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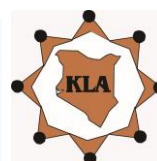
Kenya

Nowhere to go: Forced Evictions in Mau Forest

Briefing Paper, May 2007



CENTRE ON
HOUSING RIGHTS
AND EVICTIONS



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Kenya

Nowhere to go: Forced Evictions in Mau Forest

Where I live now is unfit for human habitation. People who had relatives when they were evicted are ok, but others are living in temporary structures by the side of the road. They are like poultry houses. Children have dropped out of school and youth have gone astray. My husband is gone, and my daughter has gone into prostitution.

Victim of evictions in Mau Forest Complex

1. Introduction

Between 2004 and 2006, a massive programme of evictions has been carried out in forest areas of Kenya. Houses, schools and health centres have been destroyed, and many have been rendered homeless. Estimates indicate that in six forests alone, more than a hundred thousand persons were forcibly evicted between July 2004 and June 2006.¹ Evictions in a number of forest areas are reportedly continuing and humanitarian groups are expressing growing concerns about the ongoing increase in internally displaced persons from forest areas in Kenya.² The Government of Kenya has indicated that evictions in forest areas will continue.³

These forced evictions were ostensibly carried out in order to protect Kenya's forests. Environmental groups and the United Nations (UN) have long expressed serious concern about the loss of forest cover in Kenya and its wide-ranging negative impacts, both nationally and internationally, including droughts, loss of livelihoods and

¹ See COHRE and Hakijamii, 'Forest evictions: A way forward?', *Kenya Housing Rights Update*, August 2006, available at www.cohre.org/kenya. Note that the total number of people affected by the evictions between 2004 and 2005 is disputed and no accurate figures are available.

² See, for example, 'Kenyi displaced protest treatment, conditions', UN Office for the Coordination of Humanitarian Affairs, available at <http://www.irinnews.org/report.aspx?reportid=25656>; Internal Displacement Monitoring Centre, *Continued conflict and displacement in the Rift Valley (Special report, December 2006)*, available at [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/E91FC740643EDFEEC12572480053E483?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/E91FC740643EDFEEC12572480053E483?OpenDocument)

³ See for example 'Evictions will go on to save forests, says top official', *Daily Nation* 5 April 2006.

reduced access to basic environmental services such as clean water.⁴ The main cause of loss of forest cover is human activity, including logging and the clearing of forests for human settlement and agriculture. Partly in response to national and international pressure, the Government of Kenya has carried out a series of evictions from forest areas, of people deemed to be living there illegally.

In October 2006, a coalition of national and international human rights organisations including Amnesty International, the Centre on Housing Rights and Evictions (COHRE), Hakijammi and the Kenya Land Alliance undertook a fact finding mission to two areas of the Mau Forest Complex to investigate the extent of forced evictions and other related human rights violations. The Kenya National Commission on Human Rights, an independent national human rights institution of the Government of Kenya, accompanied the mission.

The mission to Mau Forest is also part of a wider program of research and advocacy being undertaken in Kenya by civil society organisations and KNCHR on forced evictions. The partnering organisations are concerned that future plans for forest evictions do not incorporate a rights-based approach and that the impact of such action will fall heaviest on people living in poverty in Kenya. The Government of Kenya promised the United Nations in March 2005 (more than two months before the Mau forest evictions accelerated) that it will ensure that all future evictions comply with international human rights standards but there are still no concrete guidelines or laws at the national level, or policies and programmes within the Ministry of Environment, that ensure that these standards will be respected.

2. Forced evictions in forest areas

Forced evictions have been described as a “gross violation of human rights” by the former UN Human Rights Commission (now the Human Rights Council), of which Kenya was a frequent member.⁵ It has been defined by the UN Committee on Economic, Social and Cultural Rights (CESCR), as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes

⁴ See Government of Kenya, UNEP, KFWG and KWS, *Maasai Mau Forest Status Report* (2005); Kenya Forests Working Group, *Excision and settlement in the Mau Forest, Report of a Fact-Finding Mission on the Status of the Eastern Mau Forest*, February 2001; WWF, *Climate Change impacts on east Africa, a review of the scientific literature*, November 2006; IRIN, *East Africa: deforestation exacerbates droughts and floods*, 10 November 2006.

⁵ United Nations Commission on Human Rights, Resolution 1993/77 on Forced Evictions, adopted unanimously on 10 March 1993, UN Doc. E/CN.4/RES/1993/77 (1993), para 1.

and/or land which they occupy, without the provision of and access to, appropriate forms of legal or other protection."⁶

Under international and African human rights law, everyone has a right to be protected against forced eviction (see further section 3.1 below). Evictions can only take place as a last resort, after it has been determined that all other possible alternatives have been exhausted. International law further provides that, in cases where an eviction is unavoidable, the process must include:

- An opportunity for genuine consultation with those affected.
- Adequate and reasonable notice for all affected persons prior to the date of the eviction
- Information on the proposed eviction should be made available in a reasonable time to those affected
- Government officials or their representatives should be present during an eviction
- Persons carrying out the eviction should be properly identified
- Evictions should not take place in particularly bad weather or at night
- Legal remedies should be available and legal aid should be available to those in need of it to seek redress from the courts.
- Provide fair compensation and resettlement

The cases of eviction in Mau Forest, discussed in this report, reveal a failure by the authorities to abide by international human rights and standards in respect of evictions. The notice provided was inadequate and confusing and there was no consultation with residents or effort to find an alternative to evicting them from their homes. None of the evictions was carried out on the basis of a court order; on the contrary there a court injunction halting evictions was ignored.⁷ Evictions were executed with excessive force and the authorities responsible for ensuring respect for the law failed to take appropriate action to stop the abuses or to investigate allegations of human rights violations. Many people were left without shelter, livelihoods, and many lost their possessions.

Incidents of forced evictions have been reported in different areas of the Mau Forest since 2004, affecting thousands of families. In October 2006, the fact-finding mission visited two areas in the Mau Forest Complex – Masai Mau and Sururu – where

⁶ Committee on Economic, Social and Cultural Rights, *General Comment No. 4, The right to adequate housing*, (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), para. 3.

⁷ This case is discussed in section 4.2 above.

evictions had been carried out between 2004 and 2006. Sururu is part of Eastern Mau forest and falls under the administration of the Forest Department while the Maasai Mau forest is managed by the Narok County Council since it is covered by the Trust Land Act. The fact-finding mission met affected community groups who had been victims of forced evictions in both areas.

The fact-finding mission obtained information that the forced evictions undertaken in the Mau Forest were based on a directive from the District Commissioner's office. The District Commissioner is part of the provincial administration and answers directly to the Office of the President. Country Council rangers were also present at several evictions. In 2004, a cabinet decision was reportedly taken to commence evictions in forest areas.⁸ Although this was a major policy decision, no policy document or plans have ever been made public and the FFM was informed by sources close to the process that no policy document on forest evictions existed at the time of the mission. In the case of the Mau Forest complex, the evictions appear to be prompted by a National Environment Management Authority (NEMA) investigation in 2003 and the recommendations. The recommendation to the effect that all persons settled in the forest be evicted was heavily publicised by the Kenya Forest Working Group.⁹ The Ministry of Environment also reportedly holds a list of forest areas where forced evictions are planned and has publicly confirmed it will continue evictions in forest areas.

2.1 Forced Evictions in Maasai Mau

Maasai Mau Forest is located in the Mau Forest Complex, Narok District, Rift Valley Province. The majority of those interviewed in Maasai Mau were evicted in 2005 and 2006. The government had begun evicting people from the area in 2004, but had been forced to halt the evictions following a High Court injunction granted to seven individuals on the basis that they held title deeds.¹⁰ In February 2005, the Minister of Lands reportedly announced that some 10,000 title deeds in Mau were cancelled.¹¹ The cancellation of title deeds did not follow any legal process and the affected individuals did not receive individual notification.

⁸ This is partly confirmed in *Maasai Mau Forest Status Report* (n. 3 above), p. 7.

⁹ *Maasai Mau Forest Status Report* (n. 3 above), p. 6.

¹⁰ *Maasai Mau Forest Status Report* (n. 3 above), p.7.

¹¹ AllAfrica, "Maasai: Kenya's Government Cancels 10,000 Titles for Mau Forest Land"; Daily Nation 18 February 2005; The East African, "Kenya starts process to cancel 12,000 title deeds", 28 February 2005, quoting the Minister of Lands and Settlements. In June of the same year the Minister reportedly said "a title is just piece of paper."

Forced evictions in Mau resumed in May 2005. The Mulot Catholic Mission, which operates in the area and assisted the victims, estimated the number of people affected by these evictions in Maasai Mau to be 50,000.¹² In an interview with Kenya Land Alliance in 2005, the County Council estimated that some 10,000 *households* had been affected by the evictions in Massai Mau,¹³ which would tally with the Mulot Mission estimate, assuming an average of five persons per household. This is also consistent with the government-endorsed *Maasai Mau Forest Status Report*¹⁴ which described a “increasing consensus among the Cabinet on the need to conserve the Maasai Mau” and that “the Government decided to move ahead, evicting 10,290 people in May and June 2005”.

The fact-finding mission interviewed a community which was living in a cleared area that had formerly been forest. They reported that in April 2005 they heard rumours (which would not constitute notice) that evictions would take place in the area because it was in a water catchment area. However, they claimed that a local senior provincial administration official held a *baraza* (a public meeting), and assured residents through the radio that those who held title deeds would not be evicted. Since most members of this community held title deeds they assumed they would be unaffected by any programme of evictions. Some had lived there for more than two decades, while many others obtained land in 2000 and 2001, under a process that they allege was supervised by the County Council.

On an unspecified day in June 2005, police arrived at about 12 noon and told people they had until 4pm to get out of their houses, which were to be burnt down. Those who tried to assert their title deeds were ignored. Residents salvaged what they could and moved onto the road. The police came back after dark and burnt every house, the local school and crops. No alternative accommodation was provided to the evictees. The displaced were left without any access to shelter or sanitation facilities, and for many their access to food and education was also compromised as a direct result of the forced evictions. The victims were forced to find their own solutions. Some received assistance from relatives and friends in nearby areas. Others constructed temporary shelters.

In September 2005, more than two months after the evictions had been carried out, the District Commissioner reportedly informed some of those who had been forcibly evicted that if they held title deeds, they would be resettled.¹⁵ Families lined up at a

¹² Kenya Land Alliance, Fact Finding Mission on the Evictions in Mau Narok, July 2005, p. 10.

¹³ Ibid.

¹⁴ Maasai Mau Forest Status Report (n. 3 above), p. 7.

¹⁵ Interview with victims of forced eviction, Maasai Mau, October 2006.

district official's office in Mulot to have their details taken, and were told they would obtain alternative accommodation by December 2005. At the time of the fact-finding mission (October 2006), the evictees had heard nothing more of the resettlement plan.¹⁶

Faced with the fact of having no-where else to go, in the months after the evictions, many of those evicted slowly began returning to their homesteads and rebuilding. At the time of the fact-finding mission scores of families had reconstructed their homes, and showed the fact-finding mission these rebuilt structures and cultivated fields. Although no attempt has yet been made to re-evict them, they remain extremely insecure about the future.

The process described above in Massai Mau clearly constituted mass forced eviction. The process failed to meet even the most basic human rights standards in respect of consultation, adequate notice, legal remedies, relocation and compensation.

2.2 Forced Evictions in Sururu

The fact-finding mission interviewed members of an affected community in Sururu, who described how, in the early hours of the morning of 28 August 2004, police and forest guards arrived and began to burn their homes. Up to 2000 families were evicted, and were not offered any alternative place to live. Many of those interviewed had moved onto their land in 1997/98 after being told by local government officials to do so, and community leaders claim that some 300 families had title deeds to the land they occupied. Other families reported that they had been told at the time they moved in to the area that title deeds would be provided later, although this did not happen.

The issue of title deeds in Sururu, as elsewhere, is an issue the Government has consistently failed to address. As noted above, the mission met several people who were able to identify the person or authority that sold or allocated them land; the mission also saw a number of title documents which those forcibly evicted held over land in Sururu.¹⁷ Several government ministers and officials have publicly recognised that many of those evicted from the forests had title deeds, but consider that the deeds were obtained illegally.¹⁸ In July 2005 shortly after the evictions in Maasai Mau, Kenya Land Alliance conducted a search in the land registry on the title deed held by one evictee from land that was designated forestland and found that the title to that

¹⁶ Ibid.

¹⁷ The mission was not in a position to verify whether or not the land title documents were genuine or referred to a specific piece of land.

¹⁸ 'Ndung'u Report: Kimunya 'Can't Cancel' Bad Titles', Daily Nation, 24 January 2005.

land was actually issued by the government. The perceived legality of the land allocations and title deeds is further evidenced by the fact that banks have been willing to accept these title deeds as collateral.

Since the evictions in 2004, many community members have remained in the area, living with friends, relatives or in makeshift structures. For most of those interviewed by the fact-finding mission, life has been extremely difficult. In addition to losing their homes, they have lost the land on which they relied to sustain themselves and to earn their living through agriculture, which was the main source of livelihood for the majority of the community. According to one woman who was forcibly evicted in 2004:

Where I live now is unfit for human habitation. People who had relatives when they were evicted are ok, but others are living in temporary structures by the side of the road. They are like poultry houses. Children have dropped out of school and youth have gone astray. My husband is gone, and my daughter has gone into prostitution.

For many of the Sururu community their suffering since 2004 has been amplified by the fact that new people are now reportedly using their old land for cultivation despite being told they were being evicted because they were living in a protected forest area.

2.3 Resettlement

A direct consequence of the Mau forest eviction was the displacement of thousands of families. The fact-finding mission was able to confirm that the Government had made no effort to relocate people or ensure that the evictions did not result in homelessness.

Local government officials insisted that affected communities have “somewhere to return to”¹⁹ but the fact-finding mission found evidence to refute this assertion.²⁰ In Sururu, a significant number of those who were forcibly evicted in 2004 were still living in the area, many in inadequate housing. In Massai Mau, many people moved back onto the land from which they were forcibly evicted and rebuilt their homes. They all claimed they had no-where else to go.

However, there have been contradictory signals from government officials on the resettlement issue. For example, there has been some, albeit highly inadequate,

¹⁹ Interview with local government official directly involved in forest evictions who did not wish to be identified, October 2006.

²⁰ Only one group of people said they had an area where relatives were still living and to which they could return.

acknowledgement by the Government that some people evicted from forest areas need to be resettled.²¹ The Government has reportedly set aside land for the purpose of resettlement in Molo, but nothing more has been done²² and it is unclear who would be resettled or what criteria would be used to decide who would be resettled. Indeed the proposed resettlement land in Molo is the subject of some controversy, with allegations that the land in question was purchased for an undisclosed sum from a member of the national cabinet, Njenga Karume, and that perhaps the funds used to purchase the land could have been deployed more effectively.²³

Under international law there can be no justification for forcibly evicting tens of thousands of women, men and children and exposing them to a range of serious human rights violations. Had the Government intended to ensure that those affected had access to adequate alternative housing this would have had to be done prior to any evictions taking place.

In the Basic Principles and Guidelines on Development-based Evictions and Displacement, the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living has identified the criteria against which to assess whether the resettlement plans are compatible with international human rights standards, including, firstly, that “no resettlement shall take place until such a time that a comprehensive resettlement policy consistent with the present guidelines and internationally recognized human rights principles is in place”.²⁴

One of the major obstacles to ensuring appropriate resettlement during the forest evictions is the absence of effective coordination between different branches of government. While the Forest Department and in some cases the County Council, have responsibility for administration of forests, including the eviction of people who unlawfully occupy the forest, there is a lack of clarity about the authorisation and management of the 2004 – 2005 forest evictions.

²¹Following evictions in some forest areas the government, including the Office of the president, made statements that some of the evictees would be resettled. However, it was clear that the resettlement plans were only considered after forced evictions had occurred and that not all of those evicted would be accommodated in proposed relocation plans. See: UN Office for the Coordination of Humanitarian Affairs “Kenya: Government announces plan to resettle forest evictees”, 5 October 2005 and *The Standard*, “3,155 Mau evictees to be resettled, says DC”, 1 December 2005.

²² This is also stated in US State Department, Country Reports on Human Rights Practices - 2006, Released by the Bureau of Democracy, Human Rights, and Labor March 6, 2007

²³ *The Standard*, 10 November 2006.

²⁴ UN. Doc E/CN.4/2006/41, available at <http://daccessdds.un.org/doc/UNDOC/GEN/G06/118/59/PDF/G0611859.pdf?OpenElement>

Publicly the Ministry of Environment has led on the issue and there is supposed to be ministerial cooperation. For example, the Permanent Secretary of the Ministry of Environment is reported to have stated that all, ‘evictions are planned in advance and always involve the ministries of Environment, Lands and Internal Security’.²⁵

However, the evidence gathered by the fact-finding mission suggests that the cooperation implied by the Permanent Secretary’s statement does not exist in practice. The evictions, which were based on the Cabinet decision, referred to above, involve the Office of the President and the Provincial Administration, which answers directly to the Office of the President. Moreover, local government representatives and environmental groups stated that the Ministry of Lands was rarely involved in discussions on evictions from the forests. This was cited as one of the main obstacles to putting in place proper resettlement plans as it is the Ministry of Lands that would generally have led in the identification and allocation of alternative land and allocate it for resettlement. In meetings to discuss forest evictions, the Ministry of Environment officials who were present indicated they believed they could not address the relocation issue. According to one person interviewed during the mission, there is almost no communication between the Ministry of Environment and Ministry of Lands. One government source felt that the Ministry of Environment officials believed the issue of resettlement was not within the mandate of their Ministry and therefore they did not cooperate with Ministry of Lands before the evictions. The absence of any communication with the Ministry of Lands in respect of the Mau Forest evictions was confirmed to the fact-finding mission by local government officers.

3. Kenya’s legal framework for the protection against forced evictions

*[I]nstances of forced evictions are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.*²⁶

Committee on Economic, Social and Cultural Rights

3.1 International law

The actions of the Government of Kenya in forcibly evicting tens of thousands of people from forests violates a range of human rights, which are contained in

²⁵‘Evictions will go on to save forests, says top official’, *Daily Nation* 5 April 2006.

²⁶Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing, (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), para. 18.

international instruments to which Kenya is a State Party. These treaties include the International Covenant on Economic, Social and Cultural Rights (ICESCR);²⁷ the International Covenant on Civil and Political Rights (ICCPR);²⁸ and the African Charter on Human and Peoples' Rights ('African Charter').²⁹

In particular, the evictions in the Mau Forest Complex violate the right to adequate housing. This right is set out in Article 11(1) of the ICESCR and the African Commission on Human and Peoples' Rights has determined that the right to housing is part of the African Charter when Articles 14, 16 and 18 are read together.³⁰ As noted in section 2 above, the UN Committee on Economic, Social and Cultural Rights has stated in General Comment No. 7 that evictions can only proceed where they are fully "justified", "carried out in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality" with "appropriate procedural protection and due process".³¹ Moreover, "Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State Party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."³²

The African Commission on Human and Peoples' Rights drew directly upon this General Comment No. 7 in a 2001 landmark decision concerning a complaint against the Federal Republic of Nigeria.³³ The Commission stated that, "[a]t a very minimum, the right to shelter obliges the Nigerian government not to destroy the housing of its

²⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. Article 11(1) of the ICESCR has been consistently interpreted as providing legal protection against forced evictions, most notably within the UN Committee on Economic, Social and Cultural Rights. See Committee on Economic, Social and Cultural Rights, *General Comment 7, Forced evictions, and the right to adequate housing*, (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997) and General Comment No. 4 (n. 6 above).

²⁸ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. Kenya acceded to this treaty on 1 May 1972.

²⁹ African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (Kenya acceded to treaty on 23 January 1992)

³⁰ The *SERAC v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001).

³¹ Committee on Economic, Social and Cultural Rights, *General Comment 7, Forced evictions, and the right to adequate housing*, (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), paras. 15-16.

³² *Ibid.* para. 17.

³³ *SERAC v. Nigeria* (n. 28 above), para. 63

citizens and not to obstruct efforts by individuals or communities to rebuild lost homes."³⁴ Indeed, UN-Habitat criticised the Mau forest evictions for contravening UN standards, called for restraint and understanding, and noted that though they advocate protection of water catchment areas, there is a great need for the government to ensure security of tenure with regard to the settlement of its people.³⁵

Forced eviction is also prohibited under Article 17 of the ICCPR as part of the right not to be subjected to arbitrary or unlawful interference with one's privacy, family and home. There was also a violation of the right to an effective remedy.³⁶

The Government of Kenya affirmed its commitment to ensuring that evictions conform with human rights standards during its appearance before the UN Human Rights Committee in March 2005. The Attorney General stated in response to questions, under Article 17 of the ICCPR, about a proposed eviction in Kibera (a large informal settlement in Nairobi):

That the Government of Kenya had halted evictions in Kibera and other informal settlements and that future evictions, if necessary, would be done according to established international and United Nations standards on eviction.

The Human Rights Committee then recommended that:

The State party should develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made.³⁷

3.2 National law

While the current Constitution of Kenya³⁸ does not provide explicit protection against forced eviction, a wide range of rights in the Bill of Rights can be interpreted to provide such protection, namely:

- right to life (and its protection of rights to shelter),³⁹

³⁴ Ibid.

³⁵ Kariuki Ndung'u, 'UN-Habitat condemns Mau Forest evictions', *Kenya Times*, 18 June 2005.

³⁶ Article 2(3), ICCPR and Article 7, African Charter.

³⁷ Concluding Observations of the Human Rights Committee: Kenya, 28 March 2005, CCPR/CO/83/KEN.

³⁸ CONSTITUTION amend. 1997, Chapter V (Kenya) (Protection of Fundamental Rights and Freedoms of the Individual, art. 70-83).

- right to security of the person and the protection of the law;⁴⁰
- right to freedom of movement,⁴¹
- protection for the privacy of the home and other property and from deprivation of property without compensation;⁴²
- protection from deprivation of private property;⁴³
- right not to be discriminated against on the basis of sex, race, tribe, place of origin, residence or other local connections, political opinion, colour or creed.⁴⁴

For example, in *John Samoei Kirwa & 9 Ors. v. Kenya Railways Corporation*,⁴⁵ the Kenyan High Court granted a temporary injunction against eviction of residents in informal settlements on a railway reserve on the following basis:

The plaintiffs [residents] are likely to establish that the notice was issued un-procedurally and unlawfully. They are also likely to establish at the hearing of suit that the notice was arbitrary and unreasonably inadequate....

It should be noted that human compassion must soften the rough edges of justice in all situations. The eviction of squatters not only means their removal from their houses but the destruction of the houses themselves. The humbler the dwelling, the greater the suffering and more intense the sense of loss. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done.

I am of the view that [if] squatters ... [have] settled and have been in existence for a long time, say for twenty years or more, and ... have improved and developed the land on which they stand [and that land] is required for a public purpose, ... alternative site or accommodation should be considered...

³⁹ Ibid. art.71 (Kenya). See for example comparative jurisprudence from India: *Francis Coralie Mullin v. The Administrator* (1981) 2 SCR 516. "The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self."

⁴⁰ Ibid. art. 70 (a).

⁴¹ Ibid. art.81.

⁴² Ibid. art. 70(c).

⁴³ Ibid. art. 75.

⁴⁴ Ibid. art. 82.

⁴⁵ (High Court of Kenya, Bungoma) HCCC No. 65 of 2004.

[I]t is clear that plaintiffs are likely to suffer irreparable loss. No one can quantify the amount of loss when children miss the benefit of free primary education or when their homes are demolished and their parents are evicted from the only known home.... The applicants have shown in their averments that they have ploughed their farms and have even planted crops on it. They have also shown that they have been in occupation of the railway land reserve for over 30 years and the owner has not disturbed them.

In the report on his visit to Kenya in February 2004, the UN Special Rapporteur on Adequate Housing recognised that the current Kenyan Constitution contains no “direct provision” recognising the right to adequate housing. He also noted how “the complexity of the legal system governing housing and land has done little to ensure security of tenure or to facilitate realization of the right to adequate housing”.⁴⁶

On 11 May 2004, in a reply to a letter sent by the above mentioned Rapporteur, the Government of Kenya assured that it would maintain a moratorium on evictions pending further review on procedures for eviction and implementation of government policy.⁴⁷

The Rapporteur recommended in his report, *inter alia*, that:

“[A] comprehensive approach needs to be adopted to address the issues of forced evictions, security of tenure, legalization of informal settlements and slum upgrading, and to ensure close consultation with those affected at the planning stage and with respect for the right to participation in decision-making in these areas. With respect to evictions, the Government should immediately put into practice the procedure called for under general comment No. 7 of the Committee on Economic, Social and Cultural Rights. There is need for a clear evictions policy and specific legislation in this regard, such as a National Act on Evictions. In the meantime, an absolute moratorium on forced evictions should be implemented.”⁴⁸

⁴⁶ See E/CN.4/2005/48/Add.2, paras. 9 and 10.

⁴⁷ *Adequate housing as a component of the right to an adequate standard of living, Report by the Special Rapporteur, Miloon Kothari Addendum on his Mission to Kenya (9-22 February 2004)* U.N. Doc E/CN.4/2005/48/Add.2 para. 25-33 (Dec. 17 2004).

⁴⁸ See E/CN.4/2005/48/Add.2, para. 82 (c). (17 December 2004).

4. Environment, land-grabbing and human rights

4.1 Protecting the forests

Protection of the environment and the avoidance of serious negative consequences for water supply, climate, livelihoods and biodiversity are the justifications put forward by the Government of Kenya for the forced evictions which have taken place from forest areas over the past two years.

The Mau Forest Complex is one of the largest remaining continuous blocks of indigenous forest in east Africa. It is one of Kenya's five water towers.⁴⁹ Numerous environmental groups including the United Nations Environment Programme (UNEP) and the Kenya Forests Working Group have identified the significant negative impacts of the Government of Kenya's failure to prevent degradation of the Mau Forest.⁵⁰ A recent study by Kenya Forests Working Group and UNEP found serious degradation of the Mau Forest. Water from the Mau forest is estimated to serve more than three million people in Kenya and Tanzania, as well as supporting the ecosystems, and thereby tourism and livelihoods in the Maasai Mara National Park in Kenya and the Serengeti National Park in Tanzania.⁵¹

It is clear that the human rights, potentially of millions of people, may depend on the protection of the Mau and other forests in Kenya.⁵² Amongst the human rights that could be seriously and negatively impacted by degradation of the forests are the rights to food and water. There may indeed be a legitimate need to limit occupation and use of the forest and the Kenyan government has obligations under international human rights law to take steps to ensure that adequate water and sanitation are available to the entire population, and, under the African Charter, to respect, protect and fulfil the right to a healthy environment.

⁴⁹ Massai Mau Forest Status Report 2005 (n. 3 above). Water towers in this context refer to the fact that the forest complex is the source of major rivers. The other four water towers are Mt. Elgon, Mt. Kenya, the Aberdare Range and the Cherangani Hills. Water originating from Mau forest complex feeds into a number of systems including the Mara and Lake Natron in Tanzania, Lakes Nakuru, Elementaita and Naivasha in Nakuru District and Lake Victoria on the border between Kenya, Uganda and Tanzania. See: KFWG and UNEP, *Changes in forest cover in Kenya's five major "water towers" 2000-2003*, September 2004.

⁵⁰ KFWG and UNEP, *Changes in forest cover in Kenya's five major "water towers" 2000-2003*, *ibid.*

⁵¹ *Mau Complex under siege – continuous destruction of Kenya's largest forest*, a presentation by UNEP, KWS and KFWG, June 2006.

⁵² *Ibid.*

4.2 Land-grabbing and title deeds

The encroachment and destruction of Kenya's forests is closely related to many controversial land issues in Kenya. In Kenya, as in many African countries that experienced colonisation, the issue of access to land is complex and emotive. During colonialism, white settlers were allocated the most productive and fertile 20 per cent of Kenya's land mass. When Kenya was declared a British Protectorate in 1895, forest cover was estimated at 30 per cent of total landmass. At independence in 1963 this figure was just 3 per cent. Following independence, there was popular expectation of increased and more equitable access to land for ordinary Kenyans. However, post-independence governments failed to put in place a land program that met popular expectations. Instead, land was systematically used as a tool of political patronage. Huge tracts of public land were allocated to political elites and to political supporters. In the 40 years since independence forest cover in Kenya has further shrunk to just 1.7 per cent of the total land mass.⁵³

In 2003, the government set up a commission to investigate land grabbing. The Ndungu Commission, as it is known, reported to the government in June 2004, and the report was made public in December 2004. The report catalogues a staggering level of illegal and irregular allocations of public lands under the administrations of both Presidents Kenyatta and Moi, for largely patronage purposes. While senior political figures, civil servants and military officers were amongst the major beneficiaries, tens of thousands of ordinary people also accessed land as a consequence of illegal land allocations. In some cases, public land, including large forest areas was used for the settlement of landless people, but this land was sometimes given to political elites. For example, 1,812 ha of forest in Kiptagich, which is part of the Mau Forest complex, was cleared to resettle the Ogiek community, which has traditional rights to the forest, but the Ndungu reports states that the main beneficiaries were not the Ogiek but prominent individuals and companies.

The illegally and irregularly allocated land includes large tracts of protected forest. This is despite the Forest Act (Cap 385)⁵⁴ requiring that gazetted forest land (under statutory regulations) can only be allocated if it has first been de-gazetted, and that such action should only be taken if it was in the public interest, and subject to provisions on land use contained in other legislation. After 2000 and the introduction of the Environmental Management and Co-ordination Act (1999), this included an Environmental Impact Assessment.

⁵³ UNEP, *An Assessment of the Status of the World's Remaining Closed Forests*, 2001

⁵⁴ A new Forest Act was passed by parliament in 2005 and subsequently signed into law by the President. It is due to come into force in early 2007.

In the case of Mau forest some 39 per cent of the officially gazetted forest has been illegally excised according to aerial surveys.⁵⁵ Many of the illegal allocations are small-holdings. As well as allocations made by politicians and the local government, forest land in Mau was acquired illegally through a process of extending legitimately settled areas of land adjacent to the forest (known as Group Ranches – a settlement area held by a community group) into the forest.⁵⁶ According to Kenya Forest Working Group, Narok County Council has never passed any resolution to give out forestland – which was under the Trust Lands Act - and therefore all allocations by the Council within Narok section of Mau Narok were illegal.⁵⁷ A representative of Narok County Council confirmed to the fact-finding mission that Council officers had – illegally - issued documents to Group Ranches that conferred authority to extend the Group Ranches into the forest. Two council officials were reported to be under investigation for corruption in relation to the issue.

However, in the case of *Kalyasoi Farmers Cooperative Society & Ors v. The County Council of Narok & Ors*⁵⁸ the Plaintiffs who were the registered owners of parcels of land within Mau Forest sued the Narok County Council for trespass after receiving eviction threats. The Court issued an injunction against the County Council, recognising the validity of the title deeds and being of the view that they could only be cancelled through a lawful process. The Clerk to the County Council was jailed for contempt of court after repeatedly failing to comply with the court orders. The authors of the *Maasai Mau Forest Status Report (2005)*, which includes the Government of Kenya, claim that the individuals who brought the claim were not representative of the residents but they provide no evidence for this assertion and whether there was any investigation of the extent of those with legitimate claims.

The Ndungu Commission recommended that the large majority of the land grabbed should be revoked, stating in relation to forests that:

All excisions of forestland which were made contrary to the provisions of the Forests Act and the Government Lands Act should be cancelled. All titles which were acquired consequent upon the illegal excisions and allocations of forestland should be

⁵⁵ Maasai Mau Forest Status Report (n. 3 above), p. 8.

⁵⁶ Ibid. P. 19. The Report indicates a quadrupling of the original allotted areas.

⁵⁷ Ibid. p. 7.

⁵⁸ High Court Civil Case Number 664 of 2005

revoked. The forestlands affected should be repossessed and restored to their original purpose.⁵⁹

However, the Commission did make provision for addressing situations where forest land had been set aside in order to settle landless people. In such cases, where genuine landless people had been settled, the Commission recommended that while the titles should be revoked (given their inherent illegality), the Government should - subject to compliance with other legislation - issue new titles to the landless settlers.

The Commission also recommended that:

Given the fact that each case of a suspected illegal or irregular allocation of public land must be dealt with on its own merits, it is recommended that a Land Titles Tribunal be immediately established to embark upon the process of revocation and rectification of titles in the country.⁶⁰

Moreover, the Government refuses to deal with the fact that thousands of people in Mau Forest Complex have been conned into purchasing land illegally, as one interviewee stated to the mission team. Even the government has acknowledged that much of the added land in Maasai Mau Forest “was sold to unsuspecting outsiders who had no information on the status of the forest”.⁶¹

4.3 Human rights

Under international human rights law to which Kenya is party, there can be no justification for forced evictions. These issues were noted in the recent report on Kenya by the Special Rapporteur on Adequate Housing, who stated:

The right to adequate housing is also interlinked with the right to health, food, and a safe environment. The issue of logging in Mau forest illustrates the need to adopt an inclusive approach to the right to housing...the Special Rapporteur himself witnessed extensive logging. If continued, this will threaten not only the livelihoods and survival of the Ogiek, but other communities that rely on water from Lake Nakuru and connected streams that are drying up as a result of logging and drought.

While the goal of forest protection is a legitimate one, the means by which the Government of Kenya has sought to achieve it is not. The appropriate manner to

⁵⁹ Report of the Commission of Inquiry into the Illegal and Irregular Allocation of Public Land, 2004, page 174.

⁶⁰ Ibid. page 188.

⁶¹ Maasai Mau Forest Status Report (n. 3 above), p. 19.

reconcile its interest in environmental protection, and its human rights obligations to ensure the right to water and a healthy environment on the one hand, with its obligation to respect, protect and fulfil the right to adequate housing on the other (including the obligation to refrain from forced eviction) is to ensure that evictions are a last resort, are only carried out where necessary, and always in a manner compatible with international human rights law. To this end, the government should develop and implement clear guidelines on evictions, drawing on the work of the UN Committee on Economic, Social and Cultural Rights, the UN Special Rapporteur and others.

Protection of the forest and protection of human rights are not mutually exclusive, and in the case of the Mau Forest evictions, the failure to address human rights has undermined protection of the forest. This point was clearly highlighted by environmental groups to whom the fact-finding mission spoke. The overall consensus amongst environmentalists in Kenya is that the forced evictions have largely failed to protect the forest – in many cases people have simply returned to their former homes.⁶² They have done so because they have nowhere else to go. Without an adequate resettlement plan in place, evictions not only violate international human rights law, they fail to provide a solution to forest protection.

In addition, the Ministry of Environment should also consider using the relevant provisions of the Forest Act (namely section 26) to take control of forests that are being mismanaged by local authorities,⁶³ which may be relevant to the situation of Maasai Mau Forest. But any revocation of title or eviction should follow international human rights standards and the recommendations of the Ndungu Commission.

⁶² Ariel photos of the Mau Forest by environment groups taken in December 2005 after the evictions show resettlement. See: *Mau Complex under siege – continuous destruction of Kenya’s largest forest*, a presentation by UNEP, KWS and KFWG, June 2006

⁶³ “Upon the recommendation of the Board, the Minister may, by order published in the Gazette, declare any local authority forest or private forest, which in the opinion of the Board is mismanaged or neglected, to be a provisional forest. (2) A declaration under sub-section (1) of this section shall only be made where (a) the forest - is an important catchment area or a source of water springs; (ii) is rich in biodiversity and contains rare, threatened or endangered species; (iii) is of cultural or scientific significance; or (iv) supports an important industry and is a source of livelihood for the surrounding forest communities; and (b) the Director has issued a notice requiring the local authority or private owner, as the case may be, to undertake specific agricultural practices to improve the forest, and such notice has not been complied with, or the forest owner is unable to undertake the specified practices. (3) A provisional forest shall be managed by the Service, in collaboration with the owner thereof, for a period of three years, which period shall be subject to review and any profits accruing therefrom shall be paid to such owner less the expenses incurred by the Service in managing the forest concerned.”

5. Conclusions

The Government of Kenya has failed to tackle, in any systematic and meaningful way, the many underlying problems which contribute to forest destruction. While it has forcibly evicted thousands of poor families from small plots, few of the powerful political actors involved in the illegal allocation of so much public land have been subjected to investigation and prosecution.

Rather, than address the serious and ongoing issue of corruption in relation to forests, the Government has been willing to deny thousands of ordinary people due process of law and cancel or disregard their title deeds. The Government's argument that the title deeds are illegitimate fails to recognise that many poor people acted in good faith when they obtained title. Moreover, where people are suspected of having obtained title deeds through corrupt or illegal practices, the burden of proving this rests with the government.

6. Recommendations

Amnesty International, COHRE, Hakijamii, Kenya Land Alliance and Kenya National Commission on Human Rights therefore recommend that the **Government of Kenya**:

1. Stop immediately the practice of forced evictions from forest areas and place a moratorium on *all* mass evictions in forests

Declare and enforce a moratorium on all mass evictions until: (a) guidelines and laws are in place to ensure that any eviction conforms with international human rights standards; (b) there is a thorough consultation with the affected communities and support organisations, which planned evictions are absolutely necessary.

2. National guidelines on eviction

Complete the drafting of the national guidelines on evictions, currently being led by the Ministry of Lands, in order to guide the elaboration of plans and legislation with regard to evictions, including in forest areas. The national guidelines should specifically address the issue of evictions in forest areas.

3. Assist victims

Ensure that victims of forced evictions in the Mau Forest Complex (Maasai Mau and Sururu) all other forest areas are provided with assistance in accordance with international human rights standards, including access to resettlement sites with effective access to basic services and schools.

4. Social and human rights impact assessments and alternatives to eviction

Develop a policy and law requiring thorough social impact assessments for activities that may result in eviction, including in forest areas, and a mechanism for community participation to examine whether specific evictions are absolutely necessary, and whether there are alternatives to eviction, particularly for those groups who have traditionally lived in the forest.

5. Comprehensive relocation and compensation plan

Move swiftly to put in place a comprehensive relocation and compensation plan for any proposed evictions, including in forest areas. The resettlement plan must be in accordance with international human rights and Internally Displaced Persons standards,⁶⁴ including respect for the right to participation of those affected, and the parameters for such plans should be enacted in legislation. The plan should not be used as means to prevent legitimate return of groups to their areas of origin, particularly if it has been occupied by others.⁶⁵ The resettlement plan must be designed in a way to minimise corruption and sufficient support is provided to ensure that livelihoods on new land are sustainable and that any costs in purchasing land in resettlement areas, to be incurred by those being resettled, are affordable.

6. Investigation of illegal and irregular land allocation

Ensure that each case of illegal or irregular land allocation is investigated separately as to the origins of the allocation, and establish a land tribunal for such purposes as suggested by the Ndungu Commission.⁶⁶

⁶⁴ See United Nations Comprehensive Guidelines on Development-Based Displacement (1977), available at <http://www1.umn.edu/humanrts/instree/forcedevictions.htm>; UN Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2, dated 11 February 1998; and Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing, (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+Comment+7.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+Comment+7.En?OpenDocument); and

⁶⁵ See *Continued conflict and displacement in the Rift Valley* (n. 2 above), p. 5.

⁶⁶ *Report of the Commission of Inquiry into Illegal and Irregular Allocation of Public Land*, Republic of Kenya, June 2004, p. 188: “Given the fact that each case of a suspected illegal or irregular allocation

7. Inter-governmental coordination

Coordinate the various activities of Government ministries and agencies that are concerned with forests and/or evictions, and give instructions to all relevant authorities that any evictions may only be carried out in full compliance with international human rights law and standards;

8. Law enforcement officials

Ensure that all law enforcement officials who assist in carrying out of any eviction that they comply with the Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. In addition the officials concerned should undergo human rights training and be made aware of provisions of international and national law in relation to evictions.

9. Submissions to Courts

In its submissions to courts, urge the judiciary to interpret the law consistently with the constitutional protections of the home and related constitutional rights that concern eviction, the International Covenant on Economic Social and Cultural Rights, the International Covenant on Civil and Political Rights and African Charter on Human and Peoples' Rights.

To **UN agencies and donors**, we recommend that they

10. Harmonisation of UN Agencies and donor advice and support

Coordinate their activities to ensure that human rights standards and concerns are incorporated in their advice and financial support to the policies and activities of the Government of Kenya, and that sufficient financial support is provided to support the Government's resettlement programmes.

of public land must be dealt with on its own merits, it is recommended that a Land Titles Tribunal be immediately established to embark upon the process of revocation and rectification of titles in the country."