

**KENYA NATIONAL COMMISSION ON HUMAN RIGHTS**

**SUBMISSIONS ON GENERAL COMMENT NO 26 (2021) OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS ON LAND AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

SUBMITTED TO:

COMMITTEE ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (cescr-land@ohchr.org )

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1. **INTRODUCTION**

The Kenya National Commission on Human Rights is an Independent National Human Rights Institution established under article 59 of the Constitution of Kenya and operationalized by the Kenya National Commission on Human Rights Act, 2011 (revised 2012). The Commission has a broad mandate to promote the respect and a culture of human rights in the Republic of Kenya. The Commission’s mandate is implemented through various strategies including research, advocacy and lobbying, education and training, complaints and investigations, litigation, monitoring, partnership building and networking among others. The Commission’s functions are guided by the 1993 United Nations approved principles on the establishment and functioning of national institution (Paris Principles) and is accredited as an ‘A’ status institution for its compliance with the Paris Principles by the Global Alliance of National Human Rights Institutions (GANHRI). The Commission also enjoys Affiliate Status before the African Commission on Human and Peoples’ Rights.

The Commission makes this submission pursuant to its human rights mandate and as the designated principal organ in ensuring state compliance with regional and international human rights obligations.

1. **GENERAL OBSERVATIONS**

Land is critical to the livelihoods and the enjoyment of other rights especially for the Indigenous People whose connectivity to land serves both cultural and spiritual functions. The general comment expressly mentions the rights of Indigenous People and recognises communal customary land tenures; this is very welcome and timely for Kenya as it will provide better clarification/interpretation of land and other related rights. The development of the General Comment comes at a time when Kenya is striving to implement the decisions of the African Commission on Human and Peoples Rights in the Endorois Case[[1]](#footnote-1) and the decision of the African Court of Human and Peoples Rights in the Ogieks Case.[[2]](#footnote-2) These cases adjudicated at regional human rights courts have at center of it disputes concerning claims to ancestral land by indigenous popuplations which the Courts have upheld. The Supreme Court of Kenya has noted that general comments can be resorted to provide clarity in the interpretation of matters human rights[[3]](#footnote-3).

The Kenya National Commission on Human Rights (KNCHR), Kenya’s National Human Rights Institution makes the following observations/recommendations on the Draft General Comment:-

1. **Inclusion of children, persons with disabilities and stateless persons as focus of disenfranchised groups**. Under Part III A - whereas the draft General Comment seeks to provide better clarity on equality and non-discrimination, more focus has been given to gender quality (which is very good); however, the draft does not incorporate children, persons with disabilities and stateless persons who are also disenfranchised on access, use and control of land including in matters of succession and commercial transactions, in both law and in practice.  It is proposed that the draft General Comment makes reference to the United Nations Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness (and other interpretive texts) that prohibit discrimination**.**
2. **Role of National Human Rights Institutions-** Under State's obligations, the draft General Comment does not include the role of National Human Rights Institutions whose role in the protection and promotion of human rights is critical. It is proposed that reference be made to the Committee's General Comment No. 10 on the role of NHRIs in the protection of Economic, Social and Cultural Rights[[4]](#footnote-4) and the Principles relating to the Status of National Institutions[[5]](#footnote-5) and General Comments by the Global Alliance of National Human Rights Institutions interpreting the Principles.[[6]](#footnote-6) Based on the above mentioned documents, National Human Rights Institutions can *advise parliament on legislation touching on economic, social and cultural rights in a bid to promote harmonization with international human rights instruments; Monitor and document violation arising out of land; Carry out public inquiries and develop publication guides on land; public awareness; monitoring and engaging with international human rights system;*
3. Under Part IV :- Consider inclusion of health/disease /pandemic/endemic in appreciation of the impact health (for instance COVID 19, HIV/AIDs) has had on land rights.
4. **SPECIFIC COMMENTS**
5. **Obligations of States parties under the Covenant as relating to land**
6. *Obligation to respect*

**Para 23:** - Consider adding: Protection of communal dimensions of tenure includes an obligation of State parties to demarcate the boundaries to communal land in consultation with the groups concerned and granting them legal titles to their land. This is in line with ILO Convention 169 that requires Governments to take the necessary steps to identify indigenous peoples’ traditional lands and to “protect their rights of ownership and possession”.[[7]](#footnote-7)

Without prejudice to the foregoing, consider breaking this paragraph down to have clearer state obligation; it conflates several obligations under one which affects the flow and clarity somewhat.

**Para 25:** Consider making express mention of procedural safeguards during evictions and cross refer to General Comment No. 7 on the right to adequate housing (Para 15).

1. *Obligation to protect*

Consider adding a new obligation for State parties to ensure that communities also benefit from exploitation of natural resources on their land by third parties, in line with ILO Convention 169 which provides that, "the peoples concerned shall wherever possible participate in the benefits of natural resources exploration or exploitation activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”[[8]](#footnote-8)

**Para 30:** - Consider adding the words, “and transparent” immediately after the word, “responsible” in the first sentence. Mention on the need to provide full information, in a language and manner that is accessible to the affected communities. In order to enable participation and lodge of complaints, information is paramount.

Consider additional reference to the United Nations Guiding Principles on Business and Human Rights.

1. *Obligation to fulfil*

Consider adding a new obligation for State parties to demarcate and title indigenous and tribal lands with the participation of the affected and neighbouring communities. The intention is to secure the land tenure and attendant bundle of rights for the Indigenous People which is often at the center of disputes concerning claims to ancestral lands.

1. **Human Rights Defenders**

**Para 53:** - The KNCHR acknowledges that Indigenous Human Rights Defenders face peculiar circumstances and challenges in their defence of human rights. It is proposed that they be included/specifically referred to in the draft General Comment. i.e “*The situation of human rights defenders and indigenous human rights defenders is particularly difficult in conflicts over land…. States must take all necessary measures to respect human rights defenders and indigenous human rights defenders and their work…”*

1. **Climate change**

Consider adding the unique role that indigenous peoples play in environmental conservation and management, and how States parties can recognize and work with indigenous peoples in environmental conservation. The role of indigenous peoples in environmental conservation has been recognized internationally. The Preamble to the UN Declaration on the Rights of Indigenous Peoples recognizes that "respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.”[[9]](#footnote-9) Consider making express mention of the predicament of indigenous people under state centric approaches to conservation at the background section of the draft General Comment.

1. **Remedies**

Consider adding the following section on reparations for indigenous people:

Reparations for land rights violations against indigenous peoples must be adequate, effective and prompt.[[10]](#footnote-10) Adequate reparations include measures which erase all the sources and consequences of land rights violations. Effective reparations, on the other hand, include measures which are efficient in restoring the right lost.[[11]](#footnote-11) Prompt reparations are made in a timely manner. Furthermore, for reparations to be adequate and effective they must be proportionate to the gravity of the breach and the harm suffered.[[12]](#footnote-12) In this vein, such adequacy and effectiveness must not only be recognized by an external party, but also by the indigenous peoples receiving the reparations.[[13]](#footnote-13) Reparations should also be made to victims for the acts or omissions which can be attributed to the State. Where a non-state actor is liable for reparation and is unwilling or unable to meet their obligations, the State should provide such reparation or establish national programmes for reparation and other assistance to the victims. Such reparations may include restitution. Where restitution of indigenous peoples’ ancestral land is not possible, States should, in consultation with the indigenous peoples, compensate them with lands, territories and resources equal in quality, size and legal status as the lands they previously occupied.[[14]](#footnote-14)

Moreover, consider adding a clause that obligates the state parties to put in place mechanisms to **ensure respect for and implementation of judicial decisions** so as to guarantee meaningful access to justice and enjoyment of the outcome of the justice mechanism.

\_\_\_\_\_\_\_\_\_\_\_**THE END**\_\_\_\_\_\_\_\_

1. ACHPR. Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya [↑](#footnote-ref-1)
2. Application 006/2012- African Commission on Human and Peoples Rights v Kenya [↑](#footnote-ref-2)
3. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa* (Amicus Curiae) [2021] eKLR [↑](#footnote-ref-3)
4. Committee on Economic, Social and Cultural Rights ‘G**eneral Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights (1998)’ available at** [https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/b)GeneralCommentNo10Theroleofnationalhumanrightsinstitutionsintheprotectionofeconomic,socialandculturalrights(1998).aspx](https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/b%29GeneralCommentNo10Theroleofnationalhumanrightsinstitutionsintheprotectionofeconomic%2Csocialandculturalrights%281998%29.aspx) [↑](#footnote-ref-4)
5. United Nations General Assembly ‘Principles relating to the Status of National Institution (Paris Principles) adopted on 20th December 1993 (UNGA 48/134) available at <https://ganhri.org/wp-content/uploads/2019/11/EN_GeneralObservations_Revisions_adopted_21.02.2018_vf.pdf> <https://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx> [↑](#footnote-ref-5)
6. Global Alliance of National Human Rights Institutions ‘General Observations of the Sub-Committee on Accreditation’ (adopted 21st February 2018) available at [↑](#footnote-ref-6)
7. Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 14 (2), available at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> [↑](#footnote-ref-7)
8. Ibid. Article 15 (2) [↑](#footnote-ref-8)
9. United Nations Declaration on the Rights of Indigenous Peoples, Preamble, available at <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> [↑](#footnote-ref-9)
10. OHCHR, “Basic Principles and Guidelines on the Rights to a Remedy and Reparation,” available at <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx> para 11 [↑](#footnote-ref-10)
11. Federico Lenzerini, “Reparations for Indigenous Peoples International and Comparative Perspectives”(Oxford University Press 2008) 20 available at [http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199235605.001.0001/acprof-9780199235605](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199235605.001.0001/acprof-9780199235605) para 1 [↑](#footnote-ref-11)
12. OHCHR, “Basic Principles and Guidelines on the Rights to a Remedy and Reparation,” available at <https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx> para 15 [↑](#footnote-ref-12)
13. Federico Lenzerini, “Reparations for Indigenous Peoples International and Comparative Perspectives”(Oxford University Press 2008) available at [http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199235605.001.0001/acprof-9780199235605](http://www.oxfordscholarship.com/view/10.1093/acprof%3Aoso/9780199235605.001.0001/acprof-9780199235605) page 14 [↑](#footnote-ref-13)
14. United Nations Declaration on the Rights of Indigenous Peoples, available at <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf> article 28 (2) [↑](#footnote-ref-14)