

Kenya



Renewable Energy Projects and the Rights of
Marginalised/Indigenous Communities in Kenya

Kanyinke Sena

IWGIA report 21

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INTRODUCTION

On 25 September 2015, the United Nations adopted a set of global goals to end poverty, protect the planet and ensure prosperity for all as part of a new sustainable development agenda.¹ For Kenya, which co-chaired the UN Open Working Group for Sustainable Development,² the goals are crucial for the well-being of the nation as a whole but particularly for its indigenous peoples.³

In its Vision 2030, Kenya aspires to be “a globally competitive and prosperous nation with a high quality of life by 2030 through transforming itself into a newly industrialising, middle-income country that provides a high quality of life to *all* its citizens by 2030, in a clean and secure environment.”⁴ Both the Sustainable Development Goals (SDGs) and Kenya Vision 2030 clearly place humans at the centre of development, in line with Article 2 of the 1986 Declaration on the Right to Development.

To end hunger, eradicate poverty and enable development for all, Goal 7 of the SDGs and Kenya’s Vision 2030 commit to

ensuring access to affordable, reliable, sustainable and modern energy for all.⁵ For this reason, Kenya has scaled up its pursuit of investments in renewable energy, primarily geothermal and wind energy projects.

But will these renewable energy projects ensure the attainment of economic, social and cultural rights for indigenous peoples in Kenya, as guaranteed and provided by the International Covenant on Economic, Social and Cultural Rights 1966,⁶ the African Charter on Human and Peoples’ Rights 1986,⁷ the UN Declaration on the Rights of Indigenous Peoples and Kenya’s own Constitution?

To answer this question, this report will look at how business enterprises in the renewable energy sector are promoting and respecting the human rights of indigenous peoples in their project areas. ○

THE STATE DUTY TO PREVENT HUMAN RIGHTS ABUSE BY THIRD PARTIES

“

Both the national and county governments have a duty to ensure respect for and promotion of indigenous peoples’ rights in areas where renewable energy projects are being undertaken.

This report recognises the State’s duty under both international and national law to prevent human rights abuses by third parties within its territory and/or jurisdiction. This includes business enterprises.⁸ Kenya’s Constitution, for example, provides for national values and principles of governance that include “human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised”.⁹ The national values and principles of governance “bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution or any law”.¹⁰ Chapter Four also pro-

vides for a Bill of Rights that applies to all law and binds all State organs.¹¹ It is furthermore the fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.¹² All State organs and all public officers have the duty to address the needs of vulnerable groups within society, including marginalised communities, and members of particular ethnic, religious or cultural groups.¹³ Both the national and county governments therefore have a duty to ensure respect for and promotion of indigenous peoples’ rights in areas where renewable energy projects are being undertaken.

ENERGY IN KENYA'S NATIONAL DEVELOPMENT



A geothermal power plant in Olkaria

Kenya envisages becoming a newly industrialising, middle-income economy by 2030.¹⁴ For it to achieve this vision, abundant, cheap and reliable energy will be crucial as energy demand is expected to rise from current peak demand of 1,193.8MW to 7,795.3MW by 2030.¹⁵ To meet this high energy demand, Kenya has to invest heavily in its energy sector. Current sources of energy in Kenya include hydropower (743 MW), fossil fuels (525 MW), geothermal (150 MW), bioenergy (30 MW), biogas (29-131 MW), wind (5.1 MW) and solar.¹⁶

However, Kenya's dependence on hydropower and fossil fuels is unsustainable. According to Kenya's National Climate Change Response Strategy (2010),¹⁷ the use of fossil fuels is causing climate change globally and in Kenya in particular. Consequently, Kenya is experiencing erratic rainfall patterns that are contributing to low levels of water flow in rivers and this is negatively impacting on hydropower production.¹⁸ The country therefore needs to shift away from hydro and fossil fuel power generation to more sustainable renewable energy sources – such as geothermal, wind, solar and biomass. This report focuses on geothermal and wind energy production in the context of indigenous peoples' rights in Kenya. ○

RENEWABLE ENERGY IN KENYA

Kenya has a wind energy potential of 1,000 MW and a geothermal energy potential of 7,000-10,000 MW.¹⁹ Kenya's Intended Nationally Determined Contribution (INDC) commits to an expansion of geothermal, solar and wind energy production, other renewables and clean energy options as climate mitigation action.²⁰ By investing in wind and geothermal energy, Kenya will not only be meeting its energy needs but also its CO₂ emissions reduction obligations under the United Nations Framework Convention on Climate Change (UNFCCC).²¹ Kenya will also gain economically through the sale of power to neighbouring countries as part of the newly launched Africa Clean Energy Corridor Initiative, aimed at supporting Africa's green growth by accelerating deployment and cross-border trade in renewable power through a continuous power network that runs from Egypt to South Africa.²²

To promote the generation of electricity through renewable energy sources, Kenya adopted a Feed-in Tariff (FIT) policy in March 2008.²³ The Feed-in Tariff allows power producers to sell renewable energy-generated electricity to an Off-taker at a pre-determined tariff for a given period of time. As a result of the FIT, there has been a sharp increase in renewable energy in Kenya, especially in geothermal, wind power, biomass and biogas.

Wind energy in Kenya

According to United Nations Energy Programme (UNEP)'s Solar and Wind Energy Resource Assessment for Kenya, 2008, wind energy has been in use in the country since the turn of the 20th century. However, this use has been limited primarily to drawing water from boreholes in remote ranches and church mission outposts. The first utilization of wind to generate electricity was in the early 1990s through a Government of Belgium grant to the Kenyan government to supply power to Marsabit in the north of the country.²⁴ In 2003, the Ministry of Energy developed a Wind Atlas to provide investors with indicative data on the strength and location of wind resources in Kenya.²⁵



UNEP's assessment estimates that Kenya has over 90,000 sq. km of excellent wind speeds. The best wind areas, irrespective of whether they will be economically viable if developed, include Marsabit, Samburu, parts of Laikipia, Meru north, Nyeri, Nyandarwa and the Ngong hills. Other areas of interest include Lamu, offshore Malindi, Loitokitok at the foot of Kilimanjaro and the Narok plateau.²⁶ Wind speeds in all these areas range from 8-14 metres per second and are therefore able to support commercial electricity generation.²⁷ However, the strong winds in Marsabit, Laisamis, Turkana and Samburu have specifically been identified as capable of producing over 1,000 MW of electricity.²⁸ The following provides a description of the current wind power projects that are operational or under development.

Ngong Hills Wind Farm

Located in Ngong Hills in Kajiado County, just 30 km west of Nairobi, the Ngong Hills Wind Farm (NHWF) has 6 Vestas V52-850kW wind turbines²⁹ that contribute 5.1 MW to the national grid. The Ngong Hills Wind Farm is owned and operated by the Kenya Electricity Generating Company (Kengen).³⁰

The project is registered with the Clean Development Mechanism (CDM) registry as a CDM project under the UNFCCC and is expected to remove 9,941 metric tonnes of carbon dioxide (CO₂) equivalent per annum.³¹

Kipeto Wind Energy Project

The Kipeto Wind Energy Project is located in Kipeto area, Kajiado County, 60 km south of Nairobi.³² Although work on the project is yet to begin, it is estimated that, once complete, Kipeto Wind Energy Project will add approximately 100 MW to Kenya's national electricity grid. The project is also designated as a CDM project and is expected to remove 253,469 metric tonnes of greenhouse gases (GHG) per annum. Kipeto Energy Limited (KEL) owns and will operate the project. KEL is registered in Kenya but the majority shareholder is US-based

General Electric. The World Bank Group's investment arm, International Finance Corporation (IFC), and a Community Trust, a not-for-profit entity created for the purpose of receiving and managing a percentage of the income from the project for the benefit of the Maasai community, are its other shareholders.³³ The Kipeto wind power project is funded by the Overseas Private Investment Corporation (OPIC), a US public agency that mobilises capital for private entities.³⁴

Lake Turkana Wind Power

Once operational, Lake Turkana Wind Power (LTWP) will be the largest wind power project in sub-Saharan Africa. LTWP will produce 310 MW of electricity from 365 wind turbines. LTWP is located in Loyangalani district, Marsabit County, in north-eastern Kenya. LTWP covers 40,000 acres (162 km²)³⁵ and is owned and operated by Lake Turkana Wind Power Ltd, a company registered in Kenya but a wholly owned subsidiary of Netherlands-registered KP&P BV Africa.³⁶ Other joint de-

velopment partners include Aldwych International Limited,³⁷ Vestas Wind Systems A/S³⁸ and the Norwegian Investment Fund for Developing Countries,³⁹ along with the Investment Fund for Developing Countries (IFU) Denmark⁴⁰ and the Finnish Fund for Industrial Cooperation Ltd (Finnfund).⁴¹ LTWP is also registered as a CDM project and is expected to remove 736,615 metric tonnes CO₂ equivalent per annum.⁴²

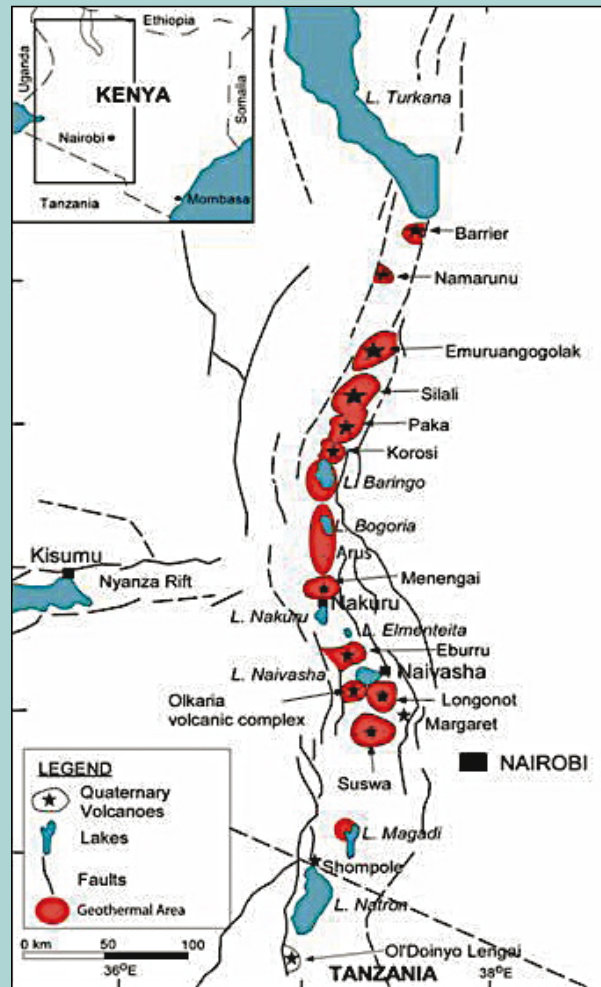
Geothermal power in Kenya

Geothermal power is heat (thermal) derived from the earth (geo).⁴³ Kenya's geothermal resources are located in the Rift Valley, with an estimated potential of between 7,000 and 10,000 MW spread over 14 prospective sites.⁴⁴ Kenya's current installed geothermal capacity is 350 MW.⁴⁵ Of these, KENGEN produces around 302 MW and Orpower4 Inc. the remaining 48 MW. The current installed geothermal capacity is generated from the Olkaria geothermal area⁴⁶ around Naivasha. Other geothermal sites include Eburu,⁴⁷ Menengai,⁴⁸ Mt. Longonot, Suswa and Bogoria-Silali geothermal site in Lake Bogoria.

The Longonot geothermal project is adjacent to the Olkaria geothermal area and covers 132 sq. km encompassing Mt. Longonot and most of Mt. Longonot National Park. Longonot's geothermal development concession has been granted to Africa Geothermal International Ltd (AGIL), a company registered in Kenya.⁴⁹

The Mt. Suswa geothermal development project is located in Mt. Suswa, astride Kajiado and Narok counties. Although work is yet to start in Mt. Suswa, the geothermal activities will be owned and managed by the Geothermal Development Corporation (GDC),⁵⁰ a Government of Kenya-owned company. Mt. Suswa geothermal project is expected to generate up to 400 MW once complete.⁵¹ Both Mt. Longonot and Mt. Suswa geothermal projects are adjacent to the Olkaria geothermal area.

The other proposed geothermal project within the greater Olkaria area is the 70 MW Akiira geothermal project which will be located between Olkaria, Mt. Longonot and Mt. Suswa geothermal project sites. Akiira geothermal project is owned by Centum (37.5%), with American firms Ram Energy and Marine Power and Danish Frontier Markets (62.5%).⁵² The Bogoria-Silali geothermal field is located in Lake Bogoria and the implementing agency is the GDC⁵³ ○



Maasai village surrounded by infrastructure in Olkaria.

RENEWABLE ENERGY PROJECTS ON INDIGENOUS PEOPLES' LANDS

Indigenous peoples in Africa are generally understood as nomadic and semi-nomadic pastoralists and hunter/gatherer communities.⁵⁴ Indigenous peoples' livelihoods, cultures and traditions are closely intertwined with the particular ancestral territories on which they are found. Because of a long history of marginalisation, indigenous peoples are being negatively impacted by projects undertaken in their territories. The Truth, Justice and Reconciliation Commission was emphatic that "the state's development policies have not created the conditions that would lead to qualitative improvement in the lives of minority and indigenous communities. On the contrary, the vast majority of development projects have deepened marginalisation and exclusion of minority groups".⁵⁵

The renewable energy projects found on indigenous peoples' territories in Kenya include the Ngong Hills and Kipeto wind power projects located on the ancestral territories of the Maasai, and the Lake Turkana Wind Power project located on the ancestral territories of the Turkana, Rendile and Borana communities. Other potential wind energy generation sites in Kajiado, Narok, Laikipia and in some coastal regions are also within the ancestral territories of indigenous peoples. Most of Kenya's geothermal sites on the floor of the Rift Valley are located on the ancestral territories of indigenous groups. For example, Olkaria, Longonot and Suswa geothermal sites are in Maasai territories while the Bogoria-Silali site is in the ancestral home of the Endorois. Geothermal sites identified in Samburu

and Turkana counties are located in the ancestral territories of the Samburu and Turkana communities respectively.

“ There is clearly a large overlap between renewable energy projects and indigenous peoples' territories in Kenya. As such, the renewable energy corporations have a responsibility to respect the rights of these communities in line with international and national human rights

There is clearly a large overlap between renewable energy projects and indigenous peoples' territories in Kenya. As such, the renewable energy corporations have a responsibility to respect the rights of these communities in line with international and national human rights instruments. The *UN Guiding Principles on Business and Human Rights* place the responsibility on business enterprises to respect the rights of communities when undertaking projects on their lands and territories.⁵⁶ Renewable energy projects in Kenya must therefore be designed and implemented in ways that protect and advance the rights of indigenous peoples.

And yet are the renewable energy companies recognising and protecting indigenous peoples' rights in their project design and implementation? Are there any best practices that can be borrowed from their activities for use in future such projects? ○



A geothermal rig being drilled in a livestock grazing area in Olkaria

THE CORPORATE RESPONSIBILITY TO RESPECT INDIGENOUS PEOPLES' RIGHTS

Even though corporations are not subjects of international human rights law, the UN Guiding Principles on Business and Human Rights impose responsibility on them because they exert tremendous influence over the human rights and lives of the populations where they operate. The corporate responsibility to respect human rights is therefore a *global standard of expected conduct* that corporations should follow in their business enterprises.⁵⁷

Corporate responsibility to respect human rights relates to international human rights standards that are enshrined in the Universal Declaration of Human Rights⁵⁸ and the International Covenant on Economic, Social and Cultural Rights⁵⁹ and the rights of indigenous peoples as enshrined in the UN Declaration on the Rights of Indigenous Peoples.⁶⁰ Chapter Four of Kenya's 2010 Constitution provides for a Bill of Rights aimed at preserving the dignity of individuals and communities and promoting social justice and the realisation of the potential of all human beings.⁶¹ The Bill of Rights applies to all law and binds all State organs and all persons,⁶² which includes corporations as "legal persons".



Respecting these standards helps corporations reduce the risk of disruption to their operations by violent or non-violent protest, conflicts, legal disputes and other public responses to harmful corporate conduct

Respecting these standards helps corporations reduce the risk of disruption to their operations by violent or non-violent protest, conflicts, legal disputes and other public responses to harmful corporate conduct.⁶³ The corporate responsibility to respect human rights applies to all enterprises regardless of size, operational context, ownership and structure.⁶⁴ Business enterprises exercise the responsibility to respect human rights through *policy commitments* and by undertaking *human rights due diligence*.



Policy commitment to human rights

In order to comply with the UN Guiding Principles and hence live up to their responsibility for human rights, corporations need to develop a human rights policy commitment. Policy commitments are public statements “which stipulate the corporation’s human rights expectations of its personnel, business partners and other partners directly linked to its operations or services”.⁶⁵ This statement is distinct from the corporation’s operational policies and procedures.

Renewable energy corporations should develop their policy statement on human rights. This would guide and support their efforts to recognise and respect the rights of indigenous peoples in their project areas. In developing human rights policy statements, they should be guided by international human rights standards, including those that address the rights of indigenous peoples. The process should be participatory and undertaken in consultation with indigenous rights experts.

KENGEN, the largest geothermal producer in Africa, has no such policy statement on human rights. Neither its quality assurance nor its environmental policy statements mention respect for human rights within its power generation activities.⁶⁶ KENGEN operates four out of the current five geothermal generation projects and also the Ngong wind power generation project, besides numerous hydropower dams. Similarly, the Lake Turkana Wind Power Company has no policy statement on human rights. Nor does a human rights policy statement appear in its project disclosure document.⁶⁷

Human rights due diligence



Corporations should therefore undertake human rights due diligence through human rights impacts assessments

To operationalise their responsibility to respect human rights, corporations should undertake *human rights due diligence* when designing and implementing projects. Principle 18 of the UN Guiding Principles stipulates that, in order to gauge human rights risks, business enterprises should *identify* and *assess* the actual or potential adverse impacts of their projects on human rights. Corporations should therefore undertake human rights due diligence through *human rights impacts assessments (HRIA)*. Although the Environmental and Social Impact Assessments (ESIA) of the various renewable energy projects show that human rights were considered, they seem to have been placed at the periphery of environmental concerns. HRIAs holistically assess the variety of rights that might be impacted by a project on the basis of both national regulations and appropriate international human rights principles and conventions. These aspects will be further examined here, looking at how they have or have not been considered in the specific cases of renewable energy projects in Kenya. ○



Maasai women getting water from a tank constructed by KENGEN in Olkaria

CRUCIAL ASPECTS OF A HUMAN RIGHTS IMPACT ASSESSMENT

Recognition of indigenous peoples

Recognition as “indigenous peoples” is a foundational element when undertaking human rights due diligence for indigenous peoples. Despite international human rights instruments recognising pastoralists as “indigenous peoples”,⁶⁸ however, none of the renewable energy projects described above recognise any of the pastoralist communities as “indigenous peoples”. The renewable energy projects opt to categorise the communities as either “vulnerable groups” or “project affected persons (PAPs)”. They thus avoid triggering the more stringent indigenous peoples’ safeguard policies required by investors, e.g. the International Finance Corporation.

Recognising and respecting land rights

In almost all the renewable energy project areas in Kenya, land ownership is often unclear and contested. Developing projects without addressing the land ownership issue in these areas thus becomes a serious investment risk. Only formal allocation of title to the land issued by the government, as opposed to ancestral occupation, is recognised as the basis for accruing land rights in Kenya.⁷⁴ For reasons of historical marginalisation and injustices, the land rights of many indigenous groups in Kenya have not been formally recognised.

Due diligence means that companies must not contribute to the State’s failure to meet its human rights obligations⁸¹ by ignoring indigenous peoples’ land rights. Whenever companies enter into contracts with the State over concessions affecting indigenous peoples’ territories and resources, the company should ensure that the communities are included as a party to the contract and that conflict resolution mechanisms are agreed to.⁸²

Case study – Lake Turkana Wind Power (1)

The Lake Turkana Wind Power Project (LTWP) denies the existence of indigenous peoples in the project area⁶⁹ despite recognising that the communities are pastoralists. The project also recognises that the communities are marginalised, have a collective attachment to the lands and that their identity as a community is linked to their particular ancestral territory and the natural resources therein.⁷⁰ Essentially, therefore, the communities fit within the classification of “indigenous peoples” as

Case Study – Lake Turkana Wind Power (2)

In the Lake Turkana Wind Power project area, for example, the land is classified as trust land held by the local government(s) on behalf of the communities. The local governments may have or be entering into renewable energy agreements without adequately consulting the respective communities for whom they are holding the land in trust. This opens up possibilities for protracted, expensive litigation and conflicts should the corporation neglect to consult directly with the communities. The case that was filed by the Rendile, Gabra, Turkana and Elmoloo communities in October 2014⁷⁵ may be an indication of future conflicts as the communities become more aware of their rights. In the interests of its investment, Lake Turkana Wind Power should under-

Case study – Olkaria

Similarly, in the Olkaria geothermal area, although the Maasai community have been occupying the land for centuries, the legal title to the land is owned by Kedong Ranch Ltd, comprising a group of individuals who do not reside in the area.⁷⁹ This situation creates an overlapping interest in the land, which is the ancestral land of the Maasai indigenous community. Conflicts have already been witnessed⁸⁰ and litigation is ongoing. The major litigation that is before the courts in Kenya involving the Maasai in Olka-

provided by the African Commission.⁷¹ The more comprehensive IFC's Performance Standard 7 on Indigenous Peoples⁷² should have therefore been triggered during project design in order to better address the rights of the indigenous communities in the project area. Interestingly, LTWP claims that it "has all the required environmental and social approvals in line with the IFC Performance Standards".⁷³

take consultations with the communities against the backdrop of these new developments, which include the Constitution of 2010 as it recognises community land rights.⁷⁶ Under Article 63 of the Constitution, community land shall be vested in and held by communities identified on the basis of ethnicity, culture or similar community of interest.⁷⁷ Community land consists of land which is lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; ancestral lands and lands traditionally occupied by hunter-gatherer communities; or lawfully held as trust land by the county governments.⁷⁸ Under international human rights norms, consultation is an ongoing process rather than merely a one-off discussion.

ria includes *George Ole Sangui & 10 others v. Kedong Ranch Ltd* [2010] eKLR and *Parkire Stephen Munkasio & 14 others v. Kedong Ranch Limited & 8 others* [2015] eKLR. In these cases, the Maasai are challenging the allocation of their ancestral lands to Kedong ranch. Other geothermal companies should therefore avoid this tortuous route by respecting the land rights of indigenous communities in their respective project areas.

“

The overall characteristics of groups identifying themselves as indigenous peoples are that their cultures and ways of life differ considerably from the dominant society, and that their cultures are under threat, in some cases to the point of extinction. A key characteristic for most of them is that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon. They suffer from discrimination as they are regarded as less developed and less advanced than other more dominant sectors of society. They often live in inaccessible regions, often geographically isolated, and suffer from various forms of marginalization, both politically and socially."

ACHPR & IWGIA: 2006:10
Indigenous Peoples in Africa:
The Forgotten Peoples? The African Commission's
work on indigenous peoples in Africa



Should we move?



New houses constructed for the Maasai as part of Olkaria IV resettlement



A Maasai elder in his new house

Consultation and free, prior and informed consent

National and international laws and policies, including Principle 18 of the Guiding Principles, require corporations to pursue meaningful consultations, in good faith, with potentially affected groups and other relevant stakeholders. In relation to indigenous peoples, consultations should lead to the free, prior and informed consent (FPIC) of the communities.⁸³ The consultations should be undertaken in culturally appropriate ways that include community decision-making structures, language and gender dynamics. International Finance Corporation performance standard 7, for example, requires consultation and participation to be through well-defined community structures. It requires free, prior and informed consent and benefit sharing among others. The consultations outcomes should be validated and documented in a verifiable indigenous peoples' plan.

Case study – Lake Turkana Wind Power (3)

RERINA and SARIMA Indigenous Peoples' Land Forums, both community-based organisations operating from the town of Loiyangalani, and other activists have consistently questioned the consultation processes that led to the acquisition of the land for the project, and whether or not the Free, Prior and Informed Consent of communities in the project area was obtained.⁸⁴ The court case filed by communities in October 2014, seeking to stop the project, also raises serious questions regarding the acquisition of the land for Lake Turkana Wind Power (LTWP), including the resettlement plans.⁸⁵ LTWP's Revised Resettlement Policy Framework states that "existing national legislation does not require resettlement plans be disclosed to or consulted with locally affected people".⁸⁶ This is archaic thinking. Article 40 the Constitution of 2010 is clear on the right to property and Article 35 recognises the right to information, including information held by another person

and required for the exercise or protection of any right or fundamental freedom.⁸⁷ However, a full resettlement action plan available on the Africa Development Bank website indicates that community consultations on resettlement were undertaken and modalities for resettlement agreed to.⁸⁸ Why then would activists complain about a lack of consultation? Did the resettlement action plan factor in pastoralism and the free movement of livestock in the project area? Or was an alternative livelihood system for the pastoralists agreed to should the wind power project impede pastoralism? The project has also designed a relocation plan for families that may need to be moved.⁸⁹ Pastoralists live as a community, however. What impact will moving a few families have on the wider community? With all these questions unanswered, how then could the project have received all IFC performance standards approvals?

Case study – Longonot Geothermal Project

Africa Geothermal International Limited (AGIL) states that it is "committed to open, transparent and detailed consultations in all phases of its geothermal project in Mt. Longonot." It carried out consultations with "project stakeholders including the local community and land-owners and widely advertised in the local and national press and on radio to share all project details, and allow a proper exchange of information to ensure stakeholders are informed of the project".⁹⁰ AGIL states that it "is undertaking a study on the impact of the project on cultural heritage and will not support access and use of ancestral

lands, cultural and sacred sites and uses of common resources, without the prior permission and support of the community in line with requirements of the Government of Kenya, international standards and in collaboration with those affected, including communities and custodians".⁹¹ A memorandum of understanding between AGIL and the Maasai community is open to review by either party and the community has already exercised this right upon getting further details of the implications of the project on their rights.⁹²

Addressing unintended consequences

A properly done Human Rights Impact Assessment will address both intended and unintended consequences of a project on the rights of indigenous peoples. This is based on the reality that indigenous peoples' land-use patterns are complex and multi-layered, comprising a host of economic, cultural and spiritual uses.⁹³ Not all renewable energy project EIAs fully capture the indigenous peoples' livelihood systems, land-use patterns, cultures and land management systems, among other things. As such, the unintended consequences of different aspects of the geothermal projects, including relocation, have not been fully addressed.



Lodwar, Turkana. IWGIA photo archive

Case study – Olkaria IV Resettlement Action Plan

The Environmental Impact Assessment for Olkaria IV geothermal project established that the proposed power plant site was an area comprising the Maasai community villages of Olo Mayana, Olonongot, Olosinyat and a cultural centre, which would be resettled through the resettlement action plan.⁹⁴ The Resettlement Action Plan (RAP) provides for a livelihood restoration plan at the resettlement site. The RAP clearly indicated that “land-based income streams to be restored at the site are those related to livestock keeping to ensure that project affected persons retain their normal grazing fields, markets and employment offered by KENGEN and other Olkaria based companies”.⁹⁵ Some of the proposed measures included securing community land rights through a community title, housing and monetary compensation.⁹⁶ For grazing, KENGEN committed to constructing watering troughs and a water dip at the resettlement site but was powerless to ensure the pastoralist community's grazing rights as the land in question legally belongs to Kedong Ranch and Kenya Wildlife Service.⁹⁷ The RAP provided for resettlement principles that would be followed in the resettlement process, detailed institutional structures that included community representatives from each village and a community council, among others.⁹⁸ The RAP has been touted as a best practice for resettlement management in Kenya.⁹⁹

However, a letter dated 24 October 2014 from Maasai community members to the World Bank Inspection Panel complained that:

*this project has totally affected our lives and instead of uplifting our livelihood or putting to our previous standard it has even stressed us a lot and many people by now are suffering from ulcers due to stressful life which one has been forced to.*¹⁰⁰

Besides complaints of being resettled without official land ownership documents, and the relocation site being close to other KEN-

GEN and other geothermal companies drilling sites,¹⁰¹ the specific complaints contained in the letter were that:

- a. *Majority of those resettled have moved far and away from their former and familiar sources of income (e.g.) the community tour guides who perform their duties at the lower gorge for sure it have become so costly compared to their earning per day (30% of their earning now became the fare) or one to start walking before Sunrise(6:00am) to arrive before 8:00am at Rangers post (workplace) some members of the tour guide Association have been forced to look for houses to rent in Naivasha, Karagita, OCK Kamere trading Centres etc. Their families are undergoing a change of life style from moderate to poor. This is creating a lot of vendetta in their families, stress and friction.*
- b. *There are some parents who by now look like thieves and it is trying to avoid meeting their children especially those who had Secondary School Children and it is due to lack of school fees so they leave home as early as not later than 4:30am and come back not early than 23:30hrs, because these children disturb them, "Dad or mum when will I go back to School." So parents are sad and shy to meet them.*
- c. *Completely killing our cultural believes, spirits of togetherness as One Community (family) introduced to western way of life of hatred, loneliness and Single thinking life, and put them in a three halls houses (Sitting room, and two bed rooms but empty)(no Sits, beds and other main necessities, this house requires.*
- d. *If you visit you will find some families seated on stone and lying on cottons, cow hides on the floor as mattress-*
- e. *This also have stressed them and saddened them a lot and there are families which are almost to collapse due to poverty and we hope in world bank logo there is a sentence which say, "A WORLD FREEE OF POVERTY", Etc.*
- e. *Kengen was to built 164 houses but built only 150 house this forced for elimination other families (14) poor ones, orphans & widows etc. from PAPs list, So we also have crying families of whom I don't know who will wipe their wetted chicks and eyes!*
- f. *The poor relatives of the Chairmen have got their house built at RAPLAND and are sometime given cash compensation of not less than Ksh 195,000, so for this process it is full of corruption nepotism, ethnicity and religious ground. We have prove evidence of all these*
- g. *We have also written to World Bank several letters in a kind request for a fair, free and justice in the process but, there are no measures taken and that's why we have written to you (the Inspection Panel).*

Although the World Bank Inspection Panel is yet to release its final report, its Report and Recommendation on Request for Inspection¹⁰² observes that "the issues of harm raised by the Requesters are plausibly linked to project activities, and notes potential non-compliance by the Bank with applicable operational policies and procedures.

The Panel also affirms that these alleged issues of harm and non-compliance are of a serious character".¹⁰³ It recommends that "an investigation be carried out on the alleged issues of harm and related non-compliance with World Bank operational policies and procedures with respect to (i) land titling, (ii) identification of PAPs, (iii) livelihood restoration measures, (iv) grievance mechanism and (v) indigenous peoples".¹⁰⁴

Benefit sharing

Sharing of benefits is key to securing the future for indigenous peoples. This also ensures that the project(s) enjoy community goodwill. Besides compensation, scholarships and jobs, the renewable energy companies, for example Orpower4 Inc, are also supporting the construction of schools and contributing to the salaries of the primary school teachers within the community in which they operate¹⁰⁵ Interestingly, both the LTWP and Kipeto Wind Power have committed to establishing foundations for the implementation of comprehensive CSR programmes.¹⁰⁶ These will ensure inter-generational benefits. “LTWP will use a combination of revenue from fundraising and profit from LTWP to form and fund a Trust (the winds of change), which will ensure a well targeted plan over the 20 years of the investment. Already various boreholes, a water filtration system, classrooms and community store projects are being implemented”.¹⁰⁷ While these are welcome, they are the duty of the State¹⁰⁸ and should not be the responsibility or public relations exercise(s) of the corporations.

The renewable energy corporations should pursue alternative benefit-sharing approaches that will entrench property rights and secure meaningful culture-based livelihoods for the communities into the future. According to RERINA, a community-based organisation in Loyangalani, the greatest challenge is the communities’ lack of negotiating capacity in the renewable energy project areas. “Community Institutional structures are weak, political players take advantage of communities, communities cannot afford lawyers and have no access to legal aid, gender considerations are not taken into account in the design of any benefit sharing arrangements and there are serious lack of access to information that will enable the communities to make informed decisions”.¹⁰⁹

The UN Special Rapporteur on the rights of indigenous peoples, Prof. James Anaya, recognised this challenge and called upon human rights defenders and indigenous rights advocates to put additional effort into enhancing the negotiating capacities of the peoples affected by operations in or around their traditional territories.¹¹⁰ ○



Community meeting in Olkaria

CONCLUSION

Rather than waiting for the State to implement its duty to respect human rights, indigenous peoples in areas where renewable energy projects are being or will be implemented must demand that corporations assume their responsibility to respect their rights. The corporate responsibility to respect internationally recognised human rights is independent of State obligations towards the human rights of its citizens. This implies that corporations are expected to live up to this responsibility even in situations where national circumstances do not support human rights, including those of indigenous peoples.

It is important to note that indigenous peoples are not opposed to renewable energy projects. As citizens of the country, they also understand the need for such projects in the development of the nation. In most cases, they consider such projects as opportunities to address historical marginalisation. Indigenous peoples' only demands relate to recognition and respect for their rights to these lands, to consultation and to benefit sharing. This path will entail a new human rights-based approach that can ensure a win-win situation for all. ○



Lodwar, Turkana. IWGIA photo archive

NOTES

- 1 See UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS at <http://www.un.org/sustainabledevelopment/sustainable-development-goals/>
- 2 Established by UN General Assembly Resolution 67/555 of 22 January 2013. See A/67/L.48/rev.1
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- 4 See Kenya Vision 2030 at <http://www.vision2030.go.ke>
- 5 UN Sustainable Development Goals, Goal 7: Ensure access to affordable, reliable, sustainable and modern energy for all at <http://www.un.org/sustainabledevelopment/energy/> and Vision 2030, DEPLOYING WORLD CLASS INFRASTRUCTURE FACILITIES & SERVICES at http://www.vision2030.go.ke/?page_id=3247#tab-id-4
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- 7 Article 21, African Charter on Human and Peoples' Rights, 1986.
- 8 UN Guiding Principles on Business and Human Rights. The State Duty to Protect Human Rights: Foundational Principles, Para 1. Available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf
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- 10 Article 10 (1) (a) & (b), Constitution of Kenya 2010.
- 11 Article 21 (1), Constitution of Kenya 2010.
- 12 Article 21 (1), Constitution of Kenya of 2010.
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- 59 International Covenant on Economic, Social and Cultural Rights <http://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>
- 60 The UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007. See http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
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- 98 KENGEN, Olkaria IV (Domes) Geothermal Project, Naivasha District, Resettlement Action Plan for Olkaria IV power station, July 2012 at http://www.kengen.co.ke/userfiles/OLKARIA%20IV%20RAP%20FOR%20DISCLOSURE_JULY%20%202012.pdf
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