MOVEMENT AND PROHIBITION OF ARBITRARY ARREST

The arrest of Sengwer people solely for being present in the Embobut forest violates the right to freedom of movement enshrined in Article 12 of the International Covenant on Civil and Political Rights (ICCPR) ratified by Kenya. General Comment 27 of the Human Rights Committee, a body of experts authorised to interpret the ICCPR, has further clarified that subject to the provisions of article 12.3, the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory.⁹³

Article 12.3 of ICCPR further provides that the right to freedom of movement shall not be subjected to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant. General Comment 27 has further expanded on when the above-

⁸⁸ Interview, Magistrate, Iten Magistrates' Court, September 2016.

⁸⁹ Interview, Eldoret, August 2016.

⁹⁰ Article 50(2)(h).

⁹¹ Criminal Case no. 629 at Senior Principle Magistrate's Court at Iten (*Paul Komen Cherop v. Republic*), 8 December 2015.

⁹² Interview, Eldoret, August 2016.

⁹³ Human Rights Committee, General Comment 27, §7.

mentioned restrictions on the freedom of movement may be permissible. For example General Comment 27 states “it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”⁹⁴

Furthermore, General Comment 27 also states “The application of the restrictions permissible under article 12, paragraph 3, needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination”. Denying the Sengwer access to the Embobut forest has particular implications for them as it is their ancestral land and crucial for the realisation of their human rights as Indigenous Peoples. The restrictions on their entry and subsequent arrests are therefore inconsistent with the principles of equality and non-discrimination.⁹⁵

In order to make it easier to find Sengwer structures in the forest, the KFS employs members of the Sengwer community – known as scouts – to accompany KFS guards when going into the forest. One former scout, interviewed by Amnesty International, described the tasks they were given as “slash and destroy people’s fences; burn people’s houses; arrest and harass the people; ensure people are kept off the forest”.⁹⁶

By engaging with individual Sengwer members to provide information that enables forced evictions and arrests to happen, the scout system sows discord in the community and is representative of the government’s failure to engage with the community collectively, as an Indigenous People, in order to obtain their consent for state actions that affect them, as required by human rights law.⁹⁷ The former scout described his situation:

“Whenever I need assistance from the community, I am reminded what I did to the community. My family has abandoned me. They believe what I did was very bad. My wife is harassed in public places on my behalf. People don’t want to associate with her.”⁹⁸

On 16 September 2016, one community scout was killed and two KFS guards injured by arrow shots, when patrolling in the forest, reportedly by members of the Sengwer community who had resisted arrest.⁹⁹

⁹⁴ Human Rights Committee, General Comment 27, §14.

⁹⁵ Human Rights Committee, General Comment 27, §18.

⁹⁶ Interview, Maron, September 2016 (interviewee requested to remain anonymous).

⁹⁷ United Nations Declaration on the Rights of Indigenous Peoples, Article 19. (General Assembly resolution 61/295, 2007).

⁹⁸ Interview, Maron, September 2016 (interviewee requested to remain anonymous).

⁹⁹ Standard Digital, ‘Forest scout shot dead, two KFS rangers injured in Embobut after attack by residents’, 17 September 2016.

4. 2009-2014 – CONSULTATION AND EVICTION

4.1 THE EMOBUT FOREST TASK FORCE

The Embobut Forest Task Force was constituted in 2009 by the then Minister for Forestry and Wildlife and the Minister for Agriculture. The Task Force was set up in response to mass evictions carried out in 2009 by the KFS which resulted in a large number of forest residents being made homeless and forced to live with their families by the side of roads just outside the forest. The Kenya Red Cross and other humanitarian NGOs intervened to address their plight.¹⁰⁰ Task Force members and local government officials interviewed by Amnesty International stated that there was a consensus that the environmental degradation in Embobut forest was damaging to the entire country and required urgent action.¹⁰¹ The Task Force's work is important because it was used to justify the government's decision to evict forest residents, and because it registered residents eligible for compensation. It released an initial report of findings in 2010, including a list of eligible residents; Amnesty International has not been able to obtain a copy of the final report, released in 2013, despite filing a freedom of information request for documents relating to the Embobut Forest Task Force process in July 2017. Other documents requested include the environmental and social impact assessment, resettlement action plan, minutes of meetings, lists of participants, and written documentation of the consent given by the community to the eviction. Amnesty International also repeatedly asked Task Force members and local government officials for these documents; all without success.

The Task Force was mandated:

“(i) to enquire and determine the categories of squatters affected by eviction and verify those with genuine right for alternative settlement; (ii) to collect and collate through public *barazas* [gatherings of community members to discuss matters of concern] and other sources the number and categories of vetted genuine squatters to be presented to the government for alternative resettlement consider [sic]; (iii) to find convenient temporary resettlement sites as holding grounds for genuine squatters while waiting for a decision on permanent alternative resettlement to be made; (iv) to take inventory of public utilities in the forest land below the road towards the Kerio valley [an area on the West side of the forest where long-term semi-permanent settlement had been tolerated and where consequently public services had been set up] with a view to proposing action to be taken.”¹⁰²

¹⁰⁰ Embobut Task Force Report, pp.10-11; interview, Task Force member, September 2016.

¹⁰¹ Interview, Gabriel Lagat, Deputy Governor of Elgeyo Marakwet County, Iten, September 2016; Task Force member, September 2016.

¹⁰² Embobut Task Force Report, p.12.

The Task Force itself was not constituted through a process of consultation with the affected Indigenous communities, as required by human rights standards.¹⁰³ Members were selected by the then MP Lina Chebii Kilimo, and the District Commissioner, who chaired the Task Force.¹⁰⁴ The Sengwer were only represented by two members out of 23 on the Task Force, despite constituting the largest community in the forest; both Sengwer representatives were men.¹⁰⁵ In total, 21 of the 23 Task Force members were men.¹⁰⁶ Other members included a former MP, two retired chiefs (civil servants who perform an administrative liaison function at the village level), the chairman of a Community Forest Association, an activist from a women's NGO, and a District Forest Officer. A Task Force member told Amnesty International that in 2013 the Task Force was expanded, to improve representation of forest residents.¹⁰⁷

As part of the Task Force process, people occupying the forest were separated into two categories. The first category – “genuine squatters” – was used to identify groups that had resided in Embobut forest for several generations.¹⁰⁸ In Kenya, the term “squatter” is used to denote any person occupying land in contravention of law, even if they belong to a community claiming the land as their ancestral land.¹⁰⁹ “Genuine squatters” further includes: permit holders, their sons and their “associates” (permit holders are those that are descended from people who were given permits by the British colonial authorities to graze livestock; “sons” indicates that the authors of the Task Force did not question traditional practice that decreed that daughters did not inherit permit-holder rights; associates were people who worked for permit-holders, and their modern-day descendants); landslide victims (people who came to live in Embobut forest after being displaced by landslides in the Kerio Valley in 1951 and 1961); and forest-dwellers who are characterized as being Sengwer/Kimala. People in the second category, “economic opportunistic seekers”, “left the forest during the vetting process” according to the report.¹¹⁰

While there were many different categories of people in Embobut forest at the time of the 2014 evictions, the Task Force identified the Sengwer as “the largest and most deserving category of forest residents who do not have an original home other than the forest... Relocation and resettlement of these groups was considered to be urgent.”¹¹¹

4.1.1 VIOLATIONS OF DUE PROCESS AND FREE, PRIOR AND INFORMED CONSENT

While officials of the Ministry of Environment and Forestry and KFS insist that the Sengwer were fully consulted, via the Embobut Forest Task Force process, and consented to the eviction, the possibility of the Sengwer remaining in the forest was not explored as an option. The first Task Force report stated that its main objective was to “investigate and determine the genuine squatters in Embobut forest and further recommend to the Minister on their permanent resettlement and a lasting solution to the restoration of the degraded and encroached forest”.¹¹² Three members of the Task Force confirmed to Amnesty International that the eviction of the Sengwer, and all other occupants of the forest, was not a matter for negotiation.¹¹³ In their petition to the High Court of Eldoret, challenging the legitimacy of the consultation, eviction and compensation process, three Sengwer representatives stated that on 15 March 2013, at one of the public consultations organized by the Embobut Task Force in Tangul village, attended by approximately 2,000 forest residents:

“[T]he 4th Respondent [District Commissioner Marakwet East] warned communities including the Sengwer, that failure to accept the government’s directive would lead to unnamed dire consequences. Notwithstanding this threat, the Petitioners and the Sengwer community in the Embobut Forest declined to accept the offer of relocation to some unknown land as the Respondents neither presented any other option to the community nor invited further consultation.”¹¹⁴

¹⁰³ United Nations Declaration on the Rights of Indigenous Peoples, Article 18: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”

¹⁰⁴ Interview, Task Force Member, September 2016.

¹⁰⁵ Embobut Task Force Report, p. 20.

¹⁰⁶ Embobut Task Force Report, p. 3.

¹⁰⁷ Interview, Task Force member, September 2016.

¹⁰⁸ Interview, Task Force member, September 2016.

¹⁰⁹ Ministry of Lands, *National Land Policy*, 2007, §211.

¹¹⁰ Embobut Task Force Report, p. 14.

¹¹¹ Embobut Task Force Report, p. 20.

¹¹² Embobut Task Force report, p. 12.

¹¹³ Interviews, September 2016.

¹¹⁴ Petition no. 6.

The petition, lodged by representatives of the Sengwer community acting in the community's name, and expressly rejecting the proposals of government, is evidence that a group of recognized community leaders expressly rejected the eviction process. For this reason, government insistences that the Sengwer agreed to leave the forest do not reflect reality.¹¹⁵ This constitutes a violation of the rights of Indigenous Peoples, whose free, prior and informed consent must be obtained if they are to be relocated from their ancestral land.

OBLIGATIONS WITH REGARD TO FREE, PRIOR AND INFORMED CONSENT

The free, prior and informed consent of Indigenous Peoples must be obtained if they are to be relocated from their ancestral land. The African Commission on Human and Peoples' Rights has interpreted this right from the African Charter on Human and Peoples' Rights, to which Kenya is a party.¹¹⁶ The Commission, in its judgment in the Endorois case, found that in the case of "any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."¹¹⁷

This principle is enshrined in the United Nations Declaration on the Rights of Indigenous Peoples. Article 10 of the Declaration states 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."

The UN Committee on the Elimination of Racial Discrimination (CERD), in its guidance to states parties to the International Convention on the Elimination of All Forms of Racial Discrimination, calls on them to "Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".¹¹⁸

4.1.2 INADEQUACIES IN THE CONSULTATION PROCESS

The first phase of the Task Force process – registration of forest residents by category – involved a series of meetings in different glades (non-wooded areas within the forest) between June and December 2009. Sengwer and other forest residents interviewed by Amnesty International reported a high degree of confusion and disagreement over the purpose of the process, the details of what was being proposed and what – at the end of the Task Force process – had been agreed. Many Sengwer community members told Amnesty International that the Task Force merely came to register their names without explaining what it was for. Some confused the Task Force meetings with meetings convened by the government to consult on a World Bank-funded project on water and forest management.¹¹⁹ A number of respondents stated that they thought the compensation was not for relocation from the forest, but compensation for suffering and destroyed property during many years of forced evictions.¹²⁰ Task Force members interviewed by Amnesty International stated that it was made very clear at all points of the process that forest residents were being required to leave the forest.

Many community members interviewed said that they did not go to consultation meetings. There was no system for informing people of the time, place and subject matter of meetings. One former Task Force member did not seem to realize how inadequate this methodology was: "[the Task Force] just told people there is a *baraza*. People could find out even if they only announced it the day before, with no publicity. You would be amazed at how many people would come – between 200 and 300".¹²¹

"I don't think these means [of informing people] were effective, because some people were away, others engaged. Information was given to people the eve of the meeting. Obviously information could not have reached everyone. And even those who got the information, but had already confirmed other engagements, missed the meeting."

Paul Kirop, Sengwer man¹²²

¹¹⁵ Interview, National Land Commission, interview, Nairobi, September 2016; Task Force member, September 2016.

¹¹⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (276/2003), 2003, §225-226 (with reference to Art. 14 of the Charter).

¹¹⁷ §291.

¹¹⁸ General Comment 23, §4(d).

¹¹⁹ Interview, Researcher on Conservation, August 2016.

¹²⁰ Interviews, Tangul, December 2015 & September 2016.

¹²¹ Interview, Maron, September 2016.

¹²² Interview, Maron, September 2016.

Sengwer members interviewed by Amnesty International stated that they were not aware of any grievance mechanism put in place for people who wanted to contest any aspect of the process, and in particular, their exclusion from the list of beneficiaries for compensation. One Task Force member stated that the grievance mechanism was the Task Force itself.¹²³ While it is not in itself inappropriate for the Task Force to have an internal mechanism for evaluating grievances, it cannot be the only one. The Commission on Administrative Justice is an independent body, established under the Commission on Administrative Justice Act 2011. It acts as an ombudsman and is mandated to receive grievances concerning compensation processes, among other things. However no respondents indicated any knowledge of it. Finally, the courts function as a recourse to justice, although a time-consuming and costly one. Meanwhile, the petition by Sengwer representatives challenging the eviction and compensation process has not yet been heard at the time of writing, five years after it was filed, and the injunction put in place by the court, requiring the respondents to not interfere with the status quo in the forest, has been ignored (see section 5.1).

A member of the Task Force stated that “there were glade committees, they could listen to grievances of people and make recommendations to the Task Force. They were composed of men and women, elders and youth. They were elected by glades.” However, he recognized that in some cases women might not volunteer to be part of the committee.¹²⁴ No Sengwer or other forest residents interviewed by Amnesty International had any knowledge of these committees.

“After the compensation, the Task Force was disbanded. There was no grievance mechanism, no one to oversee implementation.”

Member of Embobut Forest Task Force ¹²⁵

The United Nations Basic Principles and Guidelines on Development-Based Evictions and Displacement state that: “No resettlement shall take place until such time as a comprehensive resettlement policy consistent with the present guidelines and internationally recognized human rights principles is in place”.¹²⁶

“We did not understand what was happening. The Task Force did not disseminate their report and discuss with us their findings”

Margaret, Sengwer woman¹²⁷

4.1.3 INADEQUACIES IN ENUMERATING FOREST RESIDENTS

The Embobut Task Force Report does not indicate a consistent methodology used to identify forest residents who would be eligible for resettlement. Task Force members interviewed by Amnesty International stated that meetings were held in six locations in the forest, that these were advertised through chiefs, who were asked to inform all forest residents to attend. Those attending were then invited to register their names. In order to facilitate the process of identifying forest residents, communities were asked to identify representatives to speak for them: “The communities were called to three *barazas*, in Maron, Kapchebau and Kapyego. They were told to appoint one or two persons to represent them. They were asked to organize in clans, but there were considered to be too many clans, so some were clustered with one representative.”¹²⁸

The lists were vetted by the Task Force members. The initial list found in the 2010 Task Force report was then shared at further consultation meetings, giving a chance to forest residents who had been left out to register. This then gave rise to a revised “cash payments” list, which was the one used to issue cash compensation. Many respondents indicated that this revision, while it corrected some omissions, also

¹²³ Interview, September 2016.

¹²⁴ Interview, September 2016.

¹²⁵ Interview, September 2016.

¹²⁶ Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Doc. A/HRC/4/18 (2007) (hereinafter, ‘Principles and Guidelines on Development-Based Evictions’), §56(a).

¹²⁷ Interview, Maron, September 2016.

¹²⁸ Interview, Task Force member, September 2016.

involved the removal of a large number of genuine forest dwellers and the addition of people with no connection to the forest.¹²⁹ Given that heads of families (mostly men) were those that attended any kind of official meeting, the methodology favoured the inclusion of men in the compensation list.

A government official, with close knowledge of cases involving conflicts over compensation, said “the government says all adults were compensated, but the Task Force registered people by family, and was very random about how many in the family were compensated. It could depend on what affiliations you had”.¹³⁰

The right to free, prior and informed consent requires that governments consult with Indigenous Peoples through their own designated decision-making mechanisms. However, according to the report, the Task Force mistook the Sengwers’ non-hierarchical structures as evidence that they should not be engaged with as a collective:

“It was decided they should be considered as individuals and for purposes of record and resettlement as any married persons do lead their life independently and not through family heads as is the case with other groups found in the forest”.¹³¹

This has serious consequences for the respect of the right of Indigenous Peoples to be consulted and to give or withhold their free, prior and informed consent, which must be a collective process. In the words of a senior local government official, the consultation “should be done through the structures of the community. The Task Force didn’t do this, it went through government structures. They should have consulted with the community on how to do the move, and how much compensation.”¹³²

4.1.4 HOW ALTERNATIVE LAND BECAME MONETARY COMPENSATION

The recommendation of the first Task Force report was to identify a large parcel of alternative land to which all the forest residents (in the first category of “genuine squatters”) could be resettled collectively.¹³³ For this purpose the residents were classed into three categories with differing land allocations: permit holders/associates (10 acres per household); Kimala / Sengwer (5 acres per adult); and landslide victims (2.5 acres per adult).¹³⁴ A Sengwer leader interviewed stated that this differentiation was arbitrary and that the Sengwer were not consulted on it.¹³⁵

The Task Force then set about the process of identifying possible parcels of land for resettlement of the forest dwellers. Representatives of forest dwellers visited two parcels of land that were proposed, but rejected them, the first because it was hot, dry plains land, and the delegation saw it as being inappropriate for their culture and form of livelihood.¹³⁶ The second parcel was too small to settle all the forest residents; the Task Force proposed to settle the communities separately on smaller plots, if a large plot of land was not available. The Sengwer, however, insisted on being settled together.¹³⁷

At this point, the Directorate of Special Programmes (within the Ministry of Devolution and Planning) intervened and imposed an offer of cash compensation instead of alternative land; the Task Force opposed this decision.¹³⁸

“We were not comfortable with the idea of money because the people had indicated the desire to be resettled together. We were disappointed by the government decision to give money. Land that could have accommodated all the Sengwer evictees and is suitable, exists. They should have tried harder to find land to resettle everyone together.”

Member of Embobut Forest Task Force¹³⁹

The amount of money given as compensation to registered Sengwer individuals (most of whom were heads of families) was 400,000 Kenyan Shillings (approximately \$4,585 USD in 2013). According to a government official and Sengwer interviewees, the government had initially promised 410,000 Kenyan Shillings but only

¹²⁹ Interview, Task Force member, Nairobi, September 2016.

¹³⁰ Interview, December 2015.

¹³¹ Embobut Task Force Report, p. 20.

¹³² Interview, Gabriel Lagat, Deputy Governor, Elgeyo Marakwet County, Iten, September 2016.

¹³³ Embobut Task Force Report, pp. 20-21; Interview Task Force member, September 2016.

¹³⁴ Embobut Task Force Report, p. 21.

¹³⁵ Interview, Joseph Kiptoo, Tangul, December 2015.

¹³⁶ Interview, Jacob Kibiwot, Tangul, December 2015; Joseph Kiptoo, Tangul, December 2015; Robert Yego, Tangul, August 2016.

¹³⁷ Interview Task Force member, September 2016.

¹³⁸ Interviews, three Task Force members, September 2016.

¹³⁹ Interview, September 2016.

400,000 was paid out.¹⁴⁰ This is the same amount that was given to victims displaced by the 2007 post-election violence, an ongoing compensation process that was happening at the same time. The amount was not therefore tailored to the specific situation of evicted forest dwellers, who needed alternative land. As a local county government official explained:

“It is not clear how they arrived at the figure of 400,000. It was passed by the cabinet. They put together the Sengwer issue and the issue of IDPs [internally displaced people]; they treated them the same way when actually it was not the same issue nor the same compensation needs. It is the Sengwers’ ancestral land, they bury their dead there.”¹⁴¹

“It was wrong to go from 10 acres to 400,000 shillings, they are not equivalent. It was based on the figure that victims of post-election violence got. It led to a negative social impact. It reduced [the forest residents] to poverty levels – it removed them from their homes, they lost family income, even children dropped out of school.”

Member of Embobut Forest Task Force ¹⁴²

An official of the county government stated that the compensation process, by suddenly creating a significantly higher demand for land in a small geographic area, had caused an increase in the price of land therefore the monetary compensation was insufficient to purchase sufficient land for a large family with livestock to graze.¹⁴³ The media also widely reported that beneficiaries spent their monetary compensation on items other than land.¹⁴⁴ Ten Sengwer members interviewed stated that they had used the money to pay for children’s schooling, to buy necessary household items, or to lease land, because it was not enough to buy land and therefore provide them a permanent place to live. Some said that they were utterly unprepared for dealing with such a large amount of money.

“The impact of the compensation was negative because most young men moved to the urban areas to have fun. They left their families behind. Some have never come back, some have come back with no money. Marriages were broken up.”

Paul Kiptuka, Sengwer clan elder ¹⁴⁵

“The government rolled out cash instead of land, and that has very much been a problem to us. Land is better, cash is evil, you can take it and squander it, it may not benefit you, very few used it wisely. Some of those that never benefited from the compensation are living in potato stores.”

Beatrice Cheruyot Kimutai, Sengwer woman ¹⁴⁶

UN guidelines on evictions state that:

“Cash compensation should under no circumstances replace real compensation in the form of land and common property resources. Where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better.”¹⁴⁷

The amount of compensation must include all costs related to the eviction, including:

“[L]and plots and house structures; contents; infrastructure; mortgage or other debt penalties; interim housing; bureaucratic and legal fees; alternative housing; lost wages and incomes; lost educational opportunities; health and medical care; resettlement and transportation costs”.

Where the home provides livelihood for the family, as in the case of the Sengwer, assessment of compensation must account for “the value of business losses, equipment/inventory, livestock, land, trees/crops, and lost/decreased wages/income”.¹⁴⁸

¹⁴⁰ Interview, local government official, Iten, December 2015; interviews, Tangul, December 2015 and September 2016.

¹⁴¹ Interview, Eldoret, December 2017.

¹⁴² Interview, September 2016.

¹⁴³ Interview, Iten, December 2015.

¹⁴⁴ See for example, *Daily Nation*, ‘Forest evictees make merry with land cash’, 24 December 2013.

¹⁴⁵ Interview, Tangul, December 2015.

¹⁴⁶ Interview, Tangul, December 2017.

¹⁴⁷ Principles and Guidelines on Development-Based Evictions, §60.

¹⁴⁸ Principles and Guidelines on Development-Based Evictions, §63.

4.1.5 THOSE EXCLUDED FROM COMPENSATION

A senior local government official and a Task Force member confirmed that many legitimate beneficiaries had been missed off the list, although they were not able to quantify exact numbers.¹⁴⁹ A member of Elgeyo Marakwet County Assembly, during a debate on the suspension of EU funds for the WaTER project, stated that the compensation was faulty and that those “who benefited were not the right people who were living [in Embobut]”.¹⁵⁰

“Not everyone living in the forest got included. Some Sengwer and landslide victims were not included. People who were not compensated felt they were cheated, some are still living in the forest.”

Elgeyo Marakwet County government official¹⁵¹

Thirty-nine Sengwer respondents stated that they were not compensated despite being legitimate beneficiaries; some reported that they were excluded because their identity card was lost or had been burned during a previous forced eviction, resulting in registration being refused. A Task Force member stated that there were mobile units to issue ID cards in two locations next to the forest. It was also possible to get a paper confirming that an ID card had been applied for, and this would be accepted by the Task Force and the person would be registered.¹⁵² However some respondents reported that they did not have funds to travel back and forth to administrative centres to challenge bureaucratic mistakes, or that the efforts they undertook were fruitless. A Sengwer woman, now living with her husband and family in a town outside the forest, told Amnesty International:

“During the enumeration process, I didn’t have an ID. I made three attempts to get it, at Kapyego, Tangul, and Maron. By the time I got it, the process had ended. My husband’s name was enumerated, but when it came back, there was an error in the name captured by the computer. He followed up about it in Chesoi, they promised him it would be corrected. After that, he didn’t follow up again, and was not compensated. We did not complain. No one told us about a complaints mechanism.”¹⁵³

An additional 10,000 Kenyan Shillings (approximately \$115 USD), promised to all beneficiaries to cover the cost of transport for bureaucratic steps, was not paid out (see section 4.1.4). A community activist has a list of twelve Sengwer members who failed to be compensated, either because of an error in registering identification details, or because they were removed for unknown reasons from the original Task Force report list. He supported four of them to get the error rectified, successfully in two cases, unsuccessfully in the other two.¹⁵⁴

One Task Force member stated that another member had accepted bribes of 200,000 Kenyan Shillings (approximately \$2,293 USD) – half of the amount the person would receive – to register people for compensation.¹⁵⁵ One Sengwer man reported he had had to pay this bribe even though he was a legitimate beneficiary:

“My name was there at the beginning, later it disappeared. I had to give 200,000 Kenyan Shillings to the secretariat to have my name reinstated. Only I got money; my wife, brothers, my mother didn’t get it. At the end of the process they brought in new names. It was not serious, I’m from inside the forest but others, you didn’t know where they came from. Eighteen people from West Pokot who never lived in the forest were on the Task Force list.”¹⁵⁶

Two interviewees stated that a second phase of compensation, for those that missed out the first time, was promised by the Directorate of Special Programmes.¹⁵⁷ It was also reported in the media that “3,000 more are expected to be compensated in the next few months”.¹⁵⁸ This was intended to cover, among others, those whose ID cards were lost or had been registered incorrectly, resulting in the bank refusing to pay out the money. However, a Task Force member told Amnesty International that the funds set aside for this

¹⁴⁹ Interview, Gabriel Lagat, Deputy Governor, Elgeyo Marakwet; Task Force member, Iten, September 2016.

¹⁵⁰ Hon. Kipketer, Elgeyo Marakwet County Assembly Special Sitting, February 2018.

¹⁵¹ Interview, Eldoret, December 2017.

¹⁵² Interview, Iten, September 2016.

¹⁵³ Interview, Kapcherop, December 2017.

¹⁵⁴ Interview, Elias Kimaiyo (by telephone), April 2018.

¹⁵⁵ Interview, Nairobi, September 2016.

¹⁵⁶ Interview, Tangul, September 2016.

¹⁵⁷ Interviews, Anonymous, Tangul, December 2015; Anonymous, Tangul, September 2016.

¹⁵⁸ Kenya Citizen TV, ‘Embobut Forest Evictions’, 24 January 2014, available at www.youtube.com/watch?v=qLSVvmtenCI

purpose were sent back to the treasury at the end of the 2013-2014 financial year due to bureaucratic delays. As a result, those who were excluded in the first round were not compensated.¹⁵⁹

4.1.6 EXCLUSION OF WOMEN FROM CONSULTATION AND COMPENSATION

Public participation and non-discrimination on the basis of gender are fundamental principles anchored in the Constitution of Kenya and in international human rights standards. Traditionally, in Sengwer culture, as in many communities, women do not participate in decision-making forums as actively as men. Even though women were adversely affected in specific ways by the forced evictions, for example through the undermining of their financial autonomy and being prevented from participating in gender-specific customs and traditions in the forest (see section 7.5), the Embobut Forest Task Force did not set up any special mechanism for ensuring that women could participate and that their specific concerns were heard.¹⁶⁰ The lack of a comprehensive Resettlement Action Plan meant that the Task Force applied a “one size fits all” approach in the consultation process. Twenty-nine out of 34 Sengwer women interviewed stated that they did not attend any Task Force meetings, all of whom said that they were not informed about the meetings.

In an interview with a focus group of 15 women, one woman reported that:

“We were not consulted for views on the development of the report. We have heard of some Task Force report but we have never seen it. A lot of people were left out since they did not consider us to be heads of families. When we demanded to know why our names had been left out by the Task Force, we were told only heads of families were being enumerated.”¹⁶¹

Women have traditionally played a significant role in the protection and maintenance of the culture of the Sengwer. Sengwer women interviewed by Amnesty International researchers described the different roles women played in specific situations such as child naming, and rituals where children died for unexplained reasons, for example in childbirth. On these occasions, groups of women performed rituals to appease the spirits, usually entailing the sharing of *kipketin* (an alcoholic brew made from honey) with the ancestors and offering traditional prayers. No consideration was given to these roles within the Task Force process.¹⁶²

While just 16 out of 48 men interviewed stated they had not received compensation, the proportion of women was even higher: 23 out of 34 interviewees. The Task Force report makes it clear that, among the Sengwer, men were more likely to be considered for compensation: “The number of Sengwer (Kimala) presented in this report indicate the number of individual adults (men) can be considered for resettlement” (the quote is verbatim).¹⁶³ While at this point the remedy being offered was alternative land, this was the basis on which the first list of names was drawn up, which appears in the 2010 Task Force report.¹⁶⁴ This list does include women, and our interviews suggest that it was possible for woman heads of households to register, or for people who were able to use their influence to be included.¹⁶⁵ For landslide victims, beneficiaries are categorized under either family heads (sex not specified) or “sons”.¹⁶⁶ One Task Force member stated that widowed women and single mothers were compensated but that married women were not, as they were expected to access compensation through their husbands.¹⁶⁷ According to an analysis of the gender breakdown of the final cash payments list, carried out by two Sengwer activists (one man and one woman), 2,077 men and 797 women received compensation. Male or female identity was deduced on the basis of first names as it was not indicated in the list. The accuracy of this method cannot be fully guaranteed.¹⁶⁸

A Sengwer woman living in the forest, told Amnesty International:

“I am a widow and a mother of six living children and one deceased. I was registered under my brother-in-law as his eldest daughter. He is my deceased husband’s younger brother. I had to complain to the D.O. [district officer] and demand to be removed from his list and registered as the head of my own family. It was not easy!”¹⁶⁹

¹⁵⁹ Interview, Task Force member, September 2016.

¹⁶⁰ Interview, Gabriel Lagat, Deputy Governor, Elgeyo Marakwet; Iten, September 2016.

¹⁶¹ Female-only discussion at Maron with 15 women from Koropkwen, Kapkok and Kaptirbai glades, September 2016.

¹⁶² Female-only discussion at Maron with 15 women from Koropkwen, Kapkok and Kaptirbai glades, September 2016.

¹⁶³ Embobut Task Force Report, p. 20.

¹⁶⁴ Embobut Task Force Report, pp. 25-113.

¹⁶⁵ See testimony of Sengwer widow, below, and of the government official in Section 4.1.5.

¹⁶⁶ Embobut Task Force Report, p. 55.

¹⁶⁷ Interview, September 2016

¹⁶⁸ Interview, Elias Kimaiyo (by phone), April 2018.

¹⁶⁹ Female-only discussion at Maron with 15 women from Koropkwen, Kapkok and Kaptirbai glades, September 2016.

holder, “ought to have been included” in the list of beneficiaries, but was left out. The letter asked the Ministry to “consider her case”.¹⁷⁰

“It took two years to get the DC to write that letter, I spent 50,000 Kenyan Shillings on transport to Maron and Chesoi, chasing up. When compensation was issued, I went to speak to the District Officer [above the Chief in the local government hierarchy]. I brought the letter, but he refused to consider it.

“After the election in 2017 I called the DC’s clerk, who said it’s because the MP and the Senator have not agreed. When it’s ready you’ll be told. Don’t come to the office.”¹⁷¹

By excluding women in this way, the Embobut Forest Task Force was replicating a phenomenon which is widespread in many ethnic groups in Kenya and elsewhere in the world who live according to traditional custom, including the Sengwer: that is, that women’s access to resources, in particular land, is determined through their husbands. Twenty-four Sengwer respondents – men and women – stated that the community organizes access to land via male children. A daughter is expected to access land by marrying. If she is unmarried, or divorces or is widowed, she returns home and will be allocated a small plot by her family.

According to Milka Chepkorir, a Sengwer activist and researcher looking at land rights with a special focus on women:

“What we need to remember is that discrimination against women in access to land rights is not unique to the Sengwer; in fact it is the norm among African societies. The Sengwer leadership has recognized this problem and intends to address it; this is a conversation that we are having and which is progressing. Depriving the Sengwer of their land rights has not helped the women, who want the community to get its land rights and then they will work within the community for equality for women.”¹⁷²

In a meeting with about 50 Sengwer members to discuss the findings of Amnesty International’s research, including men and women, and many community leaders, it was agreed that the inequality in access to land was an issue that the community should work to resolve.¹⁷³

Kenya’s Community Land Act provides that no member of a community, regardless of sex, marital status, disability, or other status, can be discriminated against, including in access to land held by the community.¹⁷⁴

Another significant problem, when heads of families are compensated, is that a one-size-fits-all approach does not take account of differences in family size and composition. A member of the Embobut Forest Task Force stated that “women were considered as household heads; for those who are in polygamous relationships, each wife would be registered”.¹⁷⁵ However, respondents told Amnesty International about cases where this did not happen in practice. One 30-year-old Sengwer man reported: “In my family, my father got compensation. My father has two wives, he has 19 children. He divided this money among his sons who used it to lease land for farming. The same money was used to rent houses and buy food so it did not last for long.”¹⁷⁶

Sarah, a 52-year-old Sengwer woman and mother of 10 children, is the second wife in a polygamous marriage. She did not get a chance to inform the Task Force about her specific situation and needs: “I have never been involved in any meeting about the evictions. We used the compensation to replace the basic items that had been burned in the forest. Since we were two families we just bought clothes and food.” In their family, only her husband received compensation.¹⁷⁷

Catherine, a 36-year-old widow and mother of nine children, told Amnesty International researchers:

“Some people were compensated, others were not. When I sought to understand from the people who enumerated us why we were left out, they told me that my name might have been omitted by the computer. I felt discriminated against because I was a widow and lacked a man to defend me.”¹⁷⁸

¹⁷⁰ Copy of letter in possession of Amnesty International.

¹⁷¹ Interview, Iten, December 2017.

¹⁷² Interview (by telephone), December 2017.

¹⁷³ Community meeting to discuss the findings of Amnesty International’s research, Tangul, December 2017.

¹⁷⁴ Articles 30(3) and 30(4) of the Community Land Act 2016.

¹⁷⁵ Interview, Iten, September 2016.

¹⁷⁶ Interview, Tangul, December 2015.

¹⁷⁷ Interview, Tangul, December 2015.

¹⁷⁸ Interview, Tangul, August 2016.

4.2 THE FORCED EVICTIONS IN 2014

To mark the culmination of the Embobut Forest Task Force process, a symbolic cheque-giving ceremony was held in Tangul in November 2013, presided over by the President of Kenya, Uhuru Kenyatta, and the Deputy President William Ruto. A notice was issued by the County Commissioner on 12 December 2013 to all forest residents still inside Embobut to vacate the forest by 3 January 2014.¹⁷⁹ KFS guards and police moved to Tangul, Kipsitono and Maron to prepare to carry out evictions on 5 January, despite a High Court injunction prohibiting evictions being in force until 6 February.¹⁸⁰ Burnings carried out at this time by the KFS affected between 800 and 1,500 homes.¹⁸¹ Community representatives alleged in a communication to the UN that the evictions took place throughout Embobut forest.¹⁸² A World Bank official, who was visiting Embobut forest at the time, told Amnesty International that “the whole of Embobut was on fire”.¹⁸³ The Senator for the area stated that the evictions had to happen but must be conducted in a more humane way: “The whole world is watching and it’s looking like we are burning our people without caring about their interests”.¹⁸⁴

“The Sengwer are the genuine community who have nowhere to go.”

Arthur Osiya, Elgeyo Marakwet County Commissioner, speaking at the time of the 2014 evictions¹⁸⁵

A number of interviewees stated that, when evictions began in January 2014, they had not yet received the compensation due to them.¹⁸⁶ A Task Force member stated that money was still being paid out by the Directorate of Special Programmes as late as April 2014.¹⁸⁷ Even if compensation was promptly received in December, the notice period clearly did not allow for the time-consuming process of negotiating a land purchase and moving livestock. Human rights law requires that evictions do not result in individuals being rendered homeless or vulnerable to the violation of other human rights, and that adequate notice of evictions must be provided.¹⁸⁸

“The government did everything so fast that there was not enough time and money for those compensated to acquire land. In any case, most of the money was spent on movements in search of land for buying.”

Focus group discussion with Sengwer women, Maron, September 2016.

In addition to the homes, the Task Force report lists a number of facilities used by the community. These include 13 schools and five health facilities. The Task Force report recommends that the state continues to allow these services to function by formally allocating land for them, as they are also used by communities outside the forest. However, after the 2014 evictions, all of these facilities were closed down and the buildings destroyed.¹⁸⁹

¹⁷⁹ Kenya Human Rights Commission, “Days in the Cold: KHRC’s Report into the Embobut Forest Evictions”, 2014, pp. 24-25.

¹⁸⁰ Kenya Citizen TV, ‘Embobut Evictions’, 11 January 2014; K24TV: ‘100 Houses Torched In Forceful Evictions From Embobut Forest’, 16 January 2014.

¹⁸¹ Kenya Human Rights Commission, *Days in the Cold: 2014 Report into the Embobut Forest Evictions*, p. 25; Interview, Elias Kimaiyo, Sengwer leader (by telephone), February 2018; *Daily Nation*, ‘500 houses burnt in forest eviction’, 23 January 2013.

¹⁸² UN Committee on the Elimination of Racial Discrimination, communication to the Permanent Representative of Kenya to the United Nations in Geneva (Ref: CERD/GH/mja/vdt), 7 March 2014.

¹⁸³ Interview, Eldoret, March 2015.

¹⁸⁴ Kenya Citizen TV, Senator Onesimus Kipchumba Murkomen on Embobut Forest Evictions, 24 January 2014, www.youtube.com/watch?v=qLSVvmtenCI

¹⁸⁵ Kenya Citizen TV, Embobut Forest Evictions, 24 January 2014.

¹⁸⁶ Interviews, Tangul & Maron, December 2015 & September 2016.

¹⁸⁷ Interview, September 2016.

¹⁸⁸ CESCR General Comment No. 7, §16.

¹⁸⁹ Interview, Elias Kimaiyo (by telephone), February 2018.



 ↑ Sengwer huts set on fire during January 2014 evictions. © Forest Peoples Programme

“I went to school, I left my home intact and when I came back, my home had been burned down. Everything I owned was torched including my books.”

Janet Cheserek, describing the 2014 evictions¹⁹⁰

On 13 January 2014, expressing “deep concern” about reports of threats to forcibly evict the Sengwer, the UN Special Rapporteur on Indigenous Peoples urged the government to respect the rights of the Sengwer, stating that “Indigenous peoples shall not be forcibly relocated 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 of fair and just compensation and, where possible, the option of return” (quoting from the UN Declaration on the Rights of Indigenous Peoples).¹⁹¹

The January 2014 evictions resulted in the violation of the human rights of the Sengwer people in multiple ways including:

- The failure to consult the Sengwer through their own decision-making structures, and to seek and obtain their free, prior and informed consent for relocation from their ancestral land, in violation of their constitutional rights to ancestral land¹⁹² and international human rights law;¹⁹³
- The failure to respect the court injunction halting any evictions before the hearing of the Sengwer petition at the High Court;

¹⁹⁰ Interview, Tangul, December 2015.

¹⁹¹ Office of the High Commissioner for Human Rights, ‘Kenya / Embobut Forest: UN rights expert calls for the protection of indigenous people facing eviction’, 13 January 2014; UN Declaration on the Rights of Indigenous Peoples, Article 10.

¹⁹² Article 63(1)(g).

¹⁹³ *Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs) (Series C No. 172) Inter-American Court of Human Rights, (2007); African Court Ogiek case; United Nations Declaration on the Rights of Indigenous Peoples, Article 10.

- Violation of procedural obligations regarding evictions, as laid out in Kenyan legislation, including the Land Laws (Amendment) Act 2016, and international human rights law (see box, “Kenya’s obligations regarding the right to adequate housing”, section 3.4).

5. CHALLENGING THE EVICTIONS

Sengwer community leaders have been very active in challenging the Embobut Forest Task Force process, the eviction and compensation, the ongoing arrests and burning of houses, and other initiatives affecting their rights, such as development and conservation projects which they say are implemented without their free, prior and informed consent. Their approach has been two-fold; one judicial, and the other based on negotiations with the National Land Commission. So far, neither approach has brought them justice or halted the evictions.

5.1 COURT CHALLENGE AND INJUNCTION

On 22 March 2013, prior to the mass forced evictions of early 2014, Sengwer representatives submitted a petition at the High Court of Eldoret, seeking a ruling that evictions would violate the petitioners' constitutional right to land and to protection of their culture, and calling on the court to stop the evictions.¹⁹⁴ The petitioners stated that the filing was prompted by a decision of government, announced on 15 March, to compulsorily resettle all Embobut forest residents on a piece of land in Uasin Gishu County. By the time of the latest spate of evictions started in December 2017, the court had not yet ruled on this. Since the filing of the petition, the court has issued a series of injunctions *ex parte* (heard by the judge without the presence of the parties and without examining the substance of the complaint), requiring both parties to refrain from actions that would prejudice the outcome of the case. The first of these requires government agencies not to interfere "with the petitioners' occupation, control and quiet enjoyment of the land they and the members of the Sengwer community enjoy at the Embobut forest".¹⁹⁵

The injunction has been reinstated at regular intervals since 2013, however with wording that has evolved – problematically – over time. From the initial very clear language, the judge has moved to more ambiguous language, requiring the respondents to "maintain the status quo". The KFS argue that the status quo is that, since the 2014 evictions, there are no permanent residents in the forest; therefore, they must evict and arrest anyone found there, being necessarily newcomers. In December 2016, a further reinstatement of the injunction gave greater clarity, stating: "No person in occupation of the forest to be evicted, but no new settlement to be allowed in the forest".¹⁹⁶ Unfortunately at the same hearing the judge contradicted himself, making a verbal clarification, in response to a request from the KFS, that status quo means there is no one currently in the forest, an interpretation which is refuted by every independent visitor to the forest since 2014 and even an official government study (see section 3.3). One of the lawyers for the Sengwer stated that the verbal clarification is unfortunate, but being only verbal, is not equivalent to a court order.¹⁹⁷

In February 2015, the court ruled on a petition brought by Sengwer representatives, asking for government agencies to be found in contempt of court for continuing to arrest Sengwer in the forest and burn their houses, thus ignoring the injunction in place. This was a response to forced evictions carried out by the KFS since the filing of the original petition. The court ruled that it could not find the respondents in contempt of

¹⁹⁴ Petition no. 6.

¹⁹⁵ Order given in relation to Petition no. 6, 26 March 2013.

¹⁹⁶ Order given by the Environment and Land Court at Eldoret regarding Petition no. 15 of 2013, 8 December 2016.

¹⁹⁷ Interview, Eldoret, December 2017.

court, based on a technicality: it had not been established that the government agencies had been served with the injunction, and were therefore aware of it. However the judge issued an unambiguous rebuke to the KFS, giving an unambiguous explanation of how the phrase “status quo” is to be understood:

“It is also evident that some of the members of the Sengwer community were evicted and or vacated at the expense of the conservatory orders in place. This was not to happen given the fact that status quo was to be maintained pending this petition in court.”

The ruling on the petition also noted that: “It is unfortunate that contemnors [persons not respecting orders of the court] should escape liability for their transgressions on account of procedural lapses”.¹⁹⁸

In response to the events of December 2017, Sengwer representatives launched, on 21 January 2018, a new, stronger petition at the Environment and Land Court of Eldoret, challenging the eviction of the community. This petition addressed the changed circumstances and gave a more detailed argument based on the right to ancestral land and the Sengwers’ right to participate in forest conservation, with an expanded list of petitioners. Two days later the court issued an injunction requiring state agencies not to interfere with the status quo in the forest.¹⁹⁹

5.2 NATIONAL LAND COMMISSION PROCESS

The Kenyan Constitution of 2010 provides the National Land Commission with a mandate to “initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress”.²⁰⁰ Since July 2016, the National Land Commission has hosted the National Forum for Forest Dependent Communities, a process with the objective of finding an agreement between government and forest dwelling communities on the management of forests. While waiting for the courts to resolve their legal challenge to the eviction, the Sengwer have participated in the Forum as another way to secure their rights to remain in the forest.

“It should be noted that these people have the traditional skills needed to help the Government conserve the forests”

Muhammad Swazuri, Chairperson, National Land Commission²⁰¹

At the Forum, the forest dwelling communities have suggested the following solution to the current impasse: an agreement that accepts their occupancy and land tenure in the forest, and puts in place an agreement for shared roles between communities and government for maintaining and protecting the forest (known as “co-management with tenure”).²⁰²

At a meeting of the Forum in Naivasha in August 2016, the chairperson of the National Land Commission stated that the forest dwelling communities should be given land tenure in the forests and supported to work with government agencies to conserve them.²⁰³ Yet, in December 2016, the Commission issued a 14-day eviction order to persons having “encroached” in Embobut forest.²⁰⁴ This contradicted not only the earlier statement, but also recommendations agreed at the Forum in July of that year to suspend evictions of Indigenous forest peoples, initiate the process of registration of their community lands, and address the historical injustices associated with evictions.²⁰⁵

Since that time there have been no further meetings of the Forum, and a Sengwer representative stated that the trust of the community in the process has been damaged.²⁰⁶

¹⁹⁸ Ruling of the Environment and Land Court at Eldoret on Petition no. 15, 18 February 2015.

¹⁹⁹ Registered as Petition no. 3 of 2018, Environment and Land Court, Eldoret.

²⁰⁰ Articles 67(2)(a) and (e).

²⁰¹ The Standard, ‘Swazuri Reveals Plans to recognise forest settlers’, July 2016.

²⁰² National Land Commission, *Securing Land Tenure Rights: The Roadmap* (July 2016).

²⁰³ The Standard, ‘Swazuri Reveals Plans to recognise forest settlers’, July 2016.

²⁰⁴ *The Star*, ‘Residents walk out on NLC, say they should be let into Embobut Forest’, 19 December 2016.

²⁰⁵ National Land Commission, *Securing Land Tenure Rights: The Roadmap* (July 2016).

²⁰⁶ Interview, David Kiptum Yator (by telephone), February 2018.

6. FREEDOM OF EXPRESSION AND HUMAN RIGHTS DEFENDERS

6.1 SENGWERS' ACCESS TO MEDIA AND CIVIL SOCIETY

An Amnesty International researcher entered the forest on a brief visit in March 2015, accompanied by Sengwer guides. On attempting to enter again in December 2015, the researcher was told by KFS guards that this was not possible, as it was necessary to request prior permission from the KFS. On submitting a formal request, Amnesty International was told we could enter on condition that we would be accompanied by KFS guards. As it would be impossible to conduct safe and meaningful interviews with forest residents if accompanied by the same state officials who are alleged to have violated their rights, Amnesty International did not enter the forest at that time. We applied for permission on two more occasions, in August 2016 and November 2017, without receiving permission. Instead of entering the forest, we arranged for Sengwer forest residents to come to us at a location outside the forest. This constitutes a violation of the right of the Sengwer people to access or impart information by denying them access to media and civil society organizations. It also violates the Constitutional guarantee of good governance, integrity, transparency and accountability.²⁰⁷

One incident in particular illustrates the measures taken by the Ministry of Environment and Forestry to control the narrative around forest evictions and place obstacles in the way of those attempting to research allegations of abuses. Shortly before the beginning of a conference entitled Deepening Dialogue with Stakeholders in the Forest Sector in Kenya, organized by the Ministry of the Environment, Water and Natural Resources on 4-6 March 2015, Sengwer representatives denounced the burning by the KFS of approximately 30 houses in the forest one week earlier. The conference was organized at the urging of the World Bank, with the objective of improving co-operation between government and forest-dwelling communities around forest management (see section 9.1). The Ministry's Permanent Secretary, Richard Lesiyampe, angrily dismissed accusations that the KFS had burned Sengwer houses, stating that to do so would be "un-African"; at a plenary session, he strongly urged all present to condemn the Sengwer for spreading lies.²⁰⁸

During the conference, the Ministry organized helicopter visits to the forest to look into the allegations, with representatives of the World Bank, journalists, Sengwer representatives and other institutions, including Amnesty International. Due to the small size of the helicopter the participants were divided into three groups on separate flights; however, on the flight in which Amnesty International participated, the pilot refused to follow the directions of a Sengwer representative who was trying to guide him to the sites where the alleged burnings had taken place, and the helicopter did not land. Of the three groups, only one landed; this group saw a burned structure and spoke to a Sengwer woman who recounted her experience of her house being

²⁰⁷ Article 10(2)(c).

²⁰⁸ A representative of Amnesty International was present at the plenary.

burned one week earlier; despite this, the Ministry issued a statement saying that the allegations of the Sengwer were falsehoods.²⁰⁹

Amnesty International visited the forest on the day following the conference, without KFS accompaniment, interviewed two Sengwer people whose huts had been burned (see Stella's story, section 3.4), and witnessed the burned remains and damaged cooking utensils and other belongings. The two interviews, carried out separately, corroborated each other on key details of the events, regarding the timings of movements of forest guards, and identities of those who carried out the burnings.

6.2 ATTACKS ON HUMAN RIGHTS DEFENDERS

Since April 2017, threats and intimidation towards Sengwer leaders and activists have increased. On 9 January 2018, Paul Kiptuka, a Sengwer elder, reported that KFS guards fired shots at him as he prepared to go to a meeting on the forced evictions with officials of the Ministry of Environment and Forestry and the EU. He was not injured in the shooting, but the KFS burned down his house while he was at the meeting.²¹⁰

On 25 March a contingent of 17 armed KFS guards burned the house of community leader Paul Kiptuka, and destroyed his sheep enclosure. On 25 April the house of another community leader, Luka Kiraton, was burned by 15 armed KFS guards.²¹¹



ELIAS KIMAIYO SENGWER COMMUNITY ACTIVIST

Elias Kimaiyo has worked for many years within the Sengwer community leadership, supporting members of the community to challenge the forced evictions and exclusion from compensation, and documenting evictions and other human rights violations. On 2 April 2017 he was filming KFS guards burning houses in Embobut forest. This is his account of what happened next:

“While I was busy taking pictures and speaking on the phone, I was spotted by KFS guards who started chasing me and shooting at me. I started running down a hill to evade the bullets, whereby I tripped, injuring my knee and I fell down. The shooting stopped but a KFS officer got to where I was lying and declared that I was troubling the government. He hit me very hard with the butt of a rifle, fracturing my upper right arm. The officer grabbed the bag that contained my two cameras, a laptop, iPad and other personal documents and disappeared into the forest. Members of the community who believed I had been shot dead started screaming and rushing to where I was lying. The community managed to put together a makeshift stretcher which they used to carry me from the forest to the nearest road. They arranged for my transportation to the hospital in Eldoret where I was admitted for treatment.”

Subsequent to the attack, angry community members, possibly believing rumours that had spread that Elias Kimaiyo had been killed, went to Tangul KFS camp and set fire to the buildings and one vehicle, causing the 12 guards who were present to flee. Elias Kimaiyo spent one week in hospital, undergoing operations to his knee and collar-bone. He then tried to report the attack and theft to the police, but the police refused to receive or register the complaint. Instead, the police accused him of organizing the arson at the KFS camp. He has not been able to recover his equipment. As his injuries have prevented him from working, and due to significant hospital bills, he has faced financial difficulties.

He told Amnesty International: “I filmed burning of houses and looting of property by KFS guards, and one arrested man, before I was shot at and injured by the guard.”²¹²

In February 2018, Elias Kimaiyo told Amnesty International that he had received a number of calls from an acquaintance who works for the KFS, who warned him that he was being followed, and that he should “be careful”.²¹³

²⁰⁹ Statement by Principal Secretary, Ministry of the Environment, Water and Natural Resources, State Department of Environment and Natural Resources, Dr Richard Lesiyampe, during the Closing Session of the Colloquium on Deepening Dialogue with Stakeholders in the Forest Sector in Kenya held on 6th March 2015 at Boma Inn, Eldoret.

²¹⁰ Interview (by phone), March 2018.

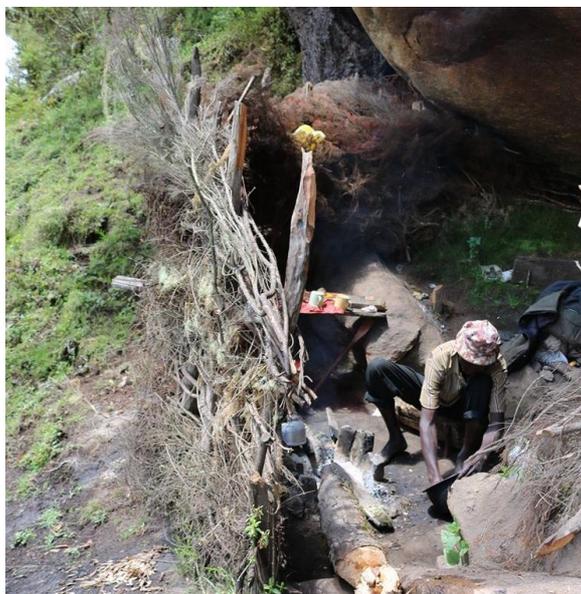
²¹¹ Interviews, Paul Kiptuka and Luka Kiraton (by telephone), March and April 2018.

²¹² Interview (by phone) with Elias Kimaiyo, April 2017; National Coalition of Human Rights Defenders, *Kenya, Fact Finding Report: Indigenous and Environmental Activist Elias Kimaiyo Kibiwot Beaten, Injured and Equipment Stolen by Kenya Forest Service Rangers because of Documenting Rights Violations of Sengwer Forest Dwellers at Embotut Forest*, 2017.

²¹³ Interview, Elias Kimaiyo (by telephone).

7. IMPACT OF THE FORCED EVICTIONS

7.1 LIVING CONDITIONS IN THE FOREST



↑ A makeshift dwelling in Embobut forest, December 2016
© Elias Kimaiyo

↓ A traditional Sengwer hut
© Amnesty International



Sengwer people living in Embobut forest reported that they live in constant fear of the ongoing forced evictions, home burnings and arrests. Twelve respondents reported to Amnesty International that they build fragile makeshift huts made of branches and a sheet of polythene, or shelter under rock overhangs or in hollowed-out tree trunks.

Joseph, his wife and nine of their 12 children live in four tree trunks in the forest. He told Amnesty International:

“My hut is built into a tree, the tree leaves are the shelter. I use bark to replace the corrugated roof. The KFS destroyed it [in December 2015], put it in a pile and burned it. They also burned the enclosure where the animals sleep. Now a hyena can get the animals. So I have to keep watch full time. There so many hyenas, they can eat all of your animals if you are not careful.”²¹⁴

²¹⁴ Interview, Tangu, December 2015.

The typical wattle-and-daub Sengwer huts (as seen in the photo above) can take between one and two months to build. With a high likelihood of the hut being burned, the investment of time is prohibitive, and the traditional hut is more easily visible to forest guards.²¹⁵ Amnesty International interviewed Sengwer respondents who said that, in their family arrangement, the father lives in the forest in order to tend to the animals, while the mother usually lives with the children in one of the towns adjacent to the forest. In some cases, the family might pass a month or more separated in this way, due to the great distances and lack of money to pay for transportation. The reasons cited for living separately included the need for children to be closer to schools, and the danger for children of living in the forest, exposed to house burnings and the possibility of spending the night in the open after a house burning.²¹⁶

“I’m married. My family is in Kapyego, close to the school. I live alone in the forest in a tree trunk. It’s very hard in the forest. Yesterday it was raining so hard in the night, I did not sleep well, I felt cold. Some people get pneumonia or common cold, in some rare cases malaria. I go during the day to Kapyego almost every day, it’s very important for my children to experience parental love. I take supper there, then I go to the forest. I cannot cook in the forest because smoke is evidence of presence.”

Joseph Kiptoo, Sengwer man²¹⁷

Richard, a Sengwer man, reported that, while he is still living in the forest, his wife and children live in Kipnai, in Marakwet West Constituency. During school term time, he sees them once every three months.²¹⁸

Albina told Amnesty International that her husband goes to the forest to look after their animals, sometimes for up to a month. “He doesn’t see the family, sometimes he sleeps in a cave. It’s very far, two to three days’ walk. It is not guaranteed that he will find a motorbike to take him. It’s very bad when we are separated, it feels like it’s not safe.”²¹⁹

7.2 LIVING CONDITIONS FOR EVICTEES

Forcibly evicted Sengwer people interviewed by Amnesty International reported a number of issues. These included economic hardship due to the loss of lands and livestock, which formed their livelihoods in the forest, and resulted in large families living in over-crowded conditions; stress relating to the inability to provide for their families; and difficulties with maintaining their language and traditions. Many reported that they had not received compensation despite attempts to register. Philemon, a 28-year-old Sengwer man said, “loss of property has made us poorer, there is food famine. Beehives have been abandoned in the forest, they provided food and income”.²²⁰ Peter now lives with his wife’s family and is economically dependent on them; he reported that “there is a lack of food production from cultivating your farm in the forest. Today I am at the mercy of my relatives. Sometimes without money for lease [to rent land], you can’t cultivate”.²²¹

Lina, whose husband died shortly before she was evicted from the forest in 2012, was looking after six of her seven children in a one-room house in Tangul. She cried several times during the interview and said that she was “stressed”, and frequently thinks of taking poison to end her life.²²²

The head teacher of a school near the forest, interviewed by Amnesty International, described the situation for evicted Sengwer children attending his school, who were now living outside the forest: “Some people volunteered to house them. They live in deplorable conditions. I have visited some of the houses. Typically a family of 10-15 lives in one room”.²²³

“Evictions should not result in individuals being homeless or vulnerable to the violation of other human rights.”

UN Committee on Economic, Social and Cultural Rights²²⁴

²¹⁵ Interview, Elias Kimaiyo (by telephone), February 2018.

²¹⁶ Interviews, Tangul and Kapcherop, December 2015, December 2017.

²²⁴ General Comment no. 7 on the right to adequate housing (Article 11(1) of the Covenant): Forced evictions, §16.



 ↑ An evicted family in a village near Embobut Forest. @Amnesty International



JANINE SENGWER WOMAN

Janine lives in a one-room former potato store near Tangul, on the edge of the forest, with her mother and her six children.

“There are no beds, we use potato sacks. The house is leaking, it floods when it rains. When I first visited it, I felt like running away because there was no bedding, no separation between people sleeping, wet floors. My youngest sister was living here when she was diagnosed with pneumonia, she has been sick for three years now. I think she became sick as a result of the wetness in the house.

“If I had two houses, I would separate men and boys from women and girls. There is a lack of privacy, especially affecting women and girls.

“I did not receive compensation because my name was not registered. If I had, I would have bought a piece of land. My husband did not get compensation, he was registered though. I do not know why he did not get it. He went away after the eviction, I don’t know where he is now.

“I depend on casual jobs for livelihood, I don’t have enough for family upkeep. My children don’t have enough food and clothing. Other children separate and marginalize them at school because they have bad clothes, and no shoes. I earn about 100-300 Kenyan Shillings (approximately \$1-3 USD) per day. It is not guaranteed though. I don’t have animals or bees in the forest, after the evictions I had to dispose of the

²¹⁸ Interview, Tangul December 2015.

²¹⁹ Interview, Kapcherop, December 2017.

²²⁰ Interview, Tangul, December 2015.

²²¹ Interview, Tangul, December 2015.

²²² Interview, Tangul, December 2017.

²²³ Interview, September 2016.

²²⁴ General Comment no. 7 on the right to adequate housing (Article 11(1) of the Covenant): Forced evictions, \$16.

animals I had because we were hosted with other people, and they could not welcome us with our animals.”²²⁵

Other respondents reported difficulties with the move away from mountain water sources: “Water sources are far, unlike in the forest where we had clean water close by. This has affected our hygiene and sanitation”.²²⁶ Some evictees stated that the availability of public services outside the forest was better,²²⁷ but one interviewee accused the government of wilfully neglecting services for those in the forest: “it was the failure of the government to not build services in the forest, because the government didn’t want us to live inside the forest.”²²⁸

A health professional at a clinic in Maron, on the Eastern escarpment where many forcibly evicted forest residents have settled, stated that the high density of population was causing health issues:

“When they were living in the forest, there were no issues of congestion, the animals would be living freely. But now they are living in congested settlements above the road [on the Eastern escarpment]. Human faeces are contaminating the water. Cases of diarrhoea have increased.”²²⁹

Another health professional in the same area stated that: “Tuberculosis is rising, which is alarming. Up to three members in one family can have TB. It’s because of the congestion. The majority of those situations happened in the aftermath of the evictions”. She stated that as a result of the forced evictions, there was an increase in cases of malnutrition, due to the poor quality of land in Maron, which is susceptible to landslides, and the much decreased area which each family would have access to for cultivation compared to what they had in the forest.²³⁰ A third health professional confirmed that cases of malnutrition had increased, as a consequence of the forced evictions, due to the density of the population in Maron and the comparative lack of land for grazing or cultivation available to each family.²³¹



**BEATRICE
SENGWER WOMAN**

Beatrice lives in a one-room hut which used to be a potato store, near Tangul, with her three children and her mother. Her husband died six months ago. While she was talking to Amnesty International researchers, a man came to the house and talked to her for a short time. Afterwards, she explained:

“The person who just called by is the landlord, he told me I can be moved out any time, it could be in one week. I have not managed to pay the last rent instalment. This is the sixth place I have lived in since I moved out of the forest. My children face many problems with homework, you can see the capacity of the house is very small. If I had money I could build a house on my own land, and buy solar powered lights.

“I didn’t get compensation. If I had, I would have bought land. I registered my name. It was at the time of payment, I went to the bank, the money was not there. I did not complain. If I did that, I would have had to spend a small amount of money, I had nothing.

“I have no animals. If I had, I could have bought land. When I was in the forest, I had animals. When I was evicted, they died one by one or the Pokot [a neighbouring ethnic group] stole them.

“My husband passed away six months ago. It is paining me looking after the kids on my own.”²³²

²²⁵ Interview, Tangul, December 2017.

²²⁶ Interview, Tangul, December 2015.

²²⁷ Interviews, Kapcherop, December 2017.

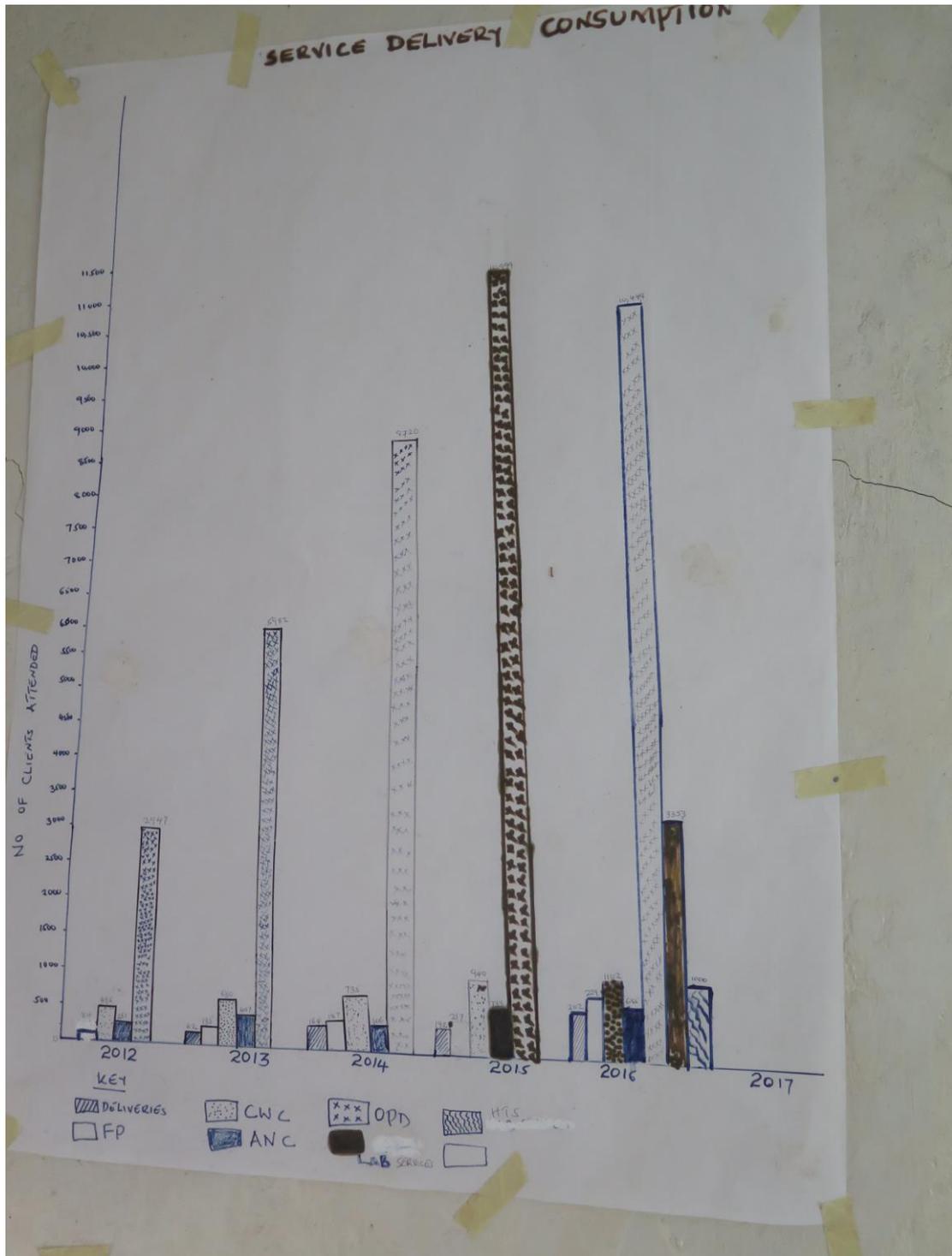
²²⁸ Interview, Kapcherop, December 2017

²²⁹ Interview, Maron, December 2017.

²³⁰ Interview, Maron, December 2017.

²³¹ Interview, Maron, December 2017.

²³² Interview, Tangul, December 2017.



↑ A hand drawn graph of incidences of disease showing increase since 2014, on wall of clinic near forest; ©Amnesty International

7.3 LIVING CONDITIONS FOR WOMEN

Sengwer women in Embobut forest have been adversely affected by the forced evictions from their former homes. Women interviewed by Amnesty International reported erosion of financial autonomy and deprivation of access to cultural practices, for example their ability to practise the traditional roles of *chepsakitia* (person practising traditional medicine) and birth attendant. Women also reported that financial compensation had

caused tensions between married couples, often leading to break-ups, and in most cases the woman was left as sole carer of the children.²³³

One woman reported that the forced eviction had destroyed her financial autonomy; in the forest she had shared in the work of looking after animals with her husband, and could sell milk or honey to earn money. Outside the forest, she had not been able to find work and depended on her husband who travelled each week to the forest to look after their animals.²³⁴ Another woman, whose husband had passed away, said “I am hosted [living in someone else’s home], I have no land, no beddings, I hardly have food. I do casual labour in people’s farms. I live in destitution.” She reported that she was not compensated, because her identity card had been burned in a forced eviction by the KFS; by the time she got a replacement, the process had terminated.²³⁵

When families were compensated, in most cases the money was given to the men (see section 4.1.6). Sengwer community members, local government officials and members of the Embobut Forest Task Force told Amnesty International that in some cases the husband took the money and went to nearby towns to live with other women, or spent the money on drink or sex workers.²³⁶

Betty, a Sengwer woman, lives with her husband and seven children in Tangul, in a two-room house, having been evicted from the forest in 2014. She told Amnesty International:

“Life is tough outside the forest. Inside [the forest] everything was available. My husband got compensation. It didn’t help to make a new life. With the money, he went to town to drink. He drank away all the money. I felt very bad about it. But even if he hadn’t drunk it, it would not have been enough because if you have cash, it’s liquid, it’s spent easily.”²³⁷

“I have been reduced to a beggar. Before, I was self-reliant and fed and paid for my children’s education”

Sarah, Sengwer woman²³⁸

A number of women told Amnesty International that their health was adversely affected during and after the forced evictions, since the traditional doctors or *chepsakitia* who lived with them in the forest were dispersed. These *chepsakitia* also functioned as birth attendants. Margaret, a *chepsakitia*, told Amnesty International that when a woman in the forest went into labour, the *chepsakitia* would come and would not leave the woman’s side until the baby was born. Now that most *chepsakitia* live outside the forest, providing this level of care has become more difficult as is it sometimes hard to reach the woman in labour. The *chepsakitia* told Amnesty International that she had been arrested previously for entering the forest to look for medicine that she needed for a patient whose condition was serious. She said that she had practised as a *chepsakitia* since her teenage years. This was her only means of livelihood and now she was losing it.²³⁹

Women interviewed reported that the forced evictions made them more vulnerable to sexual and gender-based violence. Discrimination along with marginalization and poverty complicated the process of obtaining justice.



**PRISCA
SENGWER WOMAN**

Prisca (not her real name), a 22-year-old university student, described an incident that took place in the forest during school holidays, when she had gone to watch over the family’s goats and fetch firewood. The place where the family tied their animals was approximately 1km away from the home where they were being hosted by another family. While collecting firewood, she was attacked and raped by the son of their hosts. The man threatened to shoot her if she did not co-operate. People responded to her cries and the attacker absconded. She was taken to hospital and later to the police station.

²³³ Female-only discussion at Maron with 15 women from Koropkwen, Kapkok and Kaptirbai glades, September 2016.

²³⁴ Interview, Kapcherop, December 2017.

²³⁵ Interview, Tangul, December 2017.

²³⁶ Interviews, local government official, Iten, September 2016; Sengwer community members, Tangul, Kapsowar and Kapcherop, August 2016 and December 2017.

²³⁷ Interview, Tangul, December 2017.

²³⁸ Interview, Tangul, December 2015.

²³⁹ Interview, Maron, September 2016.

Prisca is determined to get justice but has had to overcome many obstacles. The police were initially reluctant to record her statement and pressured her to opt for an out-of-court settlement with her rapist. Only pressure from Prisca's relative, who was a senior police officer elsewhere, pushed the police to prosecute the matter. The hospital in which she was first treated after the rape lost time in recording evidence. At times she had to ask well-wishers to host her after attending court as her family was unable to raise money for her transport. The case was still ongoing in a court of law at the time of writing. In her testimony, she said: "All I want is justice. I cannot trade my dignity with money. I will follow it up to the bitter end. If I do not win, I will say at least I tried."²⁴⁰

Amnesty International believes that the eviction resulted in a situation of lawlessness in the forest which impacted on the avenues available to Prisca to be protected against sexual violence. State services – in particular law enforcement – are often not present at all. Where law enforcement is present, its only function is to find people in the forest, arrest them and burn their houses.

The separation of married couples has in some cases resulted in increased hardship for women. Salina, a 39-year-old mother of eight, was nine months pregnant when interviewed. Salina's preference was to deliver her children supported by traditional birth attendants, as she had done with her first two children when she lived in the forest. Salina also told Amnesty International that, during her previous deliveries, her husband had been beside her. Now, after being evicted in 2014, she is living outside the forest, while her husband remains in the forest looking after their animals.²⁴¹ Amnesty International contacted Salina some weeks after her due date. Salina confirmed that, when her labour pains started, despite her preference to deliver her child assisted by a traditional birth attendant, her only option had been to go to hospital alone to seek assistance in giving birth. Due to the distance involved, she had been forced to ask a motorcyclist to take her to hospital while she was in labour.²⁴²

7.4 IMPACT ON CHILDREN

Forced evictions can have a lifelong impact on children's psychological, physical and social development. Freedom from hunger, disease and access to a clean and safe environment are paramount in ensuring the best interests of the child. The testimonies gathered by Amnesty International indicate that children risked both physical and psychological harm as they witnessed the destruction of their homes and were forced to sleep in the open or in inadequate structures such as potato stores, sometimes on a long-term basis.

Health professionals in three clinics on the outskirts of the forest, where large numbers of evictees had settled, stated that instances of diarrhoea and malnutrition among children had increased, and attributed this to the consequences of the forced eviction in 2014 that caused a significant increase in population density and resulted in impoverishment of evicted families (see section 7.2).²⁴³

Prisca and her six siblings lost their mother to pneumonia in June 2015. She told Amnesty International that her mother got pneumonia when they were living under a tree for three weeks after being forcibly evicted from their home by KFS guards in 2014. Prisca told Amnesty International:

"Because of the evictions, my siblings who are still very young will not know what a mother's love is. When I am back in college, they stay in school hungry until the evening as my father is away during the day in search of casual labour to be able to feed and educate us. I miss home. I miss mum."²⁴⁴

7.4.1 CHILDREN'S EDUCATION

Before the mass evictions of 2014, children of lower primary-school age went to informal community-run schools in the forest. Only the upper primary-school pupils and secondary-school students went to schools outside the forest. Amnesty International interviewed two primary school head teachers in towns close to the forest.²⁴⁵ They informed us that the evictions had increased the number of children enrolled in the two schools. However, absenteeism from school had also increased significantly among Sengwer children. The

²⁴⁰ Interview, Eldoret, December 2017.

²⁴¹ Interview, Kapcherop, December 2017.

²⁴² Interview (by phone), January 2018.

²⁴³ Interviews, Maron, December 2017.

²⁴⁴ Interview, Eldoret, September 2016.

²⁴⁵ Interviews, August-September 2016.

home setting – in some cases many children and adults living in one room – does not enable them to study at home and do school assignments. One of the head teachers reported children sleeping in class, appearing to be malnourished, and doing their homework at school because they cannot do it at home. He said that, because of the very cramped living conditions Sengwer are now living in, often hosted by other families, the evictions “have impacted negatively on children”. He said: “The kids have no place to study. They can be absent from school because of lack of food or clothes.”²⁴⁶

As noted by the Task Force report, Embobut forest had 13 schools, all of which were destroyed in the forced evictions of 2014. For children living in the forest, attending school can pose a significant challenge now that the only schools available are outside the forest. In 2015, one Sengwer man living in Kesom glade reported:

“The kids are in primary [school] – they go far. They walk to school, they leave at 5am, come back at 8pm. They eat at 4am, then they don’t eat until they get back. Sometimes if we have maize flour we can cook it in the evening and they take it the next day to school. There’s no lunch programme in school. Sometimes they complain but they remind themselves that things can get better.”²⁴⁷

A study carried out by a human rights organization immediately after the January 2014 eviction found that the closure of schools in the forest resulted in nearby schools witnessing “a massive influx of school children who were evicted in the forest... In areas where evicted persons sought refuge, school facilities in those areas were over stretched and unable to cope with the influx of new pupils for instance, the student population of St Michaels’ Embobut.”²⁴⁸

Richard, who lived with his family in the forest, told Amnesty International researchers in 2015 that his wife was taking the children to school in Kapyego, a village near the forest, a journey of two and half hours each way. She stayed in Kapyego during the day in order to take them home at the end of the school day.²⁴⁹ However, after the latest wave of forced evictions, a community activist explained: “Now that KFS has intensified evictions, it’s rare to find kids operating from the forest as it used to be. Most parents have relocated their children near to schools.”²⁵⁰ Sengwer parents are thus faced with a difficult choice; to remain in the forest, where access to education for their children is very difficult; to move to a town outside the forest, where the children will have access to schools but the family will find it more difficult to practise and maintain their culture and access their livelihoods; or to live separated, with one parent outside the forest with the children.

“It’s because of the eviction that [the children] have to drop out – before eviction they were all in school. When they were in the forest they were close to the animals. They could easily go to school and tend animals afterwards.”

Joel, Sengwer man ²⁵¹

“Lack of public services has adversely affected the education of our children. There is only one school and the forest is big. It is therefore a bit far especially for small children coming from the farthest end of the forest.”

Nelly, Sengwer woman ²⁵²

“I see most of the [Sengwer] children are malnourished. Their clothes are tattered. Before evictions they were not so poor.”

Primary School Headteacher ²⁵³

²⁴⁶ Interviews, August-September 2016.

²⁴⁷ Interview, Tangul, December 2015.

²⁴⁸ Kenya Human Rights Commission, “Days in the Cold: KHRC’s Report into the Embobut Forest Evictions”, 2014, pp. 27, 29.

²⁴⁹ interview, Tangul, December 2015.

²⁵⁰ Interview, Elias Kimaiyo (by telephone) March 2018.

²⁵¹ Interview, Tangul, August 2016.

²⁵² Interview, Tangul, December 2015.

²⁵³ Interview, September 2016.

7.5 IMPACT ON INDIGENOUS CULTURE

The forced evictions have had a significantly negative impact on Sengwer culture, partly because that culture is inseparable from the forest itself, and partly because the cash compensation has resulted in members of the community being dispersed to different locations, even nearby cities, or wherever they can lease or buy land. This impacts on cultural practices that require community collectiveness, such as language and rituals. Many children are going to schools where the majority do not speak Sengwer. As Rose, a Sengwer woman, told Amnesty International: “It would be good if we are compensated to allow us to be all in one place. Land is better. If nothing is done, it can go so far that you won’t know who the Sengwer are in 20 or 30 years’ time.”²⁵⁴

KENYA’S OBLIGATIONS REGARDING THE RIGHT TO CULTURE

The Constitution of Kenya states that “Every person has the right to use the language, and to participate in the cultural life, of the person’s choice... 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”.²⁵⁵

According to the African Court on Human and Peoples’ Rights, drawing on the Cultural Charter for Africa to which Kenya is a state party,²⁵⁶ “[t]he protection of the right to culture goes beyond the duty, not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group’s identity. In this respect, culture should be construed in its widest sense encompassing the total way of life of a particular group, including the group’s languages, symbols such as dressing codes and the manner [in which] the group constructs shelters; engages in certain economic activities, produces items for survival; rituals such as the group’s particular way of dealing with problems and practicing spiritual ceremonies; identification and veneration of its own heroes or models and shared values of its members which reflect its distinctive character and personality.”

The Court goes on to note that Indigenous Peoples are particularly at risk of violations of their right to culture due to the economic activities of other dominant groups, large scale developmental programmes and policies of forced assimilation, sometimes resulting in the “extinction of their cultural distinctiveness and continuity as a distinct group”.²⁵⁷ This does not mean that cultures must remain fixed in stone – in fact they are fluid and adaptable to external circumstances – but any adaptations must be on the basis of consent.

The African Charter on Human and Peoples’ Rights states that “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind” (Article 22).

The UN Committee on Economic, Social and Cultural Rights, has interpreted how the International Covenant on Economic, Social and Cultural Rights, to which Kenya is a party, is to be implemented: “The strong communal dimension of indigenous peoples’ cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.”²⁵⁸

Forced evictions of the Sengwer denied women their right to participate in cultural life. Women play specific roles in cultural life and in community decision-making (see section 4.1.6), but are no longer able to carry out these cultural roles which are associated with the forest because, given the community’s dispersion after the evictions, it is harder to bring people together for the rituals.²⁵⁹

²⁵⁴ Interview, Kapcherop, December 2017.

²⁵⁵ Constitution of Kenya, 2010, Art. 44 (1) and (2).

²⁵⁶ Cultural Charter for Africa, adopted by the Organization of African Unity in Accra, 5 July 1976.

²⁵⁷ African Court Ogiek case, §179-180.

²⁵⁸ Committee on Economic, Social and Cultural Rights, General Comment 21, §36.

²⁵⁹ Female-only discussion at Maron with 15 women from Koropkwen, Kapkok and Kaptirbai glades, September 2016.



 ↑ Sengwer leader Paul Kiptuka and Ismail Kirop with traditional arrows and quiver. @Amnesty International

Sengwer respondents told Amnesty International that in their culture it is unacceptable for children of post-puberty age to share rooms with adults. In the forest, a separate hut would be built for adolescents, but outside the forest, families often lacked space and funds for this, or were unable to make space because they did not own the house they were living in. According to Anneline: “In the forest, we would have enough space, we would have one house for the children, it is very bad that the older kids sleep with us. It’s a taboo in Sengwer culture.” Since their eviction from the forest, she lives with her husband and six children, the eldest of whom is 13, in Kapcherop in a three-room house (including cooking and grain storage areas).²⁶⁰ Human rights law requires that all reasonable efforts are made to ensure that housing is culturally appropriate.²⁶¹

A major aspect of Sengwer culture is bee-keeping. The Sengwer sell honey but also use it as food and traditional medicine. Many Sengwer still have beehives in the forest but risk arrest when they go to tend to them.²⁶² Amnesty International saw a number of beehives which had become dilapidated due to inability of Sengwer to move freely in the forest.²⁶³

Those who have been evicted are no longer able to practise forest-based rituals. For example, the Sengwer traditionally sacrifice animals and make predictions about future events by looking at the entrails. “We are no longer practising divining with animal entrails – this disturbs us because we cannot forecast what will happen tomorrow”, stated one woman who was evicted and is now living in Kapcherop, outside the forest.²⁶⁴

Evicted Sengwer members reported that they have difficulty gaining access to traditional medicines in the forest. These include tree bark, roots, resin, honey and leaves. Access to the right to health and especially reproductive health has been impacted; *chepsakitia* are believed to have traditional medical knowledge and act as traditional birth attendants when, in some cases, formal state health services have been absent in the forest. They provided this service to the community with no obligation to pay. Once the patient recovers, they would decide on a token of appreciation.²⁶⁵ Many of the *chepsakitia* now live outside the forest, away from other members of their community.

²⁶⁰ Interview, Kapcherop, December 2017.

²⁶¹ UN Committee on Economic, Social and Cultural Rights, General comment No. 4: The right to adequate housing, §8(g).

²⁶² Interview, Elias Kimaiyo, September 2016.

²⁶³ Interviews, Tangul, December 2015; Kapcherop, December 2017.

²⁶⁴ Focus Group Discussion, Kapcherop, December 2017.

²⁶⁵ Interview, Maron, September 2016.

Amnesty International interviewed Sengwer members who stated that they and their children suffer ostracism as a result of becoming a minority living among larger communities, and are stigmatized due to impoverishment resulting from the forced eviction. In addition, having been the subject of a government resettlement programme that was given substantial media attention, children are called pejorative names at school, such as “four ten” (a reference to the cash compensation some forest dwellers received on being evicted),²⁶⁶ or “squatter”, a reference to the government designation of anyone whom it deemed to be living illegally in a protected forest.²⁶⁷

Having experienced efforts to assimilate them into larger neighbouring communities during the colonial period, the Sengwer are keen to defend their right to maintain their culture and identity. Some government officials also favour assimilation of the Sengwer, in opposition to the community’s efforts to maintain its distinct cultural identity. “We want to integrate [the Sengwer] into other communities and support them to engage in development,” stated KFS commandant Alex Lemarkoko in a media interview.²⁶⁸

“For us to practise cultural rites we have to go back to the forest. Here we are a mixed community, this erodes our culture and identity. My last two kids, for example, can’t speak my language. They speak Swahili.”

Robert, Sengwer man, interviewed at his home in Kapcherop, outside the forest ²⁶⁹

Respondents also talked about possible psychological harm that children suffered due to being discriminated against within host communities after the eviction. One man, who was still living in the forest but whose wife and children were living in a nearby town, said his children “have an inferiority complex when they are talking to other communities. They are not proud to say they are Sengwer. They talk Marakwet, the same as the other kids”.²⁷⁰

²⁶⁶ For example, Interview, Rose, Kapcherop, December 2017.

²⁶⁷ Interview, Beatrice, Tangul, December 2017.

²⁶⁸ Reuters, ‘Locked out of their forests, Kenya’s Sengwer people fight back’, 19 May 2016.

²⁶⁹ Interview, December 2017.

²⁷⁰ Interview, Tangul, December 2015.

8. THE SENGWER AS OWNER/CONSERVATORS

“We need to distinguish between those people who are and always have been traditionally part and parcel of the forest environment, and those people who have chosen to encroach into forests for agricultural purposes leading to a destruction of the environment. Ours is not to interfere with traditional communities who have always lived there.”

Uhuru Kenyatta, President of Kenya, responding to a question on why the government of Kenya is evicting Indigenous peoples from forests ²⁷¹

The 2010 Constitution of Kenya requires the state to strive to achieve 10% forest cover,²⁷² with 2030 set as the deadline to achieve this (in 2010 the figure for forest cover was 6.99%).²⁷³ In 2010, the Embobut Forest Task Force argued that tree-felling in Embobut forest was affecting water supplies for downstream residents in the Keiyo Valley and that this was leading to rising tensions. “We had to stop impending conflict between people from the valley and people in the highlands”, warned a former Task Force member.²⁷⁴ The forest is part of Cherangany Hills, one of the five highland sources of water for the country, known in Kenya as water towers; the others are Mount Kenya, Aberdare Range, Mau Complex forests and Mount Elgon. In line with a long-standing policy of evicting the Sengwer that can be traced back to the colonial-era Carter Commission, but first properly formalized when Embobut was gazetted as public forest in 1954, the Sengwer were included in the category of “people illegally settled”, or “squatters”.²⁷⁵ This was despite settlement going back as far as the 19th Century, with some Sengwer being able to show “permits” issued by the British colonial authorities, authorizing the holder to keep animals in the forest.

However, the Sengwer, along with many conservation experts and academics around the world, believe that where Indigenous Peoples are present, they are best placed to promote the conservation of their ecosystems as owners/co-managers. Where Indigenous Peoples have a share in management and conservation, there is an incentive to ensure sustainability as the forest is closely linked to the identity, spirituality, livelihood and long-term survival of the Indigenous People in question.²⁷⁶ A 2014 review of research in this field “provides

²⁷¹ Speaking at Chatham House, London (<https://www.youtube.com/watch?v=vGDI02-a1X8&feature=youtu.be&t=1722>), 17 April 2018.

²⁷² Article 69(1)(b).

²⁷³ Ministry of Environment and Natural Resources, *National Forest Programme 2016-2030*, 2016, p. xiii.

²⁷⁴ Interview, Nairobi, September 2016.

²⁷⁵ *Anthropos into humanitas*, pp. 12-13.

²⁷⁶ Report of the United Nations Special Rapporteur on Indigenous Peoples, ‘Thematic Analysis of Conservation Measures and their Impact on Indigenous Peoples’ Rights’, UN Doc. A/71/229 (2016).

evidence that community tenure over forests can result in more forest cover and more species-rich forests, less deforestation and degradation, and fewer fires than some other approaches to protecting forests. These beneficial forest outcomes are more likely if communities are ‘traditional’ or have a long term relationship with their natural resources, if the forest provides them with some livelihood options, and if community forest rights are secure and enforced (i.e. the risks of alienation low).”²⁷⁷



 ↑ Sengwer bee-hive in Embobut Forest. ©Amnesty International

A world-wide comparison of 40 government-protected areas and 33 community-managed forests found that “as a whole, community managed forests presented lower and less variable annual deforestation rates than [government] protected forests”.²⁷⁸

“Could the Sengwer destroy the forest? No they could not. Our main activity was bee-keeping. If we wanted to cultivate, we went outside the forest.”

Sengwer man, estimated to be 110 years old, remembering the time of the British colonial administration ²⁷⁹

“The flow of some rivers was reduced [in the Cherangany Hills], the government had to come in and restore the ecosystem. There are some genuine people who were there before. They were not farming, they were hunter-gatherers, they were practising bee-keeping, they were friendly to the forest and the ecosystem. It’s the internally displaced communities who were planting crops.”

Senior local government official with responsibility for development projects in Elgeyo Marakwet County ²⁸⁰

The recommendations of international human rights bodies support an approach of empowering Indigenous Peoples to participate in conservation. The United Nations Committee on the Elimination of Racial Discrimination has recommended to the Kenyan government to:

“Ensure legal acknowledgement of the collective rights of the Sengwer, the Endorois, the Ogiek and other indigenous peoples to own, develop, control and use their lands, resources and communal territories

²⁷⁷ F. Seymour, T. La Vina and K. Hite, *Evidence linking community-level tenure and forest condition: An annotated bibliography*, Climate and Land Use Alliance, 2014, p. iii.

²⁷⁸ L. Porter-Bolland, E.A. Ellis, M.R. Guariguata, I. Ruiz-Mallén, S. Negrete-Yankelevich and V. Reyes-García, ‘Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics’ in *Forest Ecology and Management*, Elsevier, 2012, p.6.

²⁷⁹ Interview, Tangul, December 2017.

²⁸⁰ Interview, Eldoret, December 2017.

according to customary laws and traditional land-tenure systems and to participate in the exploitation, management and conservation of the associated natural resources.”²⁸¹

A 2015 KFS study cites the “erosion of indigenous knowledge and / or good cultural practices” as one of the “issues undermining conservation efforts”. The KFS study also notes the relevance of Principle 22 – “Indigenous Peoples have a Vital Role”– of the Rio Declaration on the Environment, which the Government of Kenya had participated in drafting. Principle 22 states:

“Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”²⁸²

Decision VII/28 of the Conference of Parties (one of which is Kenya) to the Convention on Biological Diversity “[r]ecalls the obligations of Parties towards indigenous and local communities in accordance with Article 8(j) and related provisions and notes that the establishment, management and monitoring of protected areas should take place with the full and effective participation of, and full respect for the rights of, indigenous and local communities consistent with national law and applicable international obligations”.²⁸³

“Kenya should count itself lucky to have Indigenous forest peoples, because they are the only community that is ready to accept non-transferable collective land title, which guarantees lands will be protected in their entirety. They are entirely committed to conserving the forest because they depend on it. There is lots of good practice of communities having land tenure and sharing in forest management.”

Liz Alden Wily, conservation and land management expert²⁸⁴

ALLEGATIONS OF CORRUPTION IN FOREST MANAGEMENT

In September 2015, Sengwer representative Paul Kibet wrote to the Ministry of Environment and Forestry to denounce illegal logging in the Kerer sector of Embobut forest by one of the Community Forest Associations that has an agreement with the KFS to exploit forest produce. The KFS responded assuring Paul Kibet that the matter was being addressed by its regional office.²⁸⁵ According to media reports in September 2016, the chairperson of the National Land Commission voiced his concerns about the logging and the KFS’ complicity in it.²⁸⁶ A senior local government official alleged that the KFS were not planting trees at a rate that would replace those it was felling, and that there was corruption in the allocation of licences to cut trees.²⁸⁷

On 24 February 2018, Kenya’s Deputy President announced a 90-day suspension of logging, citing concerns over the widespread destruction of forest cover.²⁸⁸ In March 2018, the newly appointed Cabinet Secretary for the Environment and Forestry criticized the KFS for allowing illegal logging in government controlled forests, and stated that he intended to investigate allegations of collusion in logging. He dismissed a number of KFS officers accused of collusion in logging, and suspended others, pending investigations, including the KFS director.²⁸⁹

A further issue of relevance to conservation is the contribution of the actual evictions themselves to forest degradation. A number of interviewees stated that the repeated burnings of their huts meant that they had to cut down more trees to rebuild.²⁹⁰

²⁸¹ Committee on the Elimination of Racial Discrimination, Concluding Observations: Kenya, UN Doc. CERD/C/KEN/CO/5-7 (2017) 20(b)

²⁸² *Cherangani Hills Forest Strategic Ecosystem Management Plan*, p. 10, p. 19.

²⁸³ §22

²⁸⁴ Interview, Nairobi, August 2016.

²⁸⁵ Ministry of Environment, Natural Resources and Regional Authorities letter to Paul Kibet, ‘Re: Kerer Forest Timber Splitting’, 25 September 2015.

²⁸⁶ D. Njagi, ‘Youth, women, indigenous group pay the price of logging in Kenya’, Mongabay, 16 September 2016; The Standard, ‘Swazuri Reveals Plans to recognise forest settlers’, July 2016.

²⁸⁷ Interview, Iten, September 2016.

²⁸⁸ Capital News, ‘Kenya suspends logging for 3 months due to acute water shortage’, 24 February 2018.

²⁸⁹ Kenya Forest Service Media Release: ‘Kenya Forest Service Changes in Senior Management’, 12 March 2018; *Daily Nation*, ‘KFS fires several forest officers linked to logging’, 28 February 2018.

²⁹⁰ Interviews, Embobut forest, March 2015; Tangul, December 2015.

“[Evictions] became another cause of destruction because the residents went back to source for more wood to reconstruct their houses”.

Embobut Task Force Report, p.10

From a human rights perspective, the issue of the Sengwers' role in forest conservation is important because the Sengwers' alleged degradation of Embobut forest is cited by the government as the reason for infringing their rights to their ancestral land. A recent case at the African Court on Human and Peoples' Rights addressed a similar situation, that of the Ogiek of Kenya's Mau Forest Complex. In that case, the government, through the KFS, was in the process of evicting the community on the grounds that they were destroying the forest. The court found that:

“[The government] has not provided any evidence to the effect that the Ogieks' continued presence in the area is the main cause for the depletion of natural environment in the area. Different reports prepared by or in collaboration with the Respondent on the situation of the Mau Forest also reveal that the main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions. In its pleadings, the Respondent also concedes that 'the Mau Forest degradation cannot entirely be associated or is not associable to the Ogiek people'. In this circumstance, the Court is of the view that the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest”.²⁹¹

In the Embobut case, the lack of due diligence in determining the exact causes of environmental degradation is equally striking. The Embobut Forest Task Force report undertook only a very cursory overview of the degradation of the forest complex, with no attempt at all to assess the contribution made to that degradation by the different communities present, which included people who moved to the forest from surrounding areas either because of insecurity, or hunger, and Internally Displaced Persons fleeing landslides in 1951 and 1961.²⁹²

International and regional law requires that any limitations placed on Sengwer access to Embobut forest, and their eviction from their ancestral land, must be demonstrated as appropriate and necessary. The government needs to consider alternative measures that would not violate their rights – for example having the Sengwer remain in the forest as co-conservators with the KFS. This would most likely involve the Sengwer agreeing to a set of conditions for sustainable management of the forest, which they have consistently stated their readiness to do. As one Sengwer respondent stated:

“I want the government and the affected people to embark on consultations that will lead to the community going back [to the forest]. If this is accepted we will ensure that we police the conservation efforts. Among other things we would ensure that no one cultivates [crops]. I believe this way we will co-exist with the forest and water catchment”.²⁹³

If relocation of the Sengwer is considered to be the only option, the government would need to obtain the free, prior and informed consent of the Sengwer, as an Indigenous People, for the relocation. None of these conditions have yet been satisfied. The UN Special Rapporteur on the Rights of Indigenous Peoples, in her report on Indigenous Peoples' rights and conservation initiatives, wrote that states have a number of obligations when they establish protected areas for conservation purposes:

“[F]irst, that States must recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources; second, that decision-making in relation to all aspects of protected areas must take place with indigenous peoples' effective participation and consent where any restrictions on their rights may be proposed; and third, that indigenous peoples have a right to restitution and

²⁹¹ African Court Ogiek case, §130.

²⁹² Embobut Task Force Report, pp. 14-20; interview, member of the Embobut Forest Task Force, September 2016.

²⁹³ Interview, Tangul, September 2016.

other forms of redress where their lands have been incorporated into protected areas without their consent.”²⁹⁴

In fact, due to their role in the conservation of biological diversity and the protection of forests and other natural resources, Indigenous Peoples have the potential to play a crucial contribution in addressing climate change.²⁹⁵ Research has shown that expansion of Indigenous Peoples’ tenure rights is the most cost-effective way to protect forests, sequester carbon and ultimately mitigate climate change.²⁹⁶ Equally, in its Fifth Assessment Report, published in 2014, the Intergovernmental Panel on Climate Change recognized that integrating indigenous forms of knowledge increases the effectiveness of climate adaptation measures.²⁹⁷

On 27 February, the Cabinet Secretary for Environment and Forestry set up a Taskforce to Inquire into Forest Resources Management and Logging Activities in Kenya, to investigate the current state of forest management efforts and allegations of illegal logging,²⁹⁸ and, among other tasks, “to make recommendations on short-term, medium-term, and long-term actions to ensure sustainable management, restoration and protection of forests and water catchment areas”.²⁹⁹ On 2 May, the Task Force submitted its report. One of its findings was that “The Board and Management of the Kenya Forest Service has been unable to stem and in some instances have directly participated in, abated, and systemized rampant corruption and abuse of office. By so doing they have overseen wanton destruction of our forests, have systematically executed plunder and pillaging of our water towers and bear the responsibility for the bringing our environment to the precipice”. With regard to forest communities, the Task Force recommended “Any community residing in the forest or carrying out activities that do not align with forest conservation should be evacuated from the forest. In case of forest-dwelling communities who have traditionally lived in the forest, they should be resettled in areas adjacent to the forest.”³⁰⁰ It is regrettable that the Task Force thus ignores the constitutional land rights of Indigenous forest-dwelling communities, as well as best practice on engaging forest communities as partners in conservation; in so doing it is promoting the same model that led to the disastrous results which the report itself identifies, and furthermore, to the government of Kenya being found guilty of violating the African Charter on Human and Peoples’ Rights in the Ogiek case.

FREE, PRIOR AND INFORMED CONSENT – A FRAMEWORK FOR ADDRESSING CONTENTIONS OVER CONSERVATION

There is currently a contention between two positions; on the one side, the government is alleging that the Sengwer are causing environmental destruction through livestock grazing and tree-felling; on the other, the Sengwer state that they have always conserved the forest, and want to work with government to develop conservation protocols, but they are instead being harassed, forcibly evicted, ill-treated, and their constitutional land rights denied.

From the point of view of human rights, the free, prior and informed consent framework is the correct framework for pursuing a negotiated solution to this contention.

It allows for the concerns and grievances of both sides to be aired in a constructive atmosphere and to be considered. Constructive solutions can be proposed which would allow for both the fulfilment of human rights obligations and the effective attainment of conservation goals.

Questions/Concerns on both sides can be debated constructively. These could include, on the Sengwer side:

- Is it possible for the Sengwer to practice ideal models of conservation when they are being harassed and burnt out of their homes on a regular basis?
- Is it reasonable to expect a community to invest in long-term conservation if they have no security of tenure and are constantly at risk of being evicted?

²⁹⁴ Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples, Victoria Tauli-Corpuz, UN Doc. A/71/229 (2016), p. 12.

²⁹⁵ See for example, Report of the Special Rapporteur on the rights of indigenous peoples, A/HRC/36/46, §15.

²⁹⁶ World Resources Institute, ‘Indigenous Peoples and Local Communities Are the World’s Secret Weapon in Curbing Climate Change’, November 2016

²⁹⁷ Intergovernmental Panel on Climate Change, Summary for Policymakers, p. 26.

²⁹⁸ MSN News, ‘Environment CS Sets Up Taskforce to Review Forestry Management’, 27 February 2018.

²⁹⁹ Taskforce to Inquire into Forest Resources Management and Logging Activities in Kenya, ‘A report on Forest Resources Management and Logging Activities in Kenya: Findings and Recommendations’, April 2018, p. 3.

³⁰⁰ ‘A report on Forest Resources Management and Logging Activities in Kenya: Findings and Recommendations’, p. 45.

- What role has the government played in encouraging the Sengwer to move towards less sustainable livelihoods, for example by provision of livestock through the Natural Resource Management Project?
- How can we achieve a fair and independent assessment of the causes of deforestation in Embobut, in a context where multiple actors are present, resulting in blame for environmental destruction alternately being assigned to the Sengwer, the KFS and neighbouring wealthy cattle-ranchers?
- What might the results be if the government agreed to the Sengwer request to develop a conservation protocol and agree on a shared monitoring and enforcement framework?

Equally, the government will no doubt have strong arguments and concerns to put forward from its side.

Contrary to what is often claimed, the free, prior and informed consent framework is not an inflexible one. It cannot be depicted as a veto for Indigenous peoples; instead it allows for an assessment of cases on their merits, within an international law framework which allows for a balancing of the rights of communities and individuals on one side and national interests on the other.

The government may be able to restrict certain rights if it can demonstrate that it has an overwhelming national interest. The precedent set by the Ogiek case at the African Court on Human and Peoples' Rights, however, indicates that, where the culture and identity of an Indigenous People is inextricably attached to a forest, as it is in the case of the Sengwer, and where the government has not provided evidence that the interest of the country is served by resettling them from the forest, doing so without their consent will represent a violation of their fundamental human rights under the African Charter.

9. RESPONSIBILITIES OF EXTERNAL DONORS

“Eviction of encroachers was a main task of this Department of the KFS... Thus, the introduction of the practice of forest co-management... required a major paradigm shift in the culture and functioning of KFS.”

World Bank Inspection Panel³⁰¹

Since the mid-2000s in particular, international donors have funded a number of projects that have included Embobut forest in their geographic scope. These projects usually focus on: forest protection and conservation; rehabilitation of water sources; addressing land tenure concerns of, or providing livelihoods projects to, forest communities; and carbon off-setting / reducing emissions from deforestation and forest degradation (REDD+).³⁰²

The EU, the Government of Finland and the UNDP are currently funding, or have proposed to fund, projects in Embobut forest in which the main partner is the KFS or its parent institution, the Ministry of Environment and Forestry. The risk in carrying out a programme which is channelled through the KFS, does not recognize the Sengwers' land rights, and is not based on consultations with them, no matter how laudable the objectives, is that funds will be used to build capacity of the KFS to carry out forced evictions. This is what happened in the case of the World Bank-funded Natural Resource Management Project (NRMP). In addition, the Sengwer argue, such approaches will most likely defeat conservation objectives (see section 8.).

The EU, the Government of Finland and the UNDP are all individually required to ensure that their projects comply with international human rights standards. Donors and financial institutions providing project funding should undertake a robust human rights due diligence process to become aware of and prevent or mitigate any risks to human rights as a result of the project. The funders should also have considered Kenya's track record on forced evictions. Had this been done, it would have been clear that forced evictions were a significant risk, which needed to be discussed with the government authorities in order to put in place mitigation measures.

INTERNATIONAL HUMAN RIGHTS RESPONSIBILITIES OF DONORS

The **European Union's** “European Consensus for Development” defined the situation of Indigenous Peoples as a vital factor in strengthening the impact and sustainability of co-operation. The Consensus

³⁰¹ World Bank Inspection Panel, *Kenya Natural Resource Management Project Investigation Report*, 2014, (hereinafter, 'Inspection Panel Report') p. ix.

³⁰² Schemes which allow governments, individuals and companies to invest in environmental projects around the world in order to balance out their own contribution to carbon dioxide emissions; *The Guardian*, 'A complete guide to carbon offsetting', 16 September 2011.

further states that the “key principle for safeguarding indigenous peoples’ rights in development cooperation is to ensure their full participation and the free and prior informed consent of the communities concerned”. In addition: “The EU and its Member States act in accordance with the principles of EU external action set out in Article 21(1) TEU: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”.³⁰³

The European Union has committed to: “Step up efforts to protect Human Rights Defenders including social partners, who are working to uphold economic, social and cultural rights, with a particular focus on human rights defenders working on labour rights, land-related human rights issues, and indigenous peoples, in the context of inter alia ‘land grabbing’ and climate change.”³⁰⁴

The **Government of Finland**, which has ratified the International Covenant on Economic, Social and Cultural Rights, has stated that the human rights-based approach to development means “a systematic integration of human rights as means and objective in development cooperation” and recognizes “the specific rights of indigenous peoples to participate in decision-making in matters affecting them, as set out in the UN Declaration on the Rights of Indigenous Peoples”.³⁰⁵ As a member state of the EU, Finland has also committed to the above principles on human rights in its external actions.

The **United Nations Development Programme’s** Social and Environmental Standards state that “UNDP shall both refrain from providing support for activities that may contribute to violations of a State’s human rights obligations and the core international human rights treaties and seek to support the protection and fulfilment of human rights”. The UNDP’s work is also governed by the United Nations Development Group’s Guidelines on Indigenous Issues, which state that: “The spiritual relationship of indigenous peoples to their lands and territories and environmentally sustainable practices have been recognized and conservation efforts on indigenous lands, including the establishment of new and management of existing protected areas, have to take place with the free, prior and informed consent and full participation of the communities concerned.”³⁰⁶ The guidelines also state that the right to free, prior and informed consent requires a “preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle”.³⁰⁷

9.1 WORLD BANK

Between 2007 and 2013, the Kenyan government implemented the World Bank-funded Natural Resource Management Project (NRMP), with the following objectives:

“[T]o enhance the institutional capacity to manage water and forest resources; reduce the incidence and severity of water shocks in river catchments; and improve the livelihoods of communities participating in the co-management of water and forests”.³⁰⁸

There was also an explicit commitment that:

“Land issues requiring special intervention, such as historical injustices, land rights of minority communities such as hunter-gatherers, forest dwellers and pastoralists, and vulnerable groups will be addressed... Measures will be initiated to identify such groups and ensure their access to land and participation in decision making over land and land based resources.”³⁰⁹

In June 2011, a significant restructuring of the project was approved by the World Bank, which removed the element addressing land rights because it was “overly ambitious”.³¹⁰ In January 2013, Sengwer representatives submitted a complaint to the World Bank’s Inspection Panel, a semi-autonomous body set up by the World Bank as a grievance mechanism, which is mandated to receive and adjudicate complaints from persons claiming to be adversely affected by World Bank projects. The complaint cited that forced

³⁰³ Joint statement by the Council and the Representative of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus’ (2006/C 46/01) §§13 & 30.

³⁰⁴ Council of the European Union, ‘EU Action Plan on Human Rights and Democracy’, 2015, §17(c).

³⁰⁵ Human Rights Based Approach in Finland’s Development Cooperation, Guidance Note, 2015, pp. 7 & 10.

³⁰⁶ The United Nations Development Group’s Guidelines on Indigenous Issues, February 2008, pp. 17-18.

³⁰⁷ The United Nations Development Group’s Guidelines on Indigenous Issues, p. 28.

³⁰⁸ World Bank, ‘Kenya – Natural Resource Management Project: Project Information Document: Appraisal Stage’, 2007, §16.

³⁰⁹ World Bank, ‘Kenya – Natural Resource Management Project: Project Information Document: Appraisal Stage’, 2007, §4.

³¹⁰ Inspection Panel Report, p. vi.

evictions had continued unabated under the project, and that the restructuring of the project had been implemented without consulting the community as required by the World Bank policy on Indigenous Peoples at that time (OP.4.10) which, among other things, required that Indigenous Peoples give “broad community support” to any initiative proposed on their lands.

A resulting investigation by the panel found that, although the project had not directly supported the evictions, “eviction of encroachers was a main task of [the Enforcement and Compliance Department of the KFS] before, during, and after the conclusion of the NRMP”, and that the World Bank had failed to identify the risk that the KFS would continue with this approach, which conflicted with the goal of co-managing forests (which is also a guiding principle of Kenya’s 2005 Forest Act). It also found that Kenya had failed to consult affected communities on the restructuring of the project.³¹¹

“Not surprisingly, restructuring became a turning point in the relationship between the Cherangany-Sengwer and the [NRMP] because of its negative impact on the trust between the [Government of Kenya] and the Bank on one side, and the Cherangany-Sengwer on the other.”³¹²

The project was concurrent with ongoing forced evictions in Embobut forest, most notably in May 2009 after an eviction notice had been served. In December 2010, the World Bank asked the Kenyan government to implement a moratorium on evictions. This was eventually agreed and announced in April 2011.³¹³

9.2 EUROPEAN UNION

The Water Tower Protection and Climate Change Mitigation and Adaptation (WaTER) project, funded by the EU, aims to support forest management, climate change mitigation and conservation of water sources in 11 counties of Kenya, including Elgeyo Marakwet where Embobut forest is located. The €31 million (\$38 million USD) project was launched in September 2016.³¹⁴ Despite stating that the project will focus on Mount Elgon and Cherangany Hills, the ‘Action fiche’ document outlining the technical details of the WaTER project does not mention the presence of any Indigenous Peoples, either the Sengwer in Cherangany Hills or the Ogiek in Mount Elgon, nor does it mention the pending court cases undertaken by representatives of these Peoples seeking to challenge the loss of their ancestral land rights in both areas.³¹⁵

The document implicitly accepts the government narrative that there are no people living in Embobut forest:

“The main beneficiaries will be ‘up-stream’ communities, mainly small scale female farmers, living along the forest margins in the Water Tower ecosystems and the down-stream users, including quasi government institutions and private companies”.³¹⁶

There is also no mention of lessons learnt from the experience of the World Bank’s Natural Resource Management Project (NRMP), either in the section entitled “Lessons Learnt” or elsewhere. The KFS benefits from a grant of €4 million from the project with no acknowledgement by the EU of its role in evictions going back to 2014.

Sengwer representatives are not included on the steering committee of the project, which has “the mandate to oversee and validate the overall direction and policy of the project based on terms of reference”.³¹⁷ EU Commission staff informed Amnesty International that the Sengwers’ consent will be sought when elements of the project to be implemented at county level are planned. This means that Sengwer representatives will only have a say in details of the implementation of the project at the practical level, but not in the actual design of the overall project, including the conservation model to be adopted, and how their land rights in the forest are addressed.³¹⁸ In this respect, the EU project falls below the standard set by the previous World Bank NRMP, in which the Sengwer were consulted and gave their support to the original design. It also means that the Sengwer will not have any opportunity to provide information on the role of the KFS in past human rights violations with a view to ensuring that these are not repeated.

³¹¹ Inspection Panel Report, p. ix.

³¹² Inspection Panel Report, p. 55.

³¹³ World Bank Group / The Inspection Panel, “World Bank Board Discusses Inspection Panel Cases in India and Kenya”, 2 October 2014.

³¹⁴ Interview, EU Commission staff member (by telephone), July 2017.

³¹⁵ EU, ‘Action fiche for Kenya’s Water Tower Protection and Climate Change Mitigation and Adaptation (WaTER) Programme’, (Hereinafter ‘Action fiche’), p. 2.

³¹⁶ Action fiche, p. 7.

³¹⁷ Terms of Reference: Technical assistance to the Water Tower Protection and Climate Change Mitigation and Adaptation (WaTER) Programme (EuropeAid/137671/IH/SER/KE).

³¹⁸ Interview, December 2017.

The project is also repeating mistakes made by the World Bank NRMP, in failing to assess the risk of working with the KFS, an institution which is committed to evictions as part of its approach to forest management; there is no indication in any publicly available project literature that lessons learnt from the World Bank's experience have been incorporated into the EU's programme design. The failure of the EU to obtain the free, prior and informed consent of the Sengwer people for the project is evidenced by a letter, signed by 10 community leaders and dated 3 November 2016, calling on the EU to "suspend the WaTER Towers Protection and Climate Change Mitigation and Adaptation Programme until you carry out free prior and informed consent, incorporate rights-based approach, accountability and transparency in the project". The authors of the letter allege that project documents, including information about the geographic scope of the project, have not been shared with them. A further letter was sent by Sengwer representatives calling for suspension of the project on 26 December 2017.³¹⁹ The EU Delegation to Kenya confirmed in a letter to Amnesty International in March 2018, 18 months after the project was launched, that at that point no consultations had been undertaken with the Sengwer. In August 2017, EU staff said that this task would be handled by a technical advisor who was in the process of being hired.³²⁰ However the Terms of Reference for the advisor make no mention of free, prior and informed consent, nor of Indigenous Peoples, and in fact talks of engagement with affected communities in terms of "knowledge management and information sharing".³²¹

On 15 January 2018, three UN human rights experts called on the EU to suspend funding for WaTER, saying: "We are concerned that the project is being undertaken without a human rights impact assessment... Consultations have not been held with the Sengwer to seek their free, prior and informed consent".³²² On 17 January, one day after the killing of Robert Kiroch Kibor and the serious wounding of David Kosgei Kiptilkesi, the EU delegation announced the suspension of funding for the WaTER project in light of concerns about human rights violations in Embobut forest.

A letter from the EU Delegation in Nairobi to Amnesty International stated that "the overall design of the Water Towers Programme included a feasibility study, which considered the human rights impact but was elaborated without the direct participation of the affected communities." The study "did not match the human rights assessment standards that we apply today"; nevertheless the letter states that "[t]he EU has systematically insisted on full respect of indigenous peoples' rights in this programme's implementation" and states that guidelines on free, prior and informed consent developed for use in Kenya by the United Nations Development Programme will be used for the WaTER programme.³²³

Forest Peoples Programme, an NGO, asked the EU to provide human rights impact assessment documents in December 2016, and had not received them at the time of writing.³²⁴ Although Amnesty International has requested project documents including the framework for seeking and obtaining free, prior and informed consent from Indigenous Peoples; a resettlement action plan; and a human rights risk assessment, these have not been provided.³²⁵

At the time of writing, the EU is undertaking a redesign of the programme in conjunction with the Government of Kenya. This will take into account the findings of the mid-term review (an internal evaluation of the programme, which has been brought forward in response to the crisis leading up to suspension of funding), the report of the Kenya National Commission on Human Rights fact-finding mission, the findings of the government Task Force to investigate forest management, and Amnesty International's report; the EU states that "if the resultant redesign does not take due account of the need to protect human rights including the rights of indigenous peoples, the EU will not support the programme."³²⁶

9.3 GOVERNMENT OF FINLAND

The Government of Finland has supported the Government of Kenya through the Miti Mingi Maisha Bora programme, also known as Support to Forest Sector Reform in Kenya, implemented over seven years (2009-

³¹⁹ Copies of letters on file with Amnesty International.

³²⁰ Letter, EU Delegation to Kenya, to Amnesty International Kenya, 22 March 2018; interview, EU Commission staff, August 2017.

³²¹ Terms of Reference: Technical assistance to the Water Tower Protection and Climate Change Mitigation and Adaptation (WaTER) Programme (EuropeAid/137671/IH/SER/KE).

³²² Office of the High Commissioner for Human Rights: 'Indigenous rights must be respected during Kenya climate change project, say UN experts', 15 January 2018

³²³ Letter, EU Delegation to Kenya, to Amnesty International Kenya, 18 April 2018.

³²⁴ Interview, Justin Kenrick, Forest Peoples Programme (by telephone), March 2018.

³²⁵ Letter, Amnesty International Kenya to Stefano Dejak, Ambassador, EU Delegation to Kenya, 29 February 2018.

³²⁶ Letter, EU Delegation to Kenya, to Amnesty International Kenya, 18 April 2018; Delegation of the European Union to Kenya, 'Why the EU's support for conservation of Kenya's "Water Towers" remains suspended', 13 March 2018

2016). The purpose of the programme was to achieve “improved forest and woodland management and utilisation practises, and a transformation of policy and institutional arrangements to serve the needs of communities, the private sector, civil society and the government”.³²⁷ The programme involved the provision of support for Community Forest Associations which, in the case of Embobut forest, represent communities living near to the forest and allow limited access to and exploitation of forest products without tenure rights. A Finland government representative admitted that “the Community Forest Associations have nothing to do with tenure. The KFS has control and communities only have user rights. This is an ‘iron fist’ conservation approach.”³²⁸

A review of the programme completed in 2016 by an external consultancy mentions the January 2014 evictions and states that: “According to [the Government of Kenya], there was no forceful eviction of people from the forest and the 2,874 affected families accepted the Kshs 400,000 offered by the [Government of Kenya] as compensation and voluntarily moved out of the forest. Although this compensation was provided and people moved out of the forest, some people still believe that they are historically entitled to this land.”³²⁹ The report identifies the fact that communities lack secure tenure on their lands as a problematic issue; it then describes the eviction of the Sengwer as “progress made” in addressing community tenure, and states that the future trend is towards a positive resolution of the issue.³³⁰

The final report of the programme, by the KFS and Finland’s Ministry for Foreign Affairs, makes no mention of Embobut forest, the Sengwer, or evictions. There is no mention of the World Bank’s experience or lessons drawn from it. The report lists as a result of the programme “PFM [Participatory Forest Management] approaches institutionalised and implemented”, and as an indicator of this result, “PFM takes into consideration gender and the rights of indigenous and/or marginalized groups.” However, there is no mention of consultations with the Sengwer, or their concerns regarding tenure, evictions or free, prior and informed consent.³³¹

In a letter to Amnesty International, an official of the Ministry for Foreign Affairs of Finland stated that in the Miti Mingi Maisha Bora programme, “the [human rights-based approach] specifically aimed at enhancing rights-holders’ awareness of their human and fundamental rights and improving their capacity to defend these rights while increasing duty-bearers knowledge of and capacity to carry out their responsibilities. To this end, MMMB supported human rights training to the entire Kenya Forest Service... in solving forest related conflicts. Good forest governance and the [human rights-based approach] were highlighted in their relationship with forest dependent communities... An expected outcome was that tenure arrangements support the self-management of community forests.” The letter also highlighted financial support to a number of processes including the National Land Commission forum for forest communities (see section 5.2).³³²

Finland has proposed a new €9.5 million project entitled “Private Forestry and Forest Enterprise Support in Kenya”.³³³ While the previous project prioritized conservation, the new project is targeted at income generation through supporting local communities to commercialize forest products. This proposed project would again be implemented by the KFS. Sengwer representatives wrote to the government of Finland in January 2018, asking it to suspend funding, due to fears that it would support the KFS to carry out forced evictions.³³⁴ The project was initially designed to include Embobut forest but after public pressure within Finland on the government resulting from allegations of human rights violations committed against Indigenous Peoples, and community objections to the project, Embobut forest was removed from the geographic scope. The start date of the project has also been delayed, for the same reasons.³³⁵

³²⁷ LTS International Ltd, *Review of Governance of the Forest Sector in Kenya, Miti Mingi Maisha Bora, Final Report*, 2016, (hereinafter ‘*Miti Mingi Maisha Bora, Final Report*’) p.1.

³²⁸ Interview, September 2016.

³²⁹ *Miti Mingi Maisha Bora, Final Report*, p. 31.

³³⁰ *Miti Mingi Maisha Bora, Final Report*, p. 121.

³³¹ *Miti Mingi Maisha Bora: Support to forest sector reform in Kenya October 2009 – September 2016: Completion Report, Prepared by the MMMB Programme Management Team for MMMB Supervisory Board*, 2016, p. 34.

³³² Letter from the Ministry for Foreign Affairs to Amnesty International Kenya, 11 August 2018.

³³³ Ministry for Foreign Affairs of Finland, ‘Private Forestry and Forest Enterprise Support in Kenya’, 12 August 2017.

³³⁴ Sengwer Forest Indigenous Peoples of Cherangany Hills, “Re: Suspend €9.5 million for Private Forestry and Forest Enterprise Support in Kenya and Forestry related Projects in Kenya to STOP continued violation of Sengwer Human Rights”, 22 January 2018

³³⁵ Interview, staff member of Siemenpuu (Finnish environmental NGO), February 2018.

9.4 UNITED NATIONS DEVELOPMENT PROGRAMME

UNDP and the Japan International Co-operation Agency (JICA) were invited by the Government of Kenya to initiate a REDD+ programme (Reducing Emissions from Deforestation and Forest Degradation), which launched in January 2017. UNDP will be responsible for the first two stages of this project: developing a REDD+ strategy addressing conflicts, drivers of deforestation, and land rights; and developing safeguards and an information system. The safeguards (phase 2) include compliance with national policies, respect for Indigenous Peoples' rights including tenure rights, and protections against environmental destruction. JICA will be responsible for: implementing a national forest monitoring system; and developing the forest reference level (this quantifies the amount of CO₂ sequestered).³³⁶

In a letter to Amnesty International, the UNDP Resident Representative stated that 11 representatives of Indigenous communities, including the Sengwer, have been involved in designing a project document known as the "Draft PRODOC", a document which describes the project activities and methodologies for the REDD+ project and "which will be submitted to Kenya's National Treasury and UNDP for approval".³³⁷ However, the Sengwer representative on the Task Force stated that more grassroots-level engagement is needed:

"We requested them to organize for consultative meetings at community level in order to have support or rejection, but they insisted there are no funds... it is the Sengwer position that there'll be no need of REDD+ if KFS are not ready to stop evictions and commit themselves to a constructive dialogue process that will lead to Sengwer securing their rights to live in and own their ancestral lands, working together with KFS and other state agencies and stakeholders to promote conservation."³³⁸

The Kenya National REDD+ Co-ordination Office has developed guidelines on the implementation of free, prior and informed consent (FPIC) in Kenya, which will govern the project; we note that the guidelines state:

"The right of FPIC applies to forest carbon and REDD+ discussions prior to:

- a. Relocating an indigenous community from their land**
- b. Taking cultural, intellectual, religious and spiritual property**
- c. Causing damages, takings, occupation, confiscation and uses of their land, territories and resources**
- d. Adopting and implementing legislative or administrative measures and**
- e. Approving any project affecting their land or territories and other resources, particularly about the development, utilization or exploitation natural resources".**³³⁹

However, given that the government's position is that the Sengwer have left the forest voluntarily, it remains unclear what the consequence will be if the Sengwer withhold their consent. To respect the human rights of the Sengwer, Amnesty International recommends that project documents should explicitly state that no activities that would infringe the Sengwers' rights to land, natural resources and cultural heritage in Embobut forest will proceed without their free, prior and informed consent.

The February 2018 Draft PRODOC states that project activities will need to consider:

"Dialogues outcomes on how forest communities including marginalised communities can secure rights in light of the forest conservation efforts, as well as securing land tenure for forest dependent communities where consistent with REDD+ planning and implementation".³⁴⁰ This illustrates clearly the difficulties and risks involved; however, it does not clarify how the benefits of the REDD+ programme will be shared, given that the Sengwer, as an Indigenous People, have the right to the land in Embobut forest and the resources it contains. The Sengwer also have a pending claim in domestic courts to have those rights recognized, while the government continues to deny recognition of those rights. The documents do not clarify what approach will be taken under the project if the government continues to disregard their land rights.

In a letter to Amnesty International, the UNDP Representative in Kenya stated that "FPIC is specifically designed to be applied at the project level/community level/territories during REDD+ implementation... A study to clarify [benefit-sharing mechanisms and pending claims by the Sengwer community] has been proposed... note that the project document cannot pre-determine how benefit sharing mechanism under

³³⁶ Interview, UNDP staff, Nairobi, December 2017.

³³⁷ Letter, 'Situation in Embobut Forest and UNDP Projects' Siddharth Chatterjee, Resident Representative, UN Resident Co-ordinator, to Amnesty International Kenya, 12 March 2018.

³³⁸ Interview, David Kiptum Yator (by telephone), February 2018.

³³⁹ Ministry of Environment and Natural Resources, *National Guidelines for Free Prior and Informed Consent (FPIC), For REDD+ and Sustainable Forest Management in Kenya*, 2017, p. 2.

³⁴⁰ Draft PRODOC, February 2018, (Project Title: FCPF REDD+ Readiness Grant, Project Number: 99178), p. 13.

REDD+ programme will operate as those would need to be discussed and defined as part of the national REDD+ readiness process through stakeholder engagement. Consider as well that the project is subject to the UNDP Social and Environmental Standards [which state] that “UNDP will not participate in a Project that violates the human rights of indigenous peoples as affirmed by Applicable Law and the United Nations Declaration on the Rights of Indigenous Peoples””.³⁴¹

³⁴¹ Letter, ‘Response to request for Information ahead of Amnesty Report on the Sengwer and Embobut’, Siddharth Chatterjee, UN Resident Co-ordinator, to Amnesty International Kenya, 11 April 2018.

10. CONCLUSION AND RECOMMENDATIONS

The forced evictions experienced by the Sengwer people have left them impoverished and in danger of losing their culture and identity as an Indigenous People. Sengwer who continue to live in the forest are forced to live in sub-standard housing, as the constant fear of house burning makes the building of permanent structures impractical. Those who live outside the forest, and who were not compensated, have had their livelihoods significantly diminished. Families have been divided as one parent is often forced to remain in the forest, while one lives with the children outside the forest. Contrary to the narrative of the Kenyan government, the Sengwer cannot be said to have been consulted, nor to have given their free, prior and informed consent to the eviction, nor to have been compensated; significant inadequacies have been demonstrated in each of these elements of the Task Force process.

Sengwer women were marginalized during both the consultation and compensation processes that led up to the forced eviction of 2014, resulting in a failure to take into account their perspective on the situation, and exclusion from remedies. Women have also suffered disproportionately in terms of reduction of financial autonomy and denial of the right to enjoyment of their culture, as a result of the forced evictions. Sengwer community leaders, activists and members have been harassed, ill-treated and – in one case – killed as a result of efforts to evict them and silence their dissent. The government of Kenya is ignoring a High Court ruling that expressly forbids evictions and arrests in Embobut forest, as well as the lessons learnt from the rulings of international bodies such as the African Commission on Human and Peoples' Rights (Endorois case), and the African Court (Ogiek case). Finally, the government has failed to demonstrate that the eviction of the Sengwer from Embobut forest was a necessary or appropriate response to the problem of deforestation in Kenya.

The urgent situation of the Sengwer, who are now vulnerable to the risk of losing their identity as a people, necessitates an urgent response to provide a remedy to human rights violations suffered. While the solution to this problem must be found with full consultation of the Sengwer people, Amnesty International outlines here its recommendations for what that remedy could look like.

10.1 TO THE GOVERNMENT OF KENYA

- Immediately cease all evictions, and arrests of Sengwer for the sole reason of being present in Embobut forest;
- Instruct the KFS and other security agencies to stop harassing, threatening and intimidating Sengwer leaders and human rights defenders;
- Ensure that immediate, independent and thorough investigations take place into the forced evictions and violence in Embobut forest since January 2014, in particular the killing of Robert Kiroich and wounding of David Kosgei Kiptilkesi, Elias Kimaiyo and Ismail Kirop, and ensure that those responsible for excessive use of force, including murder, are held accountable in line with due process requirements without recourse to the death penalty;

- Recognize the rights of the Sengwer to their ancestral land in Embobut forest and convert Embobut forest to community forest, under conservation conditions, under the Community Land Act 2016 and Forest Conservation and Management Act 2016;
- Ensure that all Sengwer who have been evicted are allowed to return to their places of dwelling in Embobut forest in safety and dignity;
- Initiate a proper consultation in accordance with international standards with the Sengwer, ensuring the effective participation of women, and guarantee that their free, prior and informed consent is obtained for a resolution of the issues of the status of Embobut forest, forest conservation, and the injustices suffered by Sengwer members during the forced evictions, including those now living in the forest and those that live outside;
- Ensure that the Sengwer are consulted and their free, prior and informed consent is obtained for any plans that the authorities seek to implement which impact significantly on their human rights;
- Issue an apology, an appropriate remedy, and guarantees of non-repetition to all Embobut residents who have suffered evictions, arrests on the basis of presence in the forest, ill-treatment or other human rights violations, including the family of Robert Kiroitch; provide reparations for those injured; and return all personal possessions taken from Elias Kimaiyo when he was beaten in April 2017;
- Ensure that all conservation and climate change mitigation and adaptation measures and projects, including those funded through international cooperation, do not result in human rights violations and that Indigenous peoples are effectively consulted in their development, and that their free, prior and informed consent is obtained;
- Ratify Convention 169 of the International Labour Organization (Indigenous and Tribal Peoples Convention) and make an official declaration endorsing the UN Declaration on the Rights of Indigenous Peoples.

10.2 TO THE KENYA FOREST SERVICE

- Immediately cease evictions including through burning of homes of Sengwer in Embobut forest, arrests on the basis of presence in the forest, and harassment of community members;
- Engage in negotiations with the decision-making structures of the Sengwer in order to obtain their free, prior and informed consent, before initiating any activities in the forest that may impact on their human rights, for example through the planting of non-Indigenous plants or tree species;
- Grant independent access, without the presence of KFS personnel, to civil society and media wishing to investigate allegations of human rights violations in Embobut forest.

10.3 TO THE NATIONAL LAND COMMISSION

- Consult with the Sengwer with the aim of addressing the historical injustice of their forced eviction from Embobut forest and obtain their free, prior and informed consent for potential solutions to be proposed to government, in accordance with their constitutional land rights.

10.4 TO THE COUNTY GOVERNMENT OF ELGEYO MARAKWET

- Carry out an assessment of the socio-economic impacts of forced evictions on Sengwer and others in Embobut forest and initiate measures to address health, education and livelihoods needs, including where necessary by increasing resources to public services experiencing excessive demand, paying particular attention to the disproportionate effects on women;

- Engage with and bring together the leadership of communities affected by the suspension of the WaTER project to ensure that any tensions over access to project funds, and over forest management and water access, are discussed and addressed;
- Engage with the decision-making structures of the Sengwer with regard to any initiative affecting Embobut forest, and obtain their free, prior and informed consent for such initiatives.

10.5 TO ALL EXTERNAL DONORS FUNDING PROJECTS IN EMOBUT FOREST

- Ensure that projects in Embobut, including conservation and climate change mitigation and adaptation projects, do not cause or contribute to human rights violations, that the free, prior and informed consent of the Sengwer is obtained for any project that will impact on the human rights of the Sengwer in Embobut Forest, and that the consequences of relevant jurisprudence, in particular the Ogiek case at the African Court, are taken into account.
- Carry out and publish human rights-based socio-economic impact assessments, grievance mechanisms, protocols for guaranteeing the rights of Indigenous Peoples including free, prior and informed consent, and where appropriate resettlement action plans, for any projects operating in Embobut forest, including for projects which are already underway, and for which such assessments have yet not been carried out.

10.6 TO THE EUROPEAN UNION

- Engage with the government of Kenya to ensure that any resumption of the WaTER project only takes place under guarantees that there will be no further evictions, arrests of Sengwer on the basis of their presence in Embobut forest, harassment or violence towards community leaders/human rights defenders, or any other human rights violations, and that genuine consultations will be held with the affected communities regarding the status of the forest and its management, allowing for a new approach to conservation which recognizes their role as co-managers, co-conservators and owners of the land, and ensures their free, prior and informed consent is obtained for any agreements made;
- Publish the mid-term review of the WaTER project;
- Ensure that all impact assessments effectively assess the risk of contributing to human rights violations through a robust due diligence process, and incorporate lessons learnt from similar projects in the past, including those not funded by the European Union, and ensure that effective mitigation measures are taken to address such risks/impacts. Where national legislation is not in compliance with the country's human rights obligations, assess the commitment of the borrower to ensure the project complies with international human rights standards;
- Promote a process that will ensure that affected communities can easily access all necessary documents relating to the project and that the documents are presented in a form and language that they can understand;
- Ensure affected individuals and communities are aware of and can easily access accountability and grievance mechanisms in order to have their complaints with regard to project implementation considered and have access to effective remedies;
- Engage with the Government of Kenya, if appropriate using the political dialogue under Article 8 of the Cotonou Agreement, to urge a human rights-based approach to the issue of forest-dwelling Indigenous Peoples, land rights and conservation, setting clear benchmarks for what is expected in this regard;
- Provide Sengwer and other Indigenous human rights defenders with full political backing and capacity-building support, and pro-actively engage with the government of Kenya to address any cases of harassment, ill-treatment or other human rights violations towards Indigenous human rights defenders. At the same time, the EU and its member states must promote and protect the work of human rights defenders working on Indigenous Peoples' rights in Embobut forest and

throughout Kenya, in line with the EU Human Rights Defender Guidelines, commitments in the EU Action Plan on Human Rights and Democracy and the Council conclusions on Indigenous Peoples of 15 May 2017;

10.7 TO THE GOVERNMENT OF FINLAND

- Undertake a new review of the Miti Mingi Maisha Bora programme, also known as Support to Forest Sector Reform in Kenya, in line with Finland's human rights commitments, paying particular attention to possible human rights violations which occurred in the context of the programme, in light of events since December 2017, as well as previously existing information including allegations by the Sengwer community of human rights violations;
- Engage with the Government of Kenya on the findings of the review, and urge a human rights-based approach to all future programming relating to forest-dwelling Indigenous Peoples;
- Work with the government of Kenya to provide an appropriate remedy to any persons found to have suffered human rights violations as a result of the Miti Mingi Maisha Bora programme;
- Where any new or existing project planning will impact on the rights of Indigenous peoples, ensure that their free, prior and informed consent is obtained, that lessons learnt from other similar projects are incorporated, and ensure that sufficient safeguards are built in to ensure that projects do not contribute to human rights violations.

10.8 TO THE UNITED NATIONS DEVELOPMENT PROGRAMME

- Engage with the Government of Kenya within the context of the REDD+ programme to ensure that progress is made towards recognizing the rights of the Sengwer to their ancestral lands in Embobut forest;
- Ensure that the project framework explicitly provides for the free, prior and informed consent of the Sengwer in relation to their ancestral lands and cultural heritage in Embobut forest, and that any initiatives under the programme that would affect those lands and cultural heritage will not go ahead without their free, prior and informed consent.

10.9 TO THE DECISION-MAKING STRUCTURES OF THE SENGWER PEOPLE

- Move forward discussions within the community on a model of land allocation and management that treats women and men equally.

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FAMILIES TORN APART

FORCED EVICTION OF INDIGENOUS PEOPLE IN EMBOBUT FOREST, KENYA

As this report goes to print, families in Embobut forest, in the North Rift Valley of Kenya, are losing their homes, livelihoods, and access to cultural practices. They belong to the Sengwer Indigenous People and Embobut is their ancestral home. The Kenya Forest Service has been carrying out forced evictions in the forest since the 1980s; however on Christmas Day 2017 it began a new campaign, burning 341 houses and leading to the killing of one Sengwer man and the hospitalisation with gunshot wounds of another. The government of Kenya claims that the Sengwer were consulted, agreed to leave the forest, and were given cash compensation. But the process was opposed by community representatives who went to court to stop it; the government nevertheless went ahead and burned an estimated 800 - 1500 houses in January 2014. The compensation process, marred by allegations of corruption, excluded many legitimate forest residents. Many Sengwer who are now living outside the forest, are living in appalling poverty. The eviction has dispersed the community, separating them from their spiritual and cultural practices in the forest; many fear that it will lead to the disappearance of the unique culture and identity of the Sengwer.