

Mandates of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; the Special Rapporteur on the rights of indigenous peoples; the Special Rapporteur on the human rights of internally displaced persons; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

REFERENCE:
AL GBR 5/2021

31 May 2021

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence; Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context; Special Rapporteur on the rights of indigenous peoples; Special Rapporteur on the human rights of internally displaced persons; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; and Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, pursuant to Human Rights Council resolutions 45/10, 43/14, 42/20, 41/15, 43/36 and 43/20.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the alleged lack of effective remedies for the Kipsigis and Talai indigenous peoples who were subjected to human rights violations during the pre-colonial and colonial period in Kenya, associated primarily with the expropriation of land on Kericho County.**

According to the information received:

During the pre-colonial and colonial period in Kenya, the Kipsigis and Talai indigenous peoples of Kericho County, as was the case with other communities and indigenous peoples in Kenya, were subjected to gross violations of human rights, such as unlawful killing, sexual violence, torture, inhuman and degrading treatment, arbitrary detention, arbitrary displacement and violations of the rights to privacy, family life and property. The violations also included the expropriation of extensive land belonging to the Kipsigis and Talai peoples of Kericho County, which was considered to be particularly fertile and suited to agriculture. Over 500.000 persons belonging to the Kipsigis and Talai peoples are estimated to have been affected by these events.

Pre-colonial period

In 1895, the United Kingdom proclaimed a protectorate in East Africa, which included Kenya. The East Africa Protectorate was administered by the Colonial Office in London. In 1902, through the Crown Lands Ordinance, 90.000 acres of land in Londiani, Kericho County were confiscated and subsequently given to foreign settlers. The Kipsigis who previously lived on that area were forcibly removed from the homes without compensation and relocated to created "reserves" in Belgut, Bureti and Sotik. After the First World War, in 1919 a further 25.000 acres of land in Kericho County were

given to the British East African Disabled Officers Colony. The Crown Lands Ordinances of 1902, 1907, 1915 and 1919 were part of a sequence of legislation which took the title to land away from the communities, allowing the land to be allocated to European Settlers. The Ordinances advocated British settlers' supremacy and granted them impunity for any violations committed, as there were no avenues of legal redress for the victims.

Colonial Period - Eviction Operations and Displacement

In 1920, Kenya became a British Colony. It was ruled by a British Governor appointed by the British Crown and reported through the United Kingdom Colonial Office to the British Crown. Throughout the colonial period, the territory of Kericho County was progressively taken away from Kipsigis and Talai peoples by the enforcement of Crown Lands Ordinances. The members of the community were evicted from their ancestral lands and forcibly displaced to *native reserves*. During the organised evictions operations, families were forcibly removed, and their huts burned. They were also subjected to serious human rights violations including killings, beating, and sexual violence at the hands of Colonial and British soldiers, policemen and/or home guards. Others were removed from their homes never to be seen again. Several were forcibly displaced to areas several miles from their families and relatives and forced to change their ethnicity. The victims were not protected by the police who only supported the settlers. Many of the settlers were themselves police and military reservists who were licenced to carry firearms. Furthermore, the victims had no access to the courts.

As example of the many serious violations suffered by members of these communities, a Kipsigis victim reported that during her family's eviction, the soldiers raped her and burnt down her house with one of her children inside. Many victims who were children at the time also reported having been raped. Other victims reported killings and torture. They all reported being evicted from their land and some expelled from Kericho County for years or decades

Kenya was administered by the British Government in London through the Governor-General and Executive Council in Kenya until the enactment of the Independence Act of 1963 by the British Parliament, upon which Kenya was no longer a colony of the United Kingdom.

Conditions in the Reserves

The survivors of the eviction operations were forcibly displaced and forced to live in overcrowded and resource limited *reserves* and their freedom of movement was restricted. Among these evictions, the Talai peoples' treatment was particularly concerning. In 1934, the Laibon Removal Ordinance mandated the detention, deportation and internal exile of the entire Talai clan from Kericho County to Gwasi. The Talai or Laibon were a powerful clan within the Kipsigis. They held a leadership position and were considered wealthy in terms of land and cattle. The Talai were a source of concern as they were identified as opponents of the British rule. The British Government reportedly had full knowledge and supported these operations. Moreover, the Secretary of State for the Colonies (a Minister of the British Government) reportedly approved and was directly involved in the drafting of the Laibon

Removal Ordinance. The Talai clan was forced to remain in Gwasi until 1962.

Among the conditions that were present in the *reserves*, it has been highlighted that i) the land was overcrowded and poor, ii) the area was infested with deadly malaria carrying mosquitoes and tsetse fly, iii) the livestock died and the food was scarce due the perpetual drought, iv) the only source of water was a long way from the settlement area, v) there was no employment and members of the community were forced to do heavy labour, vi) there were wild deadly animals including poisonous snakes, crocodiles and lions, vi) there were no medical facilities or schools; and vii) the Talai had to apply for a pass to leave the area, which was frequently denied.

Due to the precarious, unsafe and insalubrious living conditions, many children and adults died, women suffered miscarriages, and families were lived in poverty and inhuman conditions. The prevailing conditions also made them vulnerable to other violations such as sexual assaults, killings, beatings, and arbitrary detentions. Furthermore, the confinement of the Talai also prevented them from marrying and forming a family, as they do not marry within their own clan.

As example of the precariousness experienced in the *reserves*, a Talai victim reported that five of his siblings died of illnesses in Gwasi, his mother and relatives suffered miscarriages and still births, and another was killed by snake bite. Other recalled traumatic encounters with a leopard and a snake. Victims also described the difficulty obtaining clean water, which in drought required a ten hour walk, and the lack of medical services. They also reported persistent psychological trauma from witnessing their relatives die..

Kenyan Emergency

The situation for victims in Kericho County deteriorated further during the Kenyan Emergency period brought about by the armed conflict between the colonial and UK forces, and the Mau Mau insurgents. The colonial government set up detention camps designed to “screen” those suspected of affiliation with the Mau Mau by interrogation and torture. Kipsigis were among the ones detained and tortured in these camps on suspicion of assisting or being Mau Mau.

As example of the violations suffered during the emergency period, a Kipsigis victim recounted being raped by a group of soldiers, having his head lacerated by a machete, as well as being torture repeatedly over a period of two years. Other victims reported suffering long-term physical consequences from the torture endured, such as hearing impediments or difficulty to walk. The victims reported suffering sustained physical and psychological consequences from the harm endured.

Lack of remedies

The 1932 Kenya Land Commission recommended in its report, which was adopted by the British Government, that the British Government should compensate indigenous peoples for the loss of their land, but this has never happened.

The Kipsigis and Talai peoples have not received any remedy or reparation for the human rights violations suffered during the eviction operations, while residing in the “reserves”, and during the Kenyan Emergency period. The members of these communities continue to suffer from the physical and psychosocial harm endured during these periods. Medical diagnosis conducted recently on some of these victims evidenced the continued presence of physical injuries as well as post-traumatic stress disorder and depression. They also continue to experience economic hardship derived from the expropriation of land. Currently, the majority of the land in Kericho County is retained and farmed by multinational tea-production companies. Even though the persons affected by these violations due to time passing are currently unable to identify the individual soldiers, policemen or other officials that abused them, they have consistently reported that the Colonial Government, alongside with the British Army and officials were responsible for the abuses.

The Kipsigis and Talai peoples have tried to pursue their claims in Kenyan jurisdiction but the limited scope for ordinary legal proceedings on the matter has made this challenging, particularly due to the existence of limitation periods, the state immunity and the immunity of British officials in Kenyan jurisdiction; and the transfer of liability from the United Kingdom to the newly independent Kenya pursuant to section 26 of the Constitution of Kenya (Amendment) Act 1964. These obstacles have made the bringing of claims in Kenya virtually impossible. The victims have instead submitted their claims to the National Land Commission in Kenya, which is mandated to investigate and make recommendations in relation to historic land injustices

In response to these claims, the National Land Commission in Kenya decided in 2019 (Gazette Notice of 1 March 2019) that the Kipsigis and Talai peoples were victim of historic land injustices. The decision comprised several recommendations, including that: i) the British Government apologize to the Kipsigis and Talai victims; ii) the Kenyan Government makes a formal acknowledgement that the crown land had been unlawfully taken from the Kipsigis and Talai by the colonial government and should have been returned to them upon Kenya’s independence; iii) the British Government and the multi-national tea companies construct schools, hospitals, roads, a museum, a university and provide services such as water or electricity to alleviate or compensate for the victim’s suffering. iv) the British Government provide direct reparations to victims; v) the multinational companies lease land at commercial rates iv) the land with expired leases are not renewed without the concurrence of the respective County government; i) the Kenyan Government identify and acquire land for the purpose of resettling members of the Kipsigis and Talai community, among other recommendations.

The Kipsigis and Talai victims did not issue proceedings in the United Kingdom due to the limitations imposed by the UK’s 1980 Limitation Act and the succeeding decisions of the British courts. The 1980 Limitation Act sets the limitation period for claims related to damages for personal injury to 3

years (section 11) and for land claims to 12 years (section 15). Section 33 of the Act permits the Court a discretion to disapply the limitation period in personal injury claims only (and not in land claims) where the action occurred after June 1954. However, in decisions *Kimathi v FCO* [2018], EWHC 2066 and [2018] EWHC 3144, the British High Court refused to exercise its discretion to disapply the limitation period in relation to test claims brought by victims alleging mistreatment in Kenya in the 1950s. The failure of this test case means that it would be futile for these victims to issue proceedings in the United Kingdom.

In November 2018, a request was sent to the British Government to consent to arbitrate the dispute with the Kipsigis and Talai peoples and meet with their representatives. However, on 27 February 2019, the government replied that it had “no intention to enter any process” to resolve these claims.

Overall, there has been a lack of an effective institutional mechanism for the investigation of the gross human rights violations occurred during this period, aside for the limited investigation carried out in Kenya by the National Land Commission, which can only address land related concerns. No reparations have been made to the victims to date. In addition, there is no realistic prospect of commencing domestic legal proceedings, in view of the aforementioned precedents in British jurisdictions.

We express serious concern at the alleged lack of accountability and effective remedy for the victims of gross human rights violations committed against the Kipsigis and Talai peoples in Kericho County in the context of the extensive evictions and land expropriation carried out during pre-colonial and colonial times in Kenya, which included unlawful killings, sexual violence, torture, or other cruel, inhuman or degrading treatment, arbitrary detention, arbitrary displacement and violations of the rights to privacy, family life and property.

We are further concerned at the failure to adopt measures to establish the facts and know the truth about the circumstances surrounding those violations, including the identity of victims and perpetrators, the events that led to the violations, and their impact on the affected populations and their descendants.

In addition, we express concern at the failure to provide public apologies for the human rights violations committed against the Kipsigis and Talai peoples, which include an official acknowledgement of the plight of victims and of the share of responsibility of the British Government, and which is aimed at restoring the dignity of the victims.

We express further concern at the alleged lack of reparation provided to victims for the gross violations suffered at the time of the events; as well for the harm suffered by victims and their descendants in the succeeding decades as a result of the loss of property, means of livelihood and community life. In this regard, we wish to recall that reparation should aim at comprehensively addressing the multiple consequences and effects of the harm suffered by the victims and should include measures in the areas of restitution, compensation, rehabilitation and satisfaction, as well as the full participation of the victims in the establishment and implementation of such measures.

In connection with the above alleged facts and concerns, we would like to remind your Excellency's Government of the obligation of States to adopt measures to ensure justice, truth, reparation and guarantees of non-recurrence of past human rights violations, as guaranteed by various international human rights instruments.

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

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

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please provide information about the measures adopted by your Excellency's Government to provide access to remedy, within your jurisdiction, to victims belonging to the Kipsigis and Talai people for the violations endured. If such measures have not been adopted, please explain why.
3. Please indicate if any measures have been adopted to establish the truth about the facts and circumstances surrounding these violations. If such measures have not been adopted, please explain why.
4. Please provide additional information on the measures adopted by your Excellency's Government to provide reparation to victims, including restitution of confiscated land, compensation, psychosocial and physical rehabilitation, and satisfaction. Please include information on the measures taken to ensure the participation of indigenous peoples, and internally displaced persons, in the establishment and implementation of such measures.
5. Please indicate if any measures have been adopted to provide public apologies to the Kipsigis and Talai peoples in connection to the violations they have suffered during the pre-colonial and colonial periods.
6. Please indicate if any memorialization practices or processes have been adopted in your country to inform the general public about the violations suffered by the the Kipsigis and Talai peoples during the pre-colonial and colonial periods, and to keep the memory of those tragic events for current and future generations.
7. Please provide information on the status of the request for arbitration submitted by the Kipsigis and Talai peoples before British courts.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also

subsequently be made available in the usual report to be presented to the Human Rights Council.

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

Please note that a letter regarding the aforementioned allegations will also be sent to the Government of Kenya.

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

Fabian Salvioli
Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

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

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

Cecilia Jimenez-Damary
Special Rapporteur on the human rights of internally displaced persons

E. Tendayi Achiume
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance

Nils Melzer
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, and without prejudging the accuracy of these allegations, we would like to draw the attention of your Excellency's Government to the relevant international norms and standards.

We would like to refer to Article 2 of the Covenant on Civil and Political Rights, ratified by the United Kingdom of Great Britain and Northern Ireland in 1976, which establishes that States must undertake measures to ensure that persons whose rights or freedoms are violated shall have an effective remedy. In addition, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law establish the right of victims to have equal access to an effective judicial remedy and receive adequate, effective and prompt reparation for the harm suffered, and to have access to relevant information on reparation mechanisms (paragraphs 10, 11, 12 and 15).

In its General Comment No. 31, the Human Rights Committee established that States need to respect and ensure the Covenant rights to all persons who may be within their territory and to all persons that are subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party (paragraph 10). Furthermore, States have an obligation to investigate and punish serious human rights violations, including summary or arbitrary killings, torture and other cruel, inhuman or degrading treatment, and enforced disappearances (paragraph 18). Failure to investigate and prosecute such violations is in itself a breach of the norms of human rights treaties. Impunity for such violations can be an important element contributing to the recurrence of violations.

With regards to the question of the status of limitations, we would like to recall that the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity of February 2005 has established that States should adopt and enforce safeguards against any abuse of restrictive rules, such as those pertaining to prescription, that fosters or contributes to impunity (principle 22). It further prescribed that prescription in criminal cases shall not run for periods where no effective remedy is available. Moreover, the rule of prescription (or status of limitations) shall not apply to crimes that are imprescriptible under international law. Even when such principle is applicable, it shall not be effective for victims seeking reparations for their injuries. (principle 23)

Furthermore, we would like to recall the right of victims of human rights violations to receive full reparation for the harm suffered. The Updated Set of Principles (articles 31-34) recall the duty of States to make reparation to victims. Similarly, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law establish the right of victims to receive adequate, effective and prompt reparation for the harm suffered. Reparation should be proportional to the gravity of the violations and the harm suffered. Victims should be provided with full and effective reparation, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-

repetition (paragraphs 10, 11, 15, and 18).

We would also like to refer to the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes, as established in the updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity of February 2005 (principle 2). Full and effective exercise of the right to truth provides a vital safeguard against the recurrence of violations (principle 5).

In addition, principle 3 establishes the duty of States to preserve memory about those violations and their responsibility in the transmission of such history. It underscores that "people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights [...] and to facilitate knowledge of those violations". Such measures shall aim at "preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments". Interpretation of past events that have the effect of denying or misrepresenting violations are incompatible with the aforementioned obligations of the State.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the General Assembly in 2007. The preamble to the Declaration underlines fundamental aims and principles which should guide its interpretation and implementation. A key objective of the Declaration is to ensure redress for the historical injustices and the dispossession of the lands of indigenous peoples. The responsibility to provide reparation and redress for indigenous peoples is underscored throughout the Declaration in numerous provisions. Specifically, redress is required for any action aimed at depriving indigenous peoples of their integrity as distinct peoples (Art. 8, para. 2 (a)); any action with the aim or effect of dispossessing them of their lands, territories or resources (Art. 8, para. 2 (b)); any form of forced assimilation or integration (Art. 8, para. 2 (d)); for the taking of their cultural, intellectual, religious or spiritual property (Art. 11); depriving them of their means of subsistence (Art. 20, para. 2); as well as for the development, utilisation or exploitation of their mineral, water or other resources without their free, prior and informed consent (Art. 32).

The clearest manifestation that redress is still needed for indigenous peoples around the world is their continued lack of access to and security over their traditional lands. In this regard, Article 28 of UNDRIP states that 'indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent' and that this compensation 'shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress'. In addition, UNDRIP affirms that indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return (Art. 10).

We would also like to refer to the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and racial intolerance addresses the human rights obligations of Member States in relation to reparations for racial discrimination rooted in slavery and colonialism (A/74/321). In her report, the Special Rapporteur has recommended the full implementation of international human rights legal obligations to provide reparations for racially discriminatory violations of human rights, including the International Convention on the Elimination of All Forms of Racial Discrimination. The Special rapporteur has recommended that States should “adopt a structural and comprehensive approach to reparations” and “reform existing laws where necessary to make them fit for the purposes of undoing the legacies of historical racial discrimination and injustice, including by looking to indigenous and other value and legal systems to inform the process”.

We also wish to draw the attention of your Excellency’s Government to the Guiding Principles on Internal Displacement (E/CN.4/1998/53/Add.2), in particular we would like to refer to Principle 29.2 that establishes that “Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.”

Finally, we would like to refer to the report of the Special Rapporteur on the human rights of internally displaced people to the General Assembly, on internal displacement and transitional justice (A/73/173). The Special Rapporteur recommends to “Carefully monitor and evaluate transitional justice processes with the involvement of internally displaced persons and assess the impacts of initiatives on an ongoing basis so that redress and reconciliation efforts can be recalibrated if necessary”. It also recommends to “Support compensation approaches that ensure beneficial impacts by promoting equitable development and (re)integration, and which take into account the specific needs of internally displaced women, giving them greater control over the way in which reparation programmes and benefits are assigned, in order to advance durable solutions. Provide reparations in the form of education and training programmes; (m) Support capacity-building of transitional justice actors by addressing the range of injustices experienced by internally displaced persons;”. Finally, it recommends to “Systematically involve internally displaced persons by: consulting with them on the design of transitional justice and reconciliation initiatives; seeking their input as witnesses in trials and truth commissions; appointing internally displaced persons to positions of responsibility in transitional justice bodies and projects; and employing information and communication technologies to support such involvement in dispersed geographic locations, while recognizing that the function of such tools is limited by lack of access to advanced technologies and the need for opportunities for in-person participation”