IN THE AFRICAN COURT ON HUMAN & PEOPLES' RIGHTS

Communication no 006/2012

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

V

REPUBLIC OF KENYA

COMPLAINANT'S SUBMISSIONS ON THE MERITS

CONTENTS

1. THE HISTORY OF THE OGIEK

A. The Ogiek of the Mau Forest

1. The Ogiek people are the last remaining forest dwellers and are some of the most marginalised of all indigenous peoples and minorities in Kenya. Traditionally honey gatherers who survive mainly on wild fruits and roots, game hunting and traditional bee keeping, the Ogiek are friendly to the environment on which they depend and have a unique way of life well adapted to the forest. Their adaptation and their traditions have made them successful foresters and greater environmentalists than any other community in Kenya. Thus the term 'Ogiek' literally means 'the caretaker of all plants and wild animals', and the survival of the indigenous Mau Forest is inextricably linked with the survival of the community.

2. The Ogiek of Kenya's Mau Forest in the central Rift Valley number approximately 30,000 people, including adults and children.[1] It is not known when exactly the Ogiek began to live in the Mau Forest. They themselves speak of having always lived there.[2] One theory is that they originated from Northern Uganda and moved, possibly as early as A.D.1, into the Mount Elgon area (where approximately 22,000 of them still live) and then, as part of a general push south in response to pressures from other more powerful migrating African groups and the search for suitable forests, they moved to the Mau Escarpment.[3]

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[1] An Ogiek Peoples' Register, Ogiek Mau Restoration Initiative, May 2013, at Annex 87

[2] John A Distefano, 'Hunters or Hunter? Towards a History of the Ogiek' [1990] Vol. 17 History in Africa 51.

[3] See generally, Thomas C N Evans, *Economic Change Among the Dorobo/Akiek of Central Kenya 1850-1963*, Ph.D. Dissertation, Syracuse University, Syracuse. See also, Corinne A Kratz, 'Are the Okiek Really Masai? Or Kipsigis? Or Kikuyu?'[1980] Cahiers d'Etudes Africaines vol 20, cahief 79 355-368, 360, who states of the Okiek that "[a]ll share an identification of themselves as the original inhabitants of Kenya. The traditions of other peoples corroborate their claim, although whether they were actually autochthonous or just among the very earliest of the Nilotic or Cushitic migrations cannot yet be verified." See also Map of Ogiek in Kenya and Tanzania at Annex 91.

This is supported by one of the earliest outsiders to study the Ogiek, C W Hobley, who refers to how the Ogiek inhabited the whole of the East Africa highlands from Nandi to Kenia [sic] before the Masai invaded the country.[4] As a further expert, Corinne Kratz, who has spent several decades researching Ogiek communities in the Mau[5] says "*Ogiek are regarded as one of Kenya's indigenous groups and they have lived on the forested Mau escarpment for as long as oral tradition can trace*."[6]

3. Indeed, the Respondent Government has recognised and accepted that "The Ogiek have lived since time immemorial in the forest."[7] The Ogiek's long occupation of the Mau Forest has been similarly recognised by various international human rights bodies.[8] The Ogiek can trace their ancestors' occupation of the Mau Forest over many generations.[9] Place names throughout Mau Forest bear the imprint of the Ogiek's long history there.[10]

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[4] C.W. Hobley, 'Notes on the Dorobo People and Other Tribes: gathered from Chief Karui and Others', [1906] Vol. 6 Man 119-120.

[5] Note that Kratz's focus was principally on the Ogiek of Narok District, Maasai Mau.

[6] Letter in response to 60 minutes Broadcast "The Great Migration: An Epic Journey" from Corinne A Kratz, dated10 July 2010

[7] Republic of Kenya, Written Submissions, Communication No. 381/09, Centre for the Minority Rights Development (CEMIRIDE) on Behalf of the Ogiek Community against the Republic of Kenya, 15 March 2010, para. 1.1.5; already filed before this Court

[8] *Ibid*; See also ACHPR 'Report of the African Commission's Working Group on Indigenous Populations/Communities, Research and Information Visit to Kenya, 1-19 March 2010' pages 41-42 at Annex 81; UNHRC, 'Cases examined by the Special Rapporteur (June 2009 – July 2010), Human Rights Committee, 15th Session' (15 September 2010) UN Doc A/HRC/15/37/Add.1, para 268, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.1.pdf, accessed 11 November 2013; UNHRC, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples' (26 February 2007) UN Doc A/HRC/4/32/Add.3, para 37, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/110/43/PDF/G0711043.pdf?OpenElement, accessed 11 November 2013

[9] In North Narok, for example, Ogiek can trace their ancestors back over seven age-sets. (One age-set is not named until all members of the previous age-set has died. The

4. The Ogiek's ancestral territory is extensive, encompassing great swathes of the Mau Forest. In some communities, Ogiek people have been displaced from their ancestral land since as early as British colonisation. As a result, there is no accurate Government record of the boundaries of Ogiek ancestral land. The following however provides a list, in rough terms, of Ogiek ancestral territory:

    a. All of Eastern Mau was occupied by three sub-tribes and 25 clans of Ogiek.[11] The Environmental Research Mapping Service (ERMIS) has mapped Ogiek ancestral land in Eastern Mau. ERMIS explains:

        "The three sub-tribes occupy different parts of the Eastern Mau. These are:

        (i) The Chepkurerek (also called Tyepkwereg) sub-tribe occupied the forests southeast of the Eastern Mau Forest towards Lake Nakuru and southwards, in the areas of Sururu Forest, Likia (pronounced Likyo) Forest, Logoman Forest, and Teret (Tiritap Susweeg) Forest. The ancestral land of the Ogiek of Sururu

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youngest member of the current living age-set is in his late 60s). See Affidavit of A. Tulwet Lemisi, at Annex 21, Affidavit of Naomi Cherotich Tabelbech at Annex 44, noting "[m]y mother was called Tapkutuny and was born in Tinderet; my grandmother was called Kibula and was born in Sorget; my great grandfather was Kap Olongera and he was also born in Sorget".

[10] Sururu, for example, is named after an Ogiek chief (see Affidavit of Jimmy Patiat Seina at Annex 37). Chemususu in Koibatek is named after the great grandfather of Ogiek Jonathan K.K. Tarigo (see Affidavit of Jonathan K.K. Tarigo at Annex 46). The word Koibatek derives from the Ogiek word for bamboo, which Ogiek used to build their distinctive impermanent shelters (see Affidavit of Joseph Cheruiyot Sigowo at Annex 38).

[11] Julius Muchemi and Albrecht Ehrensperger, *Ogiek People Ancestral Territories Atlas*: *Safeguarding territories, Cultures and Natural Resources of Ogiek Indigenous People in the Eastern Mau Forest, Kenya* (ERMIS Africa and CDE 2009) at Annex 86. *See also* Affidavit of Patrick Kuresoi at Annex 16.

(Eastern Mau) stretched from Samogik River to Nenderit River;[12]

(ii) The Morisionig sub-tribe occupied the forest areas of Nessuit (Nesoit), Elburgon Forest (Lembegaa), Marioshoni (Moreseey soogot) Forest, and parts of the Keringet Forest;

(iii) The Kipchorng'wonik sub-tribe occupied forest areas in the west and north of the Eastern Mau Forest: Molo Forest, Baraget Forest, and parts of Keringet Forest;[13]

b. All of Northern and southern parts of Narok, in what is now known as Maasai Mau was ancestral Ogiek territory;[14] and was occupied by 5 sub-tribes as follows:

(i) Kaplelach (Mbogishi, Olopirkit areas),

(ii) Kipchorngwonik[15] (Sogoo, Nkaroni, Nkareta and Kuto areas)

(iii) Omotik (Lemek, Keneti and parts of Trans Mara forest)

(iv) Kapsopulek (Sasumuani areas)

c. In South Western and Western Mau, the Ogiek op Oom sub tribe are predominant and are known to have long history with the *Kipsigis*:

(i) Various clans of the Ogiek op oom reside in different villages in Western Mau. These are *Kipchesang, Kipkiswaek, Kapboboek, Mososoek, Kechoek, Kipaek, and Kapsugondek* clans who occupied what is now the Kiptororo/Saino area;[16]

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[12] See Affidavit of Jimmy Patiat Seina, *supra* note 10.

[13] Muchemi and Ehrensperger, *supra* note 11. *See also* Affidavit of Patrick Kuresoi, *supra* note 11.

[14] Affidavit of A. Tulwet Lemisi, *supra* note 9; see further Map of Settled Area at Uasin Gishu, at Annex 92

[15] There is no established relationship between the Kipchornwonik, but are reported to be sharing the same history and ancestors.

[16] Affidavit of Elijah Kiptanui Tuei at Annex 47

(ii) In South Western Mau, where a bigger percentage of Ogiek op Oom resides, there are nine clans in areas now known as Kabongoi, Tinet and Naarok;

d. The Ogiek currently living in Serengonik occupied Kipsangany forest (Northern Tindiret);[17]

e. The Ogiek clans currently living in Sorget occupied vast stretches of land throughout the region: the Kibartore clan occupied the land from what is now the boundary of Uasin Gishu District to Koibatek; the Kapgegeyek clan occupied the land from Sorget to Malaget and Tendeno; and the Kapkoiro and Kapchepyokwa clans occupied an area around Mt Londiani;[18]

f. In Koibatek area, the Koibateek sub tribe, with three main clans – including Kaptarigo clan, who alone occupied the three hills Narrasha, Chemususu, and Chemorogok. Another clan, Kapmatingo, also occupied land in Eldama Ravine and Maji Mazuri [19]

5. Even beyond the question of when the Ogiek first began occupying the Mau Forest, the history and identity of the Ogiek is a complex and complicated one.[20] A proper understanding of the Ogiek has been hampered by the fact that for a long period they were, and in some cases still are,[21] referred to as Dorobo.[22]

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[17] Affidavit of Samuel Kipkorir Sungura at Annex 43, see further sketch map of Kipkurerek Dorobo Coiunty, circa 1950s, at Annex 90

[18] The Kibartore clan (now living in Sorget) occupied land stretching from what is now the boundary of Uasin Gishu District to Koibatek. The Kapgegeyek clan (also of Sorget) occupied the land from Sorget to Malaget to Tano. The Kapkoiro and Kapchepyokwa clans of Sorget occupied an area around Mt Londiani. See Affidavit of Kiplangat A Samoe Chebose at Annex 3

[19] Affidavit of Jonathan K.K. Tarigo, *supra* note 10.

[20] See also Corinne A Kratz, *supra* note 3, at 357. The earliest published account of the Ogiek was by a member of the Church Missionary Society, Johann Krapf, in 1854 (see Evans, *supra* note 3, at 40).

[21] A good example are *Saleita* Sub group of Ogiek living in Enoosupukia near Naivasha. They prefer being referred as Dorobo. They have embraced the Maasai way of living owing to domination and assimilation.

This is a Maasai term widely accepted as deriving from 'Il-Torobo' which was applied to those who did not own cattle and, as such, served as a term of contempt given the importance of cattle in Maasai culture.[23] The term Dorobo was therefore capable of covering others who did not own cattle yet who did not identify as Ogiek.[24] Additionally, the ability of the Ogiek to adapt to the culture of dominant neighbours when required[25] has meant that their distinctiveness as a separate people has, at times, been overlooked.[26] Furthermore, the lack of centralised political structure within the Ogiek and the complete separateness of groups which may be only a few kilometres apart has added to misunderstandings about them. Finally, the geographical spread of the Ogiek, as well as their relative invisibility and their very vulnerability and marginalisation meant that researchers were less inclined to study them and, where they have, to only study particular local groups. What follows is an attempt to provide, as far as possible, a loyal overview of the Ogiek based on the work of researchers and the statements of the Ogiek themselves.

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[22] See Evans, *supra* note 3, at 21, noting the almost fifty variations of Dorobo related names; see also Film Evidence taken from Ogiek communities and Transcript, at Annex 48

[23] See Corinne A Kratz, *supra* note 20, at 358.

[24] See Roderic Blackburn, *Okiek Resource Tenure and Territoriality as a Mechanism for social Control and Allocation of Resources* (SUGIA 1986) 79, at note 1, who describes how those who use the term Dorobo have used it "to refer to different peoples at different times." See also John A Distefano, *supra* note 2 at 44

[25] Such adaption and accommodation has been described as part of Ogiek self-identity, see Corinne A Kratz, *supra* note 20, at 359

[26] For example, for a period they were referred to as Nandi-speaking (see Evans, *supra* note 3, at 28. See also Roderic Blackburn, 'In the Land of Milk and Honey' in Eleanor Leacock and Richard Lee (eds), *Politics and History in Band Societies*, (Cambridge University Press 1982) 283-305, 286 which refers to how "most local groups have taken on superficial charecteristics of their neighbouring horticultural and pastoral tribes, leading many early writers to the belief that the Okiek were offshoots of these larger tribes."

B. Ogiek Identity and Traditional Lifestyle[27]

6. The Ogiek (sometimes written as Okiek or Akiek)[28] are a distinct minority ethnic group. They themselves have a sense of their own uniqueness from their neighbours, and their oneness with other Ogiek and such a separateness is recognised by other tribes.[29] Specifically in relation to the Ogiek of the Mau it has been said by one researcher, John Distefano, that while "*[the Ogiek] certainly interacted, and continue to interact, with their more numerous neighbours [they] generally remained culturally and economically distinct*."[30] Distefano further records that there is, "*a common recognition, both by themselves and by others, that they are the original population of most parts of Kenya*."[31]

   "*[They] share many cultural features among themselves. Their forms of mabwaita structure, honey lore and exploits, and artefacts, including hives, elephant spears, forest capes, social honey adzes, honey baskets and hut and pottery types are all similar. Their verbal lore and songs have this same similarity, even where there has been non-Okiek influence. Maasai or Kipsigis cultural influences are recognisable, though less so in the case of Kipsigis, but underlying Okiek similarities are culturally stronger when Okiek groups are compared, regardless of their individual neighbouring interactions*."[32]

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[27] This section describes life for the majority of Ogiek up until the changes that began and have continued from the 1930s onwards, as further addressed in paras 57-82 below, Section C "Changing Lifestyle." The past tense is used on occasion not because practices have changed in nature, but because the Ogiek no longer have access to the forest.

[28] Evans, *supra* note 3, at 23 for the full list of ten "Akiek" related names.

[29] *Ibid.* At 15.

[30] John A Distefano, *supra* note 2 at 53

[31] *Ibid*

[32] *Ibid*. See also Roderic Blackburn, *supra* note 24, who refers to Ogiek "shar[ing] a certain number of distinctive and recognisable characteristics of culture, social organisation and technology associated with their foraging way of life".

7. Distefano concludes that the Ogiek "*while sometimes adopting a language and certain cultural items or practices from a variety of neighbours through time, have maintained their core cultural values and economic patterns*".[33]

Hunting

8. While looked down upon by cattle owning neighbours and by the British colonialists as being backwards or inferior,[34] the Ogiek's knowledge of the forest meant that their traditional life was far from one of mere survival. The forests provided them with "*a relatively plentiful, constant and stationary food supply*" [35] of game and honey. They are also best described as people with a unique linguistic facility that enables them to adopt their neighbour's language and thus get 'absorbed' easily and become victims of assimilation by their neighbours. Ogiek are also happy in situations of isolation in the forest where birds, trees and wild animals provide them with the "*psychological comfort as well as good neighbourhood"* that one may seek from becoming a member of larger communities. Ogiek are also known to have a peaceful coexistence with nature.[36] This is evidenced by the variety of game which they hunted: antelopes (seven types, including the common duiker), monkeys (four types, including the colobus), wart-hog or wild pig, giant pig as well as leopards, lions, buffalos and elephants.[37] It is also evidenced by the limited development of storage methods that the Ogiek developed for storing meat: the abundance of game meant that

[33] *Ibid*, Distefano

[34] See evidence given by C H. Adams Acting as Provincial Commissioner Rift Valley Province before The Carter Commission, at Annex 77, at para 1901 noting "[b]efore British occupation ... they lived from hand to mouth by hunting and beekeeping. There is no reason in modern times for this precarious mode of existence ...".

[35] Roderic Blackburn, *supra* note 24; see also Film Evidence taken from Ogiek communities and Transcript, *supra* note 22

[36] Guy Yeoman, 'High Altitude Indigenous forest conservation in relation to the Dorobo' (Swara Magazine 1978).

[37] For a full list see G W.B. Huntingford, 'The Economic Life of the Dorobo' [1955] Anthropos 602 – 634, at 605

there was no need to kill more than was immediately required.[38] According to one commentator:

"*The Dorobo/Akiek possessed a firm sense of security about their way of life. This was demonstrated by the lack of development of effective storage methods, the absence of saving and the non-investment for the future. ... The Dorobo/Akiek were not tied down to one slowly ripening harvest which could be destroyed by an invasion of pests or to a herd of animals which could all die during an epidemic. Although feeling secure, the Dorobo/Akiek hunter did not over-exploit his forest, but practiced resource underutilization. Because sharing was strongly emphasised, not only was accumulation of a surplus kept to a minimal, but food was a constant*."[39]

9. Animals would be hunted using either weapons (mainly the bow and arrow or spear) or by traps and with the assistance of the Ogiek's all important dogs.[40] As well as eating the meat of the killed animals, they would use their skins for clothes,[41] rope[42] and bags (e.g. for carrying honey)[43] and pig-gut and tendons would be used as a thread for sewing and for bow strings.[44] The Ogiek are also said to be self-sufficient in forest products except for small amounts of iron for making into arrowheads, spears and knives. Their skills and expertise lie in marksmanship with their powerful bows and arrows, management and training of hunting dogs; ability to recognise and identify flora and fauna very quickly; good mapping skills and knowledge of the forest, and acute eyesight with good tracking skills.

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[38] Evans, *supra* note 3, at 93.

[39] *Ibid.* at *95*.

[40] *Ibid.* at 50-70.

[41] *Ibid.* at 34.

[42] Affidavit of Linah Taploson at Annex 45; Affidavit of Samuel Kipkorir Sungura, *supra* note 17

[43] Affidavit of Samuel Kipkorir Sungura, *supra* note 17 noting that "*Motoget* – Honey bag. This is a large size bag. The small one, used when climbing trees, is called *logosta*".

[44] G W.B. Huntingford, *supra* note 37 at 610 – 611

10. The Ogiek used animal horns to make cups, or *lalet*, for traditional brews or alcohol.[45] There were particular rules as to how the meat was shared out amongst family members[46] and who received which pieces.[47] While the meat was usually shared out and consumed straight away, some Ogiek engaged in smoking and storing it.

11. Traditionally, and especially before more established houses were built, the family would follow the game such that after a large kill they would move to where the animal had been slain, rather than bringing it back to where they were then living.[48]

12. Males and females had specialised roles in hunting. Fathers and sons killed large animals, while daughters and mothers carried the meat home.[49] Amongst certain groups, women and girls were tasked with hunting the tree hyrax, which they knocked out of trees using spears,[50] and birds, which they first sedated with fermented porridge.[51]

13. This heavy reliance on meat and the limited amount of wild vegetables or fruits in the Ogiek diet is reflective both of their environment (a stable, moist climate with

[45] Affidavit of Patrick Kuresoi, *supra* note 11; Affidavit of Samuel Kipkorir Sungura *supra* note 17

[46] G W.B. Huntingford, *supra* note 37 at 607 – 608

[47] Evans, *supra* note 3, at 93. *See also* Affidavit of Kiplangat A Samoe Chebose, *supra* note 18 (the Ogiek distributed small animals like hyrax and antelope to the elderly and larger game—with tougher meat—to younger Ogiek).

[48] Affidavit of Joseph Cheruiyot Sigowo, *supra* note 10.

[49] Affidavit of Seli Chemeli Koech at Annex 14

[50] Affidavit of Naomi Cherotich Tabelbech, *supra* note 9.

[51] *Ibid.* noting, "[t]here is a traditional brew called busa. To make busa you make a porridge, save the residue (called mesigik) and get a fine liquid. It is then fermented. We would put busa in the fields where the birds were, and the birds would drink it become drunk. Then we could catch the birds with our hands."

an abundant supply of game the year round) as well as serving to make the Ogiek unusual in comparison to other hunter-gatherers.[52]

14. British colonisers recognised the Ogiek's hunting skills and employed them as farm guards to protect livestock from wild animals.[53]

Honey

15. As well as game, the forest served as an important source of honey. Whilst honey made up a much smaller percentage of their diet compared to meat, given its additional social and ritual values, it has been said that "*it is honey which primarily motivates Okiek use of the forests*"[54] and that "*[honey] is semi-sacred and has a high ritual value*".[55] Hives were, and still are, used to measure a person's wealth – the more hives one had, the richer one was.[56]

16. Honey was eaten raw (particularly by children) and honey-mead/honey beer ("rotik") was drunk (only by men).[57] In addition, honey was used for medicinal purposes, spiritual purposes (e.g. honey would be mixed with water and sprinkled in the air while chanting prayers and blessings), ceremonies (e.g it formed part of the bride price and was the payment for the circumciser), and was

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[52] Roderic Blackburn, *supra* note 26 at 289. See also, Distefano, *supra* note 2 at 50

[53] See Affidavit of Jimmy Patiat Seina, *supra* note 10, noting that "[t]he British recognised we were sharp shooters and could shoot quickly-moving animals". "So they employed our fathers and grandfathers as farm guards. We were skilled with bows and arrows, but the British gave us guns." See also Affidavit of Daniel Kobei at Annex 13.

[54] Roderic Blackburn *supra* note 26 at 290

[55] G W.B. Huntingford, *supra* note 37 at 614

[56] Evans, *supra* note 3, at 110; see also Film Evidence taken from Ogiek communities and Transcript, *supra* note 22

[57] Affidavit of Patrick Kuresoi, *supra* note 11; and Affidavit of Daniel Leshao, at Annex 23. Traditional beer is called *maratina*. In Ogiek "*rotik opkomeng"* means the traditional liquor made from honey.

traded with non-Ogiek, with up to one third of the annual crop of honey being traded.[58]

17. Ogiek used logs from fallen trees, such as the *aonet* tree, to create the bodies of hives. Using an axe called *kesienjot*, Ogiek hollowed tree logs. They then covered logs with tree bark and hung the finished hives in trees.[59]

18. To harvest honey, men scaled trees using bamboo or twine ladders,[60] or they pulled hives down from the trees using animal skin ropes.[61] They sedated the bees in their hives using smoke.[62] Embers for smoking were stored in a ball of *kurongurik* (lichen mixed with Spanish moss).[63] Men collected honey in small honey bags (*motoget*) and transferred them to large bags, which women carried back home.[64] The bags were made of animal skin and were of varying sizes, containing specific amounts of honey.[65]

19. As well as wild honey, which was found in hollow trees and holes in rocks, the Ogiek would gather honey from honey barrels that they themselves had made and placed,[66] so it could be stored.

20. Each family also had its own granary or store called a *kesengut* (form of a large hive, about six times larger), which was kept in a secret, hidden place; a protected area - sometimes in a cave or in very thick bush. After harvesting plenty of honey, they would be stored to cater for the family during dry season. If

[58] Corinne A Kratz, *supra* note 20 at 361

[59] Affidavit of Elijah Kiptanui Tuei, *supra* note 16

[60] Affidavit of A. Tulwet Lemisi, *supra* note 9.

[61] Affidavit of Patrick Kuresoi, *supra* note 11.

[62] Affidavit of A. Tulwet Lemisi, *supra* note 9.

[63] Affidavit of James Patiat Seina, *supra* note 10

[64] Affidavit of Naomi Cherotich Tabelbech, *supra* note 9.

[65] Affidavit of Linah Taploson, *supra* note 42

[66] G W.B. Huntingford, , *supra* note 37 at 614 – 619

they migrated to another area, they would leave the *kesengut* (plural *kesunguiek)* there and return to find the food.[67]

21. The *kesengut* held dried meat, herbs and wild fruits, millet and sorghum, as well as honey, and was designed to sustain the family through times of scarcity.[68] The *kesengut* was put in a cave or another safe place where it was difficult for others to find. As one Ogiek elder from Nessuit described:

"*Even if the Government now asks where is the Ogiek's title to our forest land, I know the title because I know my forest. Our* kesengusiek *are the titles to the forest. Even an elephant cannot destroy the* kesengut *once the Ogiek have built it."*[69]

22. The *kesengut* also was used to store food that young hunters could leave behind for the elderly during hunting expedition[70].

23. Traditionally, the Ogiek would migrate through the different types of forests along the length of their lineage territories according to the honey seasons.[71] Ogiek migrated in family groups, but not generally in larger groups.[72]

Shelter

24. Given that the Ogiek would move frequently through the forest following the hunt and also the honey harvest, their shelters were temporary in nature.[73] Women

[67] Affidavit of Patrick Kuresoi, *supra* note 11. *See also* Affidavit of A. Tulwet Lemisi, *supra* note 9.

[68] Affidavit of Kiprono Arap Chuma Siondoi at Annex 40

[69] Affidavit of John Sitienei at Annex 41

[70] Affidavit of Kiplangat A Samoe Chebose, *supra* note 18

[71] Affidavit of Patrick Kuresoi, *supra* note 11.

[72] Affidavit of Kiprono Arap Chuma Siondoi, *supra* note 68

[73] See Affidavit of Jimmy Patiat Seina, *supra* note 10 noting that, "[w]hen we were very young, we lived in bamboo houses made from curved bamboo trees. The roofs of the houses were made of the bark of bamboo (telek). These are traditional Ogiek houses. They

were responsible for building shelters.[74] Usually shelters would consist of a frame of bamboo poles bent over to form a dome and covered with animal skins or leaves or bamboo sheaths.[75] Bamboo grows and multiplies rapidly, so the Ogiek did not damage the forest by cutting bamboo to make their shelter.[76] Sometimes the shelter would simply consist of the cover provided by a particularly compact overhanging tree.[77]

Traditional medicines and other traditional uses for plants

25. Ogiek learned the uses for herbs and plants from their elders.[78] Herbs used to make traditional medicine included: *puinda (Engleromyces goetzei Henn)*, which cleanses the stomach; *simeito (Cucumis ficifolius)*, which treats malaria; *sitotik (Senna didymobotrya)*, which deworms; *korabariet (Rapanea melanophloeos)*, whose berries cleanse the stomach and deworm;[79] *cherireit (Momordica foetida Schumach)*, which stops bleeding on cuts; *olonyilit*, which energises the body and strengthens the joints;[80] *kapukeriet*, which treats the common cold; *chepindorwet (toddalia asiatica),* whose roots are used to treat chest problems and coughs;[81] and olive, which treats malaria.[82]

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were temporary because we had to move so often." *See also* Affidavit of Seli Chemeli Koech *supra* note 49, noting that, "[b]ack then we didn't have permanent houses to leave. In Ogiek tradition you don't build permanent houses. You build temporary houses wherever you are in the bush.")

[74] Affidavit of A. Tulwet Lemisi, *supra* note 9.

[75] Affidavit of Seli Chemeli Koech, *supra* note 49

[76] Affidavit of A. Tulwet Lemisi, *supra* note 9; Affidavit of Joseph Cheruiyot Sigowo, *supra* note 10.

[77] Affidavit of Seli Chemeli Koech, *supra* note 49

[78] Affidavit of Elijah Kiptanui Tuei, *supra* note 16

[79] See photo at Annex 49

[80] Affidavit of Thomas Museiyie, at Annex 28

[81] See photo at Annex 50

[82] Affidavit of Elijah Kiptanui Tuei, *supra* note 16; see also the Ogiek People Ancestral Territories Atlas, *supra* note 11, at pages 19-20

26. Ogiek used plants for many other traditional purposes. *Saptet (juniperus procera)*[83] was used in circumcision ceremonies. *Silibwet (dombeya spp.)* produced nectar for honey and its vine was used to make ropes and twine.[84] *Sitotuwet* created a forest canopy, protecting shade-loving plants and attracting rain. *Aonet* was used to make hives.[85] The *calabash* plant, a type of gourd, was used to store liquid. Ogiek would wrap the *calabash* with animal skin and decorate the *calabash* with beads.[86]

27. *Nukiat (Dovyalis macrocalyx)* was an edible fruit.[87] Women and girls collected fruits from this tree called *nuguk* and black berries called *sanangek*, which they mashed with honey in a tube of bamboo to produce jam that was fed to children.[88]

Cultural rituals and ceremonies

28. The forest was much more than just a source of food and shelter to the Ogiek: "*The forest areas where Okiek live and their way of conceptualizing and inhabiting that space strike one of the deepest chords in the Okiek sense of themselves. The forest and the life of the forest run through Okiek life symbolically, ceremonially and economically*."[89]

29. Circumcision was an initiation process for adolescent boys and girls. Circumcision involved multiple ceremonies and training initiates for adulthood. The process lasted from six months to a year.[90]

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[83] See photo at Annex 50

[84] See photo at Annex 51

[85] Affidavit of Elijah Kiptanui Tuei, supra note 16; see also photo at Annex 52

[86] Affidavit of Linah Taploson, *supra* note 42

[87] *Ibid*, see also photo at Annex 53

[88] Affidavit of Naomi Cherotich Tabelbech, *supra* note 9

[89] Corinne A Kratz, *supra* note 20 360, which refers to the Ogiek's "demonstrable emotional attachment to the forest". See also Roderic Blackburn, *supra* note 24 at 64

[90] Affidavit of John Arusei at Annex 1

30. In one circumcision ceremony, a holy person (usually an old man) blessed the new initiates by drinking traditional liquor, or beer, made from honey, from a gourd called a *komto*. He then blew the liquid out over the initiates. In another circumcision ceremony, the branch of a small olive tree was cut and stuck into the ground.

31. Initiates' parents wore a special rope made of the *sinendet* (*Periploca linearifolia*) vine to indicate that their child was an initiate.[91] Initiates' ears were ceremonially pierced and their lower incisors removed.[92]

32. Water was a source of symbolic significance to the Ogiek. During the circumcision ceremony, initiates went to the river to bathe themselves.[93]

33. In traditional Ogiek weddings, the groom and his family proposed marriage by bringing honey to the bride and her family. The bride's family then created a list of requests as a bride price (such as liquor, bags of honey, and beehives). Finally, the groom's family presented clothing made of hyrax skin for his parents-in-law.[94]

34. At the wedding, the bride wore a long rope necklace made of animal skin to symbolise her transition to her husband's clan. She also wore a crown made of *seretiot* grass (*Pennisetum clandestinum*) and beads, symbolising the binding agreement of marriage.[95]

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[91] Affidavit of Linah Taploson , *supra* note 42; Affidavit of Daniel Kobei, *supra* note 53 and Affidavit of Daniel Leshao, *supra* note 57

[92] Affidavit of Tapkili Chepkirui at Annex 5

[93] Affidavit of Jimmy Patiat Seina, *supra* note 10 noting that, circumcision is "changing from childhood to adulthood. So when you graduate and make this change, you wash yourself in the water. It's a symbol of washing away childhood and becoming an adult."

[94] Affidavit of Linah Taploson, *supra* note 42. See further Muchemi and Ehrensperger, *supra* note 11, at 26 – 28.

[95] Affidavit of Jane Bwaley at Annex 2

35. During the marriage ceremony, the bride and groom were escorted by small children, signifying that the couple would be blessed with offspring of their own.[96] The bride's parents blessed the bride and groom by smearing their faces with a special jelly, *alagulet,* made from animal fat. This symbolised the unity of the two persons.[97] The parents then placed a piece of grass on the foreheads of the bride and groom, signifying life. A holy person blew liquor from the *komto* onto the couple. As the couple departed from the ceremony, the wedding guests feasted on honey. [98]

Crafts

36. Ogiek women specialised in specific skills that they learned from their mothers. Some girls trained in the art of clothing-making, while others engaged in honey-bag production, basket-weaving or pottery-making. [99] Old women were experts in beadwork for making laces, wristlets and other decorative material worn by women.

37. Ogiek women made clothing out of the skin of wild animals. After collecting meat from animals killed for food, women cleaned, stretched and dried the animal skin.[100] They sewed skins using needles made of thorns and threads made of animal tendons.[101]

38. *Kipowet* was apparel for men to wear, made of antelope hide. *Muito* was a kind of mattress for sleeping on made out of hide. *Kutwet* was a hat made of black monkey fur, worn for special occasions such as a promotion related to leadership. *Kesulsuliet* another hat made of white monkey fur, for elders to wear

[96] Affidavit of Linah Taploson, *supra* note 42

[97] Affidavit of Jane Bwaley, *supra* note 95

[98] Affidavit of Linah Taploson, *supra* note 42

[99] Affidavit of Naomi Cherotich Tabelbech, *supra* note 9.

[100] Affidavit of Elijah Kiptanui Tuei, *supra* note 16

[101] Affidavit of Grace Chepkemoi Lemisi at Annex 19

during other ceremonies such as circumcision.[102] Ogiek used the skin of the hyrax, or *Agurietab nderit*, and the skin of a monkey, or *roiginok,* to make a piece of clothing that served as a shirt, blanket, and baby sling. [103]

39. Other women made woven bowls such as the *kerebet*.[104] Each Ogiek individual possessed his or her own *kerebet*. Children had small bowls and adults had large bowls.[105] In some areas, Ogiek exchanged *kerebet* with non-Ogiek for millet.[106]

40. Ogiek women produced high quality pottery (*teret*), built to withstand the high temperatures required to cook tough wild meat. The teret could also be used to store honey or drinking water.[107] Women moulded the pots from a hard clay and decorated the clay using the imprints of twigs. They then baked the pots by setting fire to wood placed inside a moulded clay.[108]

Personality

41. The forest surroundings have also been attributed with contributing to particular characteristics of Ogiek including shyness; seriousness of outlook; nearness to nature as shown by their animal and weather sense; and honesty.[109] As succinctly stated by Corinne Kratz:

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[102] Affidavit of Samuel Kipkorir Sungura, *supra* note 17

[103] Affidavit of Elijah Kiptanui Tuei, *supra* note 16

[104] Some Ogiek refer to this item as a *poleito*, see Affidavit of Grace Chepkemoi Lemisi, *supra* note 101

[105] Affidavit of Samuel Kipkorir Sungura, *supra* note 17

[106] Affidavit of Naomi Cherotich Tabelbech, *supra* note 9.

[107] Affidavit of Samuel Kipkorir Sungura, *supra* note 17; see also Affidavit of Daniel Kobei, *supra* note 53

[108] Affidavit of Naomi Cherotich Tabelbech, *supra* note 9.

[109] See G.W.B. Huntingford, 'The Social Organization of the Dorobo' [1942] African Studies 183 – 200*,* 184; G.W.B. Huntingford, 'The Political Organization of the Dorobo' [1954] 49 Anthropos 123 – 148 . Though see the criticism of the anthropological descriptions of the affect of the forest being too Eurocentric in Evans, *supra* note 3, at 49.

"*The forest areas where Okiek [sic] live and their way of conceptualizing and inhabiting that space strike one of the deepest chords in the Okiek [sic] sense of themselves. The forest and the life of the forest run through Okiek [sic] life symbolically, culturally and economically*."[110]

Territory

42. For the Ogiek, land ownership involved the right to the perpetual use of land-based resources.[111] Roderic Blackburn, who carried out a considerable amount of research on the Ogiek during the 1970s,[112] refers to the Ogiek having a "resource-tenure system" because their tenure system is primarily a means to allocate natural resources appurtenant to the land, such as honey.[113] Ownership as such was about "*exclusive rights to hunting, trapping, bee-keeping and food-gathering*"[114] within a discrete territory. Each clan would have an area of land whose boundaries were delimited by natural markers such as rivers, plant species or hills: hence each clan being associated with a particular feature.[115] The records of these boundaries are not found in writing but "*are held as*

[110] Corinne A Kratz, *supra* note 20 at 360

[111] See Roderic Blackburn, *supra* note 24 at 66

[112] Blackburn's research principally focussed on the Ogiek of Narok District.

[113] Roderic Blackburn, *supra* note 26 at 289

[114] Evans, *supra* note 3, at 90.

[115] See Affidavit of Patrick Kuresoi, *supra* note 11, notes that in Eastern Mau, clans were separated geographically by marker that clans could easily identify, such as ridges, valleys, or streams. See also Affidavit of Jimmy Patiat Seina, *supra* note 10 notes that the ancestral land of the Ogiek of Sururu stretched from Samogik River to Nenderit River; Affidavit of Jonathan K.K Tarigo, *supra* note 10.explains that the families of the Kiptiepsang clan divided over the hills Narrasha, Chemususu, and Chemorgong. Affidavit of A. Lemisi , *supra* note 9, notes that in North Narok, the Kipkwonyo clan's territory stretched from the river Amalo to the river Ol Posumoru; Affidavit of Elijah Kiptanui Tuei, *supra* note 16, describes that the Kiptyiromu clan's territory stretched from the river Amalo to the river Cheptuech. In Western Mau, clan's ranges were divided by rivers.

intangible cultural heritage by such means as oral traditions, songs, dances, ceremonies, folklore and riddles."[116]

43. The clan-based territories, called *keito* (sometimes known as *konoito*) in Ogiek, "*formed the basis of Ogiek occupation, ownership, utilisation, protection, conservation and governance of the forest as well as the resources therein*."[117] If clan members were hunting an animal which fled into the territory of another clan, then they could only follow the animal and kill it with the permission of that other clan.[118] The clan territories would run from highlands to lowlands across various eco-climatic zones taking in areas of more open forest, dense forest and naturally occurring open glades or moorland.[119] This delineation, ensuring a variety of forest types, would mean that flowering would not be taking place all at once but at different times in different forest types and Ogiek would move through the forest following the flowering to collect honey and maintain their hives.[120] Ogiek's "*strict rules about hunting across clan boundaries in the forest*," according to Kenya's Truth Justice and Reconciliation Commission ("TJRC"),

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[116] Muchemi and Ehrensperger, *supra* note 11, at 14.

[117] *Ibid.* See also See Roderic Blackburn, *supra* note 24 at 62, for a full description of the functioning of the resource tenure system as a means of social control by limiting access to honey.

[118] See Affidavit of Christopher Kipkones at Annex 10. See also Affidavit of Patrick Kuresoi, *supra* note 11, noting similarly that, "[w]e would leave the lowlands [and go to the forests] after harvesting the honey, knowing that no one would bother it. It was our territory, our clan land, and it will remain untouched." See also Film Evidence taken from Ogiek communities and Transcript, *supra* note 22

[119] Roderic Blackburn, *supra* note 26 at 289

[120] Affidavit of Patrick Kuresoi, *supra* note 11, inoting that "[b]ecause each clan's area was so large, its land was also very diverse . . . The diversity of climates was useful in food production. Food that was available in one part of the clan's territory during one season would not be available elsewhere. This was especially true with regard to honey. Plants flower in different seasons depending on climate. In lower elevations, flowers mature earlier. Deep in the forest, flowers mature later. This meant that our ancestors could sustain honey production throughout the year. We would harvest honey in areas like this—the low lands—earlier, and then move into the forest later in the year to continue harvesting fresh honey."

were "*designed to assure equitable resource allocation and to prevent conflict between clans*."[121]

44. It is the Ogiek's familiarity with the forest that has been credited with their endurance: other more dominant tribes which might have raided them avoided the unfamiliar, dark and vast wooded areas for fear of getting lost.[122] This familiarity with the forest was even used by Europeans who used the Ogiek as guides through the forests.[123]

Social organisation

45. The Ogiek are composed of local groups, or clans, each with its own name and area of residence e.g. Morisionik Ogiek or Tinet Ogiek.[124] Each local group is made up of patrilineally related lineages which constitute the main units of Ogiek social organisation.[125] These clans and families still exist today.[126] In contrast to their neighbouring communities, which had a hierarchical form of governance, the Ogiek had a fairly egalitarian society with no centralised leadership. In the absence of such formal positions of authority like headmen or chiefs, or even formal councils, the Ogiek maintain social control through the influence of informal meetings of lineage members, the age-set system, and the internalised

[121] Kenyan Truth Justice and Reconciliation Commission (TJRC), 'Final Report' (23 May 2013) (hereinafter the 'TJRC Report') at Annex 84, Vol IICat 225.

[122] Evans, *supra* note 3, at 48; Roderic Blackburn, *supra* note 26 at 293, 295

[123] Evans, *supra* note 3, at 49. See also, Affidavit of John Arusei, *supra* note 90, noting that "[t]he Ogiek communities living near the sawmills are the ones who showed the Europeans where to get trees in the forest, because they knew the trees and forest very well. They knew the best ones to use for the railway crosses, like cedar".

[124] Roderic Blackburn*, supra* note 26 at 287.

[125] *Ibid*, at 288

[126] See Affidavit of Barno Christopher Kipsang, para 3, at Annex 12. See also Affidavit of Jonathan K.K. Tarigo, *supra* note 10 outlining that in 2004 the Koibatek Ogiek compiled a list of ten clans and 760 families in response to the Provisional Commissioner's request for a list of clans.

norms of proper social conduct.[127] The Ogiek made decisions by coming together as a group and discussing major issues. Multiple clans sometimes came together to hold discussions if the need arose.[128] Land was managed collectively by the clan and its norms governed access, use and limited any disposition.[129]

46. As well as the taboos on killing an animal that has entered into the territory of another clan, marriage within the same clan was also prohibited.[130]

47. While local groups may not be geographically that far from each other, the nature of the forest (i.e. enclosed) and its effective delineation between clans such that there was limited need to go outside of one's territory, meant that local groups existed in relative isolation from one another.

48. The importance of the local group in terms of both identity but also for purposes of demarcating land and natural resources is well illustrated by the response to a question posed during the taking of evidence by the 1930s Kenya Land Commission (the "Carter Commission")[131] as to why the different Ogiek clans could not simply come together and be mixed:

"*The Tindoret, Kilombi and Arama Dorobo [sic] are all one in the sense that there is no trouble between them but I want my own ancestral area because my honey barrels are there*."[132]

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[127] For example, girls do not shake hands with elder men but rather present their heads, which the elder men touch, see Affidavit of Samuel Kipkorir Sungura , *supra* note 17

[128] Affidavit of Samson Kipkemboi Mutai at Annex 29

[129] John Kamau, *The Ogiek: The Ongoing Destruction of a Minority Tribe in Kenya* (2000) 12.

[130] Huntingford, *supra* note 109, at 190.

[131] O F. Watkins, 'Report of the Kenya Land Commission, September 1933', [1934] Vol. 33, No. 132 Journal of the Royal African Society, 207 – 216

[132] Evidence of Chepkurget Arab Matingo one of 32 representatives from Londiani giving evidence at Eldama Ravine, Rift Valley Province: Volume II of the Evidence to the Carter Commission, *supra* note 34 at para 1868.

In a separate move where the colonialist wanted to move the Ogiek to join the Kipsigis, Ogiek Chief from Morisionik sub tribe in Eastern Mau, Mr. Tiwas orop Njala told the Kenya Land Commission on 17th Oct. 1930 at Molo[133] that "*We are totally different from Lumbwa [referring to Kipsigis], their have their own land and we have our own. . . . we are not going to leave our land under any circumstance which is communally owned to anybody".* This shows that the Ogiek were not prepared to sacrifice their ancestral homes and would resist any attempt to separate them with their lands.

Language

49. The Ogiek speak a distinct language, Ogiek, which belongs to the Kalenjin linguistic group. Indeed, for much of their recorded history, they were thought to be Nandi-speaking, Nandi also being a Kalenjin language.[134] At the same time, the majority of them are bilingual with those in northern or western Mau also speaking Kipsigis or Nandi and those in southern and eastern Mau speaking Maasai.[135]

Religion

50. Ogiek traditionally practise a monotheistic religion closely tied to their environment. They have "a distinct belief in a god"[136], called "Asista"[137] or Torooret[138] which means both sun and god respectively[139] and view their god as omnipotent, omniscient, omnipresent, and creator of all.[140] The Ogiek would

[133] Evidence of Tiwas orop Njala, Ogiek Chief from Mariashoni testifying before the Kenya Land Commission, The Carter Commission, *supra* note 34, Volume II of the Evidences.

[134] Evans, *supra* note 3, at 28.

[135] See also Distefano, *supra* note 2 at 51

[136]G W.B. Huntingford, *supra* note 109, at 136

[137] Evans, *supra* note 3, at 35.

[138] Corinne A Kratz, *supra* note 20; see also Affidavit of Daniel Kobei, *supra* note 53

[139]G W.B. Huntingford, *supra* note 109 at 136

[140] Evans, *supra* note 3, at 35.

pray to Asista at the start of the day,[141] as well as when they went hunting or honey gathering to ensure the hunt or the harvest was good.

51. God can be approached through intermediaries, such as ancestors. Offended spirits of ancestors cause catastrophe to the living; Ogiek must practise "*various observances and ritual[s]"* to "*maintain the spiritual and material welfare*" of community and individual.[142] Ogiek traditionally pray each morning while facing the sun, requesting blessings from god or their ancestors. They offered "*libations of liquor, food, salt or tobacco*" to god.[143]

52. When Ogiek died, a religious ceremony was carefully observed to honour the dead and preserve the safety of the living. "*[D]uring the evening of the day on which [a man] dies his body is taken out by his sons*" and ceremonially laid "*on the edge of the forest about three hundred yards*" from the hut in which he died.[144] "*He was taken and placed under the tree far from where we lived and covered with the skin of an animal*," explains elder A. Tulwet Lemisi of Ol Pusimoru.[145] Ogiek smeared a special gel, made of animal fat, on the dead person's face and body, to purify the body and allow the deceased's spirit to pass to the next world: "*After we applied the gel to the dead person, the spirit would pass on. If we failed to do that, the spirit would come back to life*." [146] Ogiek did not disturb areas where the dead had been laid to rest, Lemisi explains. "*The places where people are buried are respected. You do not build a house there… You must not cut down a tree there - you will be cursed for cutting a tree there."*[147]

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[141] See Affidavit of Jane Bwaley, *supra* note 95 and Affidavit of Daniel Kobei, *supra* note 53

[142] G W.B. Huntingford, *supra* note 109 at 136

[143] Evans, *supra* note 3, at 35.

[144] G W.B. Huntingford, *supra* note 109 at 141

[145] Affidavit of A. Tulwet Lemisi, *supra* note 9.

[146] *Ibid.*

[147] *Ibid.*

53. When some Ogiek began attending missionary schools in the 1950s, they began converting to Christianity. A good number of Ogiek are now Christian, although some, particularly those age 60 and over, still believe in the old religion.[148]

Tribal interactions

54. Modes of social organisation and linguistic patterns vary among Ogiek groups, in large part due to the distinct histories of interactions each group has with its more dominant neighbours, Masai, Nandi, Kipsigis and Kikuyus. This has been described as giving rise to a number of expressions of "Okiek-ness".[149]

55. Relationships, notwithstanding the fact that as a whole the Maasai looked down on the Ogiek, were generally one of mutual respect and friendliness.[150] Indeed the Maasai were dependent on the Ogiek for honey for ceremonial purposes as well as hyrax, monkey capes, herbal medicines, buffalo skins, shields and occasional pots[151] for circumcision and for grazing land. Maasai would use the open forest areas during the dry season when there was limited grazing on the plains.

56. Those who have researched the Ogiek have noted how the Ogiek when interacting with other tribes (such as Maasai or Kipsigis) will use the language of that other tribe rather than vice versa. However, rather than being viewed as a matter of deference to more dominant tribes, it has been described as "*an expression of the breadth of Okiek abilities and repertoire ... Being Okiek, then, includes a sense of being mediator, code-switcher, interstitial ... it seems that the historical experience of their dispersion has added a particular dimension to*

[148] Affidavit of John Arusei, *supra* note 90; Affidavit of Jane Bwaley, *supra* note 95

[149] Corinne A Kratz, *supra* note 20 at 361

[150] G W.B. Huntingford, *supra* note 109 at 123; Corinne A Kratz, 'Ethnic interaction, economic diversification and language use: a report on research with Kaplelach and Kipchornwonek Okiek' [1986] 7 Sprache und Geschichte in Afrika, 189—226, 192

[151] Corinne A Kratz, *Ibid*, at 192

each group's identity and emphasised or developed an ease and flexibility in dealing with other cultures."[152]

C. Changing lifestyle

57. Ogiek society has never been static but has been one of gradual change as adjustments have been made in order to survive.[153] This includes the very migration that initially brought the Ogiek to the Mau Forest, but there have also been more gradual changes from interaction with neighbouring tribes.

58. During the twentieth century, more marked changes to lifestyle occurred largely as a result of forced evictions, the ban on hunting introduced by the British colonial government and the corresponding push for the Ogiek to modernise by owning cattle and commencing farming. It is also a result of continued marginalisation and discrimination by the Respondent Government.[154] Such changes however have not been uniform across the different parts of the Mau Forest. This lack of uniformity has taken place due to a range of factors, including some areas being subject to greater colonial incursion than others[155] and the extent and nature of contact with non-Ogiek neighbours.[156]

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[152] Corinne A Kratz, *supra* note 20 at 359

[153] Evans, *supra* note 3, at 12.

[154] See Film Evidence taken from Ogiek communities and Transcript, *supra* note 22; see also Affidavit of Daniel Kobei, *supra* note 53

[155] For example, Huntingford's research related to the Ogiek to the north of the Mau Forest in Tindiret where there were repeated evictions during the colonial administration, in contrast to Kratz's research which was to the south of the Mau Forest in Maasai Mau where there was little colonial incursion.

[156] Kratz, *supra* note 20 in her study of two particular Ogiek local groups explains in detail the different impacts of Maasai and Kipsigis interactions as well as the difference in the rates of changes despite the two groups living in close proximity. See also Affidavit of Samuel Kipkorir Sungura, *supra* note 17, noting that "[n]othing changed at independence at first. We still hunted and gathered honey in Kipsangany. But Kikuyus came and lived on boundaries of forest. So in process of roaming for hunting, we had contact with Kikuyu and that's how we learned cultivation".

59. The attempts to force a change of lifestyle on the Ogiek are well described in the 1933 Report of the Carter Commission, which records that:

"*The passing of the game and forest laws interfered with the primitive mode of life led by the Dorobo, and efforts have been made by the Administration with varying success to induce them to become useful members of native society. They have been encouraged to acquire stock and to cultivate*."[157]

60. The upshot of this is that, throughout the colonial period, the Ogiek[158] faced an institutional policy that failed to protect their traditional activities and sought to push them into lifestyles that they considered alien.[159]

61. The evidence to the same Commission of one particular Ogiot[160] puts the actions of the colonial government in a less benign light:

"[We] used to live on wild game and honey. Then the hunting of animals was forbidden by the government and we were told we could not put our honey barrels in the forest and we were told to get out of the forest .... [the Administration] is trying to do us out of our county by saying we are Maasai."[161]

62. The lack of uniformity in the changes are illustrated by the fact that Huntingford - who conducted his research between the 1920s and 1950s and who focussed

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[157] The Carter Commission papers, *supra* note 34, Part II-Chapter VIII, para 973 at p259

[158] See Roderic Blackburn, *supra* note 24 fn 1

[159] This is a theme reflected in modern-day interactions with indigenous groups. See Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission at its 28th Ordinary Session, 2005, 60 where the Working Group of Experts on Indigenous Populations/Communities concluded its Report by observing that "[g]overnments have tended to deal with the question of indigenous peoples through assimilation policies": Annex 81

[160] Singular term for Ogiek.

[161] Leratia Ole Turumet giving evidence at a meeting of Dorobo to to the Carter Commission, *supra* note 34, at Nakuru, Volume II, 1800.

on the Ogiek to the north of the Mau Forest in Tinderet - could refer to how "*the change from hunting to agriculture has taken place virtually between the years 1927 and 1938*."[162] By contrast, Kratz, focussing on the Ogiek to the south of the Mau Forest in Maasai Mau where the colonial incursion had been less marked, refers to how "*Okiek economic diversification began roughly between 1930s and the 1950s*."[163] Similarly, Blackburn (whose research focussed on the same district as Kratz) writing in the 1970s refers to how:

"*To my knowledge all Okiek groups continue to hunt animals and gather wild food, principally honey. In the last century (ie 1800s), especially within recent generations, most, if not all, Okiek have added some horticulture and/or animal husbandry to their subsistence base. Even the most pastoral or agricultural Okiek, however, continue to hunt actively and gather food*".[164]

63. Ogiek elders explain that they adopted cultivation and animal husbandry only to a limited extent, and did so only when they needed to supplement their increasingly restricted ability to hunt and gather. Elders interviewed in Sururu owned no cattle when they were growing up in the 1950s. They were permitted by the British to possess a small number of sheep, but their "main activity was hunting, making beehives, and collecting traditional medicine."[165] Elders from Ol Pusimoru, born in the 1930s and 1940s, did not have cattle growing up and adopted cattle farming in the 1970s only when deforestation made it difficult to hunt and gather.[166] Ogiek in Koibatek obtained cattle in the 1920s from the

[162] Huntingford, *supra* note 37 at 623. See also Huntingford, *supra* note 109, at 191: "The economic life of the Dorobo may be divided into two phases: (1) the old hunting existence which began to disappear about 1925 when the Government started seriously to restrict their forest life and (2) the present trapping-agricultural life in which cultivation is becoming of increasing importance."

[163] Corinne A Kratz, *supra* note 150 at 197

[164] Roderic Blackburn, *supra* note 26 at 288

[165] Affidavit of Jimmy Patiat Seina, *supra* note 10.

[166] See Affidavit of A. Tulwet Lemisi, *supra* note 9, noting "[w]hen we were growing up, we practiced our traditions of hunting and gathering. We did not keep cattle."

Tugen, but they used the cows only as a back-up source for meat.[167] Seli Chemeli Koech of Serengonik (originally Kipsangany sub-tribe from northern parts of Mau), born in 1960, recalls that life was "*all about honey and wild meat*" when she was a girl.[168] James Rana, born 1972 in Songi, Kiptunga forest, Eastern Mau, says that when he was growing up only three elders in his community owned cattle. The community practised hunting and gathering.[169]

64. However, what does seem apparent across the different local groups is that change was a gradual process and it was, to a considerable extent, more a question of taking on further practices to guarantee their survival rather than necessarily completely replacing old traditions:

"*Okiek initially incorporated new economic elements in ways that interfered minimally with their traditional subsistence base, in the case of both domestic animals*[170] *and crops. Later, as the new practices became established, Okiek economic diversification became somewhat more balanced, with more adjustments in traditional migration and work patterns*."[171]

65. In similar terms it has been said that the "Dorobo/Akiek", during the process of cultural change within Kenya in the twentieth century,

"did not physically retreat or become totally absorbed as other hunters and gatherers have done when they had experienced similar external pressures."[172]

[167] Affidavit of Joseph Cheruiyot Sigowo, *supra* note 10.

[168] Affidavit of Seli Chemeli Koech, *supra* note 49

[169] Affidavit of James Rana at Annex 33

[170] Originally domestic animals were not retained for their breeding purposes but to eat, *see* Corinne A Kratz, *supra* note 150 at 198

[171] *Ibid*, at 199

[172] *Ibid.*

66. In relation to the partial shift to pastoralism, Thomas Evans whose research sought to encompass all the Ogiek rather than those concentrated in specific locations, perceived the process as one that

"*resulted in changes that [were] not substitutive but additive. Hunting and honey gathering continued as economically and culturally important components of Dorobo/Akiek life along with the newer practices of cultivation and all that it implied*." [173]

67. As to what the changes in lifestyle have been, one of the main changes has been the marked decline in hunting, although honey gathering continues to be of importance. Those who have dared to keep honey barrels in the forest are in considerable demand as suppliers of honey beer for continued ritual purposes. Thus, for example, as recently as December 2006, an Indigenous Peoples Planning Framework adopted by the Kenya Government's Office of the President, Ministry of Water and Irrigation and Ministry of Environment and Natural Resources referred to the fact that at the time of writing:

"*Now that hunting is illegal, they only hunt with small traps around their garden farms resulting in some meat from monkeys and other smaller game ... Honey gathering is still a key activity and carried out the traditional way, with few Ogiek using modern bee-hives and/or processing the honey for regional markets*."[174]

68. Ogiek in Ngongogeri (Eastern Mau) explain that because they are forbidden to hunt, they have had to turn to animal husbandry and cultivation. "*We can't hunt—we will be arrested,*" they explain. "*So the Ogiek now have changed their lifestyle. We have changed to farming and cattle-rearing*."[175] Julius Kiprono

[173] Evans, *supra* note 3, at 191, also notes that "[t]he abandoning of an original culture and language and adoption of local or new ones were not unusual"

[174] Republic of Kenya, 'Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project' (Final Report 2006) 20

[175] Affidavit of Patrick Kuresoi, *supra* note 11.

Munyereri from Ol Pusimoru (North Narok) echoes this sentiment: "*There are reasons that we have increasingly turned to cultivation. In the 2005 Wildlife Act, Kenya set rules saying that if you are found hunting wild animals you'll be arrested. So we know if we hunt we'll be arrested, which makes us afraid. What used to be our right is now a crime*."[176]

69. As the hunting has decreased, increasing amounts of livestock (cattle, goats and sheep) were acquired, as well as increased engagement in subsistence farming, particularly the cultivation of maize. Over time, these changes led increasingly to a more sedentary lifestyle with permanent bases being established from which the Ogiek would go out and subsequently return to in carrying out their honey gathering. In turn, their accommodation took on more permanent forms and followed the mud and thatch style of neighbours. At the same time, the arrival of missionaries gradually led many Ogiek to convert to Christianity and with this they began to bury their dead and church weddings would be undertaken. Despite these changes, the clan identity remains strong and the taboo on inter-marriage within the clan continues to be adhered to.

70. Forced evictions in the colonial era restricted the Ogiek's access to traditional hunting grounds and forests, leading them to adopt cattle farming and cultivation to provide back-up food sources.[177] In many areas, the British prohibited the Ogiek from hunting but permitted them to grow crops and tend to British-planted exotic trees as part of the shamba system.[178] The Ogiek from Sorget (Londiani / Tindiret) for example, were evicted from their ancestral territory by the British in 1936. When they returned in 1938, the British assembled them into a small village called Mololo, giving them small allotments for farming and allowing them to keep a small number of livestock. However, hunting and honey collection in

[176] Affidavit of Julius Kiprono Munyereri at Annex 27

[177] Affidavit of Seli Chemeli Koech, *supra* note 49, noting that "[h]ere in Serengonik, the forest wasn't so intact, so it was hard to get wild game and hives".

[178] The shamba system is explained further below at para 163

the forest was forbidden, so the Ogiek practised their traditional livelihood secretly, continuing to hunt and collect honey, "*since this was our way of life*."[179]

71. The British evicted the Ogiek from Sorget again in 1956; when some Ogiek returned, they had little choice but to farm and tend to British trees on shambas.[180]

72. Forced evictions in the post-independence era has likewise restricted the Ogiek's access to traditional hunting grounds and forest. The 2006 eviction of Ogiek from Kipkurere, for example, resulted in the loss of hundreds of hives.[181] The Ogiek have increasingly had to turn to animal husbandry and cultivation. An elder from Ol Pusimoru explains, "*We would care for our children with [our traditional honey] stores. But [due to evictions] these* keisungut *are now in other people's land—the land has been divided. So it is very difficult for us to continue our traditional practices, because the land has been demarcated and someone else has title to the land*." Consequently, the elders must rely on sheep farming and crop cultivation.[182]

73. Deforestation has also driven the Ogiek to adopt animal farming and cultivation. The colonial British Government first interfered with Ogiek hunting and gathering by deforesting indigenous trees, which caused a reduction in nectar production, and thus honey production.[183] The loss of the Ogiek's traditional food sources

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[179] Affidavit of Kiplangat A Samoe Chebose, *supra* note 18; Affidavit of Esther Tabarno Chemeli at Annex 4

[180] Affidavit of Esther Tabarno Chemeli, *supra* note 179

[181] Affidavit of Joseph Cheruiyot Sigowo *supra* note 10.

[182] Affidavit of A. Tulwet Lemisi, *supra* note 9.

[183] Affidavit of Patrick Kuresoi, , *supra* note 11, noting "[b]ut the government's tree removal and replanting programme also called a reduction in honey production. The British felled the indigenous trees, and losing these trees hurt honey production. They felled these trees and transported them away by train, leaving us only stumps. After this, many things began disappearing: Honey, varieties of indigenous trees, the wild animals mentioned above. This meant our traditional medicine disappeared."

led them to adopt some British farming and cultivation practices.[184] The same phenomenon occurred after independence, when continued deforestation rendered it impossible for Ogiek to survive on hunting and honey collecting.[185] In Western Mau, "*It was only when the government felled indigenous trees and brought in exotic trees that the amount of honey started to decline*."[186]

74. The shift to greater dependency on farming was sometimes the result of Kenya's efforts to settle and "modernise" the Ogiek. The Ogiek in Sururu, for example, were evicted from their ancestral territory, separated from their beehives and hunting grounds, and moved to a camp, where the Government showed the Ogiek how to farm.[187] The Ogiek from Kipsangany were moved to Serengonik in 1991 and given small plots of land to cultivate.[188] In Ol Pusimoru, the Ministry of Agriculture has taken initiatives to train the Ogiek in cultivation. "*They come to us and demonstrate cultivation techniques, and they told us where to buy products to assist in cultivation*."[189]

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[184] Affidavit of Patrick Kuresoi, *supra* note 11, noting that "[A]fter the British came and honey production dropped, our ancestors did adopt some British agricultural practices. We planted new crops—wheat and maize—and raised animals". Affidavit of Tapkili Chepkiru, *supra* note 92, noting that "[W]hen we returned from Olenguruone … [t]here was no bush left in this land, so we had to go [far] to the bush to collect herbs and honey, and we had to farm. The Forest Department showed us where to cultivate while we took care of their trees. Our husbands went into bush, killed animals, and brought back meat".

[185] Affidavit of A. Tulwet Lemisi, *supra* note 9, noting that "We started farming in 1973… because the production of honey had decreased due to the white settlers. These settlers had done extensive farming and were using chemicals to spray wheat, so the bees had died, and the wild animals had been reduced because of deforestation. So as a means of survival, we also had to begin farming. This farming was only in a very small garden on a very small scale. It wasn't even the size of the white settlers' small farms—our gardens were only 15x15m, for example." *See also* Affidavit of Patrick Kuresoi, *supra* note 11.

[186] Affidavit of Elijah Kiptanui Tuei, *supra* note 16

[187] Affidavit of Jimmy Patiat Seina, *supra* note 10.

[188] Affidavit of Samuel Kipkorir Sungura, *supra* note 17

[189] Affidavit of Julius Kiprono Munyereri, *supra* at note 176

75. Modern farming has further reduced the Ogiek's ability to practise traditional honey collection. Deforestation for farming has reduced nectar production and limited available locations for hanging hives; whilst pesticides used in farming, the Ogiek argue, are poisoning the bees.[190] Ogiek avoid the use of chemical fertilisers and pesticides for fear of harming the environment.[191]

76. Cultural assimilation and loss of natural resources have resulted in the modification of some Ogiek traditional practices.[192] As the Government of Kenya explains, "*Over the years . . . changes in [Ogiek] livelihood activities have occurred, mainly due to influence from neighbouring communities . . . as well as due to dwindling natural resources upon which their hunter-gatherer lifestyle [is] based*."[193]

77. Ogiek no longer live in temporary housing, having adopted styles of permanent housing from other tribes.[194] The Ogiek from Kipsangany, for example, have learned cultivation from exposure to the Kikuyu.[195] Weddings now often take place in churches and local administrators' offices.[196] Ogiek no longer practise

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[190] Affidavit of Patrick Kuresoi, *supra* note 11. Affidavit of Julius Kiprono Munyereri, *supra* at note 176

[191] *Ibid.*

[192] *See* Affidavit of John Arusei, *supra* note 90; Affidavit of Tapkili Chepkirui*, supra* note 92; Affidavit of Patrick Kuresoi, *supra* note 11. For more on assimilation, see Affidavit of Mary Ruto at Annex 34, noting that the "Ogiek culture is not part of the curriculum. The children are not very aware of their tradition because of assimilation—they have mixed with non-Ogiek children".

[193] Written Submissions by the Republic of Kenya, March 2010, at para 1.1.5, already filed before this Court

[194] The Koibatek Ogiek, for example, learned a new style of permanent housing from the Tugen, *see* Affidavit of John Arusei, *supra* note 90

[195] Affidavit of Samuel Kipkorir Sungura, *supra* note 17.

[196] Affidavit of Judy Jemutai Kipkenda at Annex 11; Affidavit of Linah Taploson, *supra* note 42. *See also* Affidavit of Jane Bwaley, *supra* note 95, noting that "[w]e have no more traditional celebration; the bride does not wear the traditional belt with bell or crown of grass.

female circumcision, although women provide advice on adulthood to groups of teenage girls.[197] Children no longer engage in ceremonial ear piercing or tooth removal.[198] While circumcision for boys used to take place over six months to a year, it now takes place over less than one month to accommodate boys' school schedule. Instead of hunting wild animals for food, livestock are slaughtered for initiate boys.[199] Ogiek children in Government schools do not receive education in their culture, so Ogiek parents and other adults compensate by instructing their children in Ogiek tradition and history to boost inter-generational learning practices.[200]

78. The physical aspects of traditional clan structure has deteriorated as a result of evictions. Evictions have separated clan members from one another, making it difficult or impossible for clans to meet and make decisions or practise traditions. An elder has commented:

"Clans do not meet anymore. We can't, because we are scattered. Everyone is fighting for survival. Life is very difficult. To make decisions, we can only make phone calls—for us all to come together we would have to travel very far. For example, even to meet … today some of us had to travel many kilometers; one traveled 22km. Many others would have wished to attend this meeting today, but it was too far, too difficult.

This separation is very difficult emotionally for the community. We feel very sad. At times our relatives die but because we live so far from each other we don't even hear about the death until the relative is buried. We feel so disappointed and disheartened. When we do manage to see each other and meet together,

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All we do is make tea and eat common food, have a very small party and send the married couple away."

[197] Affidavit of Tapkili Chepkirui *supra* note 92; Affidavit of Jane Bwaley, *supra* note 95

[198] Affidavit of Tapkili Chepkirui *supra* note 92

[199] Affidavit of John Arusei, *supra* note 90

[200] Affidavit of Mary Ruto, *supra* at note 192. In a private school in Ndungulu, Ogiek children are instructed in Ogiek culture, *see* Affidavit of Samson Kipkemboi Mutai, *supra* note 128

we have nothing to discuss—we cannot discuss our development as a people, because we have no homes."[201]

79. Nonetheless, clan identity still remains important and the Ogiek still use it as a means of identifying themselves. It is still taboo to marry within the same clan. It also remains the case that different clans are afforded different responsibilities.

Ogiek efforts to retain traditional lifestyle

80. Despite the many obstacles Ogiek face, they continue to observe their customs and traditions when possible. Where Ogiek have access to traditional herbs, for example, Ogiek use traditional medicine treat children for minor ailments.[202] Ogiek men and boys in Sorget go hunting every Sunday, as they used to under colonial rule, and women and girls in Sorget collect herbs to make traditional medicine.[203] Honey lore remains of continued importance, both as a source of food but also for cultural and religious ceremonies. Although the Ogiek in Serengonik are completely cut off from the forest, they have built beehives near their shacks along the roadside.[204] Others have managed to retain hives in the forest and are known within the community for this, and will be approached when honey is needed for ceremonies.

81. As stated at paragraph 53 above, although most young Ogiek have converted to Christianity, some Ogiek, particularly those age 60 and over, still believe in the old religion.[205] Older men from Koibatek continue to pray at the *simotwet* tree.[206]

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[201] Affidavit of Samson Kipkemboi Mutai, *supra* note 128

[202] Affidavit of Thomas Museiyie, supra at note 80

[203] Affidavit of Naomi Cherotich Tabelbech, *supra* note 9; and Affidavit of Rose Chengetich Maritim at Annex 26

[204] Affidavit of Mary Jepkemei at Annex 8 noting "[w]e can't hunt or collect honey—it's a big crime to be found crossing the forest border. We can't even cross the fence and cut the grass to make a broom."

[205] Affidavit of John Arusei, *supra* note 90; Affidavit of Jane Bwaley, *supra* note 95

[206] Affidavit of Joseph Cheruiyot Sigowo *supra* note 10.

82. The Ogiek language is still used, although it is on the decline in younger generations and there is various borrowing of words from the languages of more dominant tribes.[207] Ogiek dialects are different depending on different factors. This includes the sub tribe, the nature of interaction with dominant community and status of assimilation. Various efforts to develop and document the Ogiek languages are being currently made by Ogiek civil society organisations. For example, Ogiek Peoples Development Program (OPDP) has been holding Ogiek annual festivals for the last three years, where the use of Ogiek language takes centre stage.

[207] *See generally* Corinne A Kratz, *supra* note 20; *see also* Affidavit of Judy Jemutai Kipkenda, *supra* at note 196, noting that "I can understand the Ogiek language but I cannot speak it fluently".

2. THE OGIEK AS CONSERVATIONISTS[208]

A. The Ogiek's relationship with the Mau Forest

83. The Ogiek's intimate relationship with the Mau Forest and their dependence on it for food, shelter, identity and survival has ensured that this relationship has been rooted in respect for the forest and the need to conserve it. In the words of the Ogiek themselves:

"*The forest was/is an Ogiek home. It is suffice to say that the destruction of the forest was equally the destruction of Ogiek people*".[209]

"*The forest is of much value to us since it's from the forest we get our livelihood – food, medicine, clothing, among others. Being hunter-gatherers, we lived on honey and wild berries, thus it was our obligation to conserve the source of our livelihood*."[210]

"*The Ogiek have been known for living in harmony with flora and fauna and for sustainably utilising forest resources and there is no reason to totally deny the community access to the Mau in the name of conservation*."[211]

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[208] This section describes the role that Ogiek play as forest conservationists. The past tense is used not because these conservationist practices have changed in nature, but because they no longer have access to the forest.

[209] Ogiek Memorandum from the North Tinderet Ogiek to the Truth, Justice and Reconciliation Commission 2010 at Annex 54. The same memorandum goes on to refer to how successive governments have failed to recognise Ogiek traditional knowledge of conservation of the forest. See also Film Evidence taken from Ogiek communities and Transcript, *supra* note 22

[210] Sorget, Makutano, Malaget and Tendeno Ogiek Memorandum to the NARC government 2003 at Annex 55

[211] Affidavit of David Sulenya and Nayieyo Olole Sirma at Annex 42, para 19; see also Affidavit of Julius Kiprono Munyereri, *supra* at note 176

"*[Our ancestors] respected and protected the trees, because this is the source of honey*."[212]

84. Forest conservation was integral to the Ogiek way of life. Indigenous trees and bush were crucial to the survival of the Ogiek, providing nectar for honey,[213] hiding places for animals, and locations to hang beehives. By protecting their environment, the Ogiek protected their sources of food. "Indigenous bee-keeping by the Ogiek . . . helped pollinate and regenerate the forests," observed the TJRC.[214]

85. The role of the Ogiek as guardians rather than over-exploiters of the forest is supported by the findings of a number of researchers:

"*The Dorobo/Akiek possessed a firm sense of security about their way of life. This was demonstrated by the lack of development of effective storage methods, the absence of saving and the non-investment for the future. ... The Dorobo/Akiek were not tied down to one slowly ripening harvest which could be destroyed by an invasion of pests or to a herd of animals which could all die during an epidemic. Although feeling secure, the Dorobo/Akiek hunter did not over-exploit his forest, but practiced resource underutilization. Because sharing was strongly emphasised, not only was accumulation of a surplus kept to a minimal, but food was a constant."*[215]

86. In his research into the economic life of the Ogiek, Huntingford also concluded:

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[212] Affidavit of A. Tulwet Lemisi, *supra* note 9.

[213] Ogiek explain that indigenous trees produce more nectar for local bees than exotic trees. *See* Affidavit of Patrick Kuresoi, *supra* note 11, noting that "[t]here were many varieties of indigenous trees in the area, including cedar and olive. These trees produced a lot of nectar which the bees used to make honey."

[214] TJRC Report, *supra* note 121, Vol. IIC, para 225.

[215] Evans, *supra* note 3, at 95.

"*One of the accusations often made against the Dorobo as forest dwellers is that by burning grass and firing trees when taking honey they cause forest fires. Apart from the fact that there is no evidence to support this allegation, for the Dorobo do not burn trees, a very good reason why they do not destroy them was given by a Dorobo who said, with reference to some people in his settlement – 'The children of the Kolelac family are in the habit of burning the grass beside our forest. We disapprove of this, for the Dorobo do not burn the forest which contains the things we eat, and where they keep their honey barrels; moreover, grass-burning destroys the flowers from which the bees get their honey*.'"[216]

87. In common with other forest peoples, over generations, the Ogiek have developed a set of conservation measures that are passed down from one generation to the next leading to their designation as "*the best imaginable conservators of land*".[217] Such measures include: ensuring that there are no forest outbreaks,[218] allowing only the experienced elders to make beehives from the trees in a way that conserves the tree; creating awareness of important tree species and prohibiting the cutting of these trees; allocation of blocks of forest for clan use, in accordance with the Ogiek land tenure system, which ensures a community stake in the allocated forest and its resources; and protection of streams by ensuring that no cultivation is done within 50 metres on both sides.[219] The Ogiek exercised great caution with fire, which they used to release smoke and stun bees during the process of collecting honey. The Ogiek stored embers

[216] G W.B. Huntingford, *supra* note 37 at 615

[217] Mark Dowie, *Conservation Refugees: the Hundred-Year Conflict Between Global Conservation and Native People* (Cambridge: MIT Press 2009) 184.

[218] It is assumed that 'forest outbreaks' in this context means 'no fires'.

[219] See Lynette Obare & J B Wangwe, 'Underlying Causes of Deforestation and Forest Degradation in Kenya', published by the World Rainforest Movement, <http://www.wrm.org.uy/oldsite/deforestation/Africa/Kenya.html> accessed 18 November 2013 and T K Ronoh, '"Refugees in their own forest home": the Politics Land Question Matrix Among the Marginalized Ogiek Community of Mau Highlands in Kenya, c. 1926-1957' (Research Report presented to the British Institute in Eastern Africa October 2002) 35-36

in a ball of *kurongurik* (lichen mixed with Spanish moss), transferred this ball in a honey bag, and extinguished embers by burying them in wet soil.[220]

88. The Ogiek did not cut down live trees for their firewood or beehives but instead collected branches and bark from fallen trees.[221] "*We did not want to cut the live trees because that is where the bees get nectar*," an elder explains. "*We saw no need to destroy live trees when there were dried ones lying on the ground*."[222]

89. On top of these measures, Thomas Ronoh has recorded that:

"*The exploitation of the natural resources had clear checks and balances thus allowing indigenous environmental sustainability. Certain trees, for instance, '*Simotwet*' were conserved mainly to be used during initiation ceremonies. Likewise, it was the sole responsibility of the lineage council of elders to teach the community members and instruct... them on the issues of environmental management for sustainable development, thus, there were trees that they were prohibited from cutting... down*."[223]

90. He further observed that:

"Herbal medicine to a greater extent aided the conservation of the environment because only the specialists were allowed to extract the herbs from the forests and they were entirely guided within the framework of their code of ethics governing their profession. Though they exploited the environment, they took into cognizance... their indigenous sustainability, thus justifying the sustainable development framework. Trees associated with provision of herbs and related

[220] Affidavit of Jimmy Patiat Seina, *supra* note 10 and Affidavit of A. Tulwet Lemisi, *supra* note 9.

[221] Affidavit of Jimmy Patiat Seina, *supra* note 10.

[222] *Ibid*. See also, G W.B. Huntingford, *supra* note 37 at 615, who quotes one Ogiek as criticizing non Ogiek for burning grass beside the forest and saying that the Ogiek "do not burn the forest which contains the things they eat, and where they keep their honey-barrels; moreover, grass-burning destroys the flowers from which the bees get their honey".

[223] T K Ronoh, *supra* note 219 at 41

medicinal value were conserved and it was the responsibility of the individual member and the lineages in general to monitor their growth and development. Likewise, during the various rites of passage, the young were taught the importance and ultimately the fundamental rights attached to these specified trees and hence the society treating them as sacred. They universally guarded them from being destroyed by the hungry-loggers, other members of ethnic groups as well as other interested parties."[224]

91. Conservation was a component of Ogiek spirituality. It was taboo for Ogiek to cut down or otherwise destroy trees. "*We didn't cut down the trees—they are God's creation*," explains an elder in Serengonik. "*If a tree fell, elders went to confirm it died naturally. The forest is our mother—it had authority over our lives and could kill us if it wanted to*."[225] An elder in Western Mau explains, "*No clan could cut down trees. It was a taboo. Trees were our source of food. This is because bees took their nectar from the trees… We also needed trees because we hunted for wild animals in the forest. The forest also provided our traditional medicines and herbs*."[226]

92. The *simotwet* or fig tree (*Ficus natalensis Hochst*) held particular significance to the Ogiek, as they believed it offered a special connection to God.[227] To honour the tree, the Ogiek refrained from eating its fruit.[228] They came to the tree to hold important meetings or pray.[229] When praying to the tree, the Ogiek spit into a ball of grass and placed the grass beneath the *simotwet.*[230]

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[224] *Ibid* at 59-60

[225] Affidavit of Samuel Kipkorir Sungura, *supra* note 17

[226] Affidavit of Elijah Kiptanui Tuei, *supra* note 16

[227] Affidavit of Samson Kipkemboi Mutai, *supra* note 128

[228] Affidavit of Joseph Cheruiyot Sigowo *supra* note 10.

[229] Affidavit of Joseph Cheruiyot Sigowo *supra* note 10, noting that "[w]hen we have meetings, we sit down at that tree. When there are big issues, we go to that tree and pray. Once when there was violence in Kenya, the elder men went to pray for peace in Kenya at the tree. The older men still believe in these traditions".

[230] Affidavit of Samson Kipkemboi Mutai, *supra* note 128

93. Despite their eviction from the forest, Ogiek communities have continued to practise conservation and attempt to restore the Mau. In 2005, Ogiek women and youth from Nessuit formed a self-help group focused on forest conservation. The group today is registered as the Network for Indigenous Youth and Development Initiative. With about three hundred members, the group created a nursery and began growing seedlings for sale and free distribution to the community. One of the group's youth leaders, Mike Lenduse, described the impetus behind the group:

"*Since I was born the whole community loved the environment because this is where we get our food, like honey, and where we did hunting, we love the forest environment naturally because it is our home…we care for it naturally so that is why we started the group*".[231]

94. Since 2006, the group has distributed more than 200,000 seedlings in the local community. While the group has received some donor support and training from technical experts, Lenduse explains that the Ogiek "*have the basic knowledge from our elders of how to care for the trees. The old men and women gave us the skills as to how to raise the seedlings*." [232]

B. International Recognition of the Role of Indigenous Peoples as Conservationists

95. The role of indigenous peoples, including the Ogiek, in the conservation of land and natural resources has been recognised by a number of international bodies. Firstly, the UN Committee on the Elimination of Racial Discrimination ("CERD") has articulated two main inter-related rules which apply to the establishment of 'protected areas' in indigenous peoples' territories. "*No decisions directly relating to the rights and interests of indigenous peoples [can] be taken without*

[231] Affidavit of Mike Lenduse at Annex 22

[232] *Ibid*

their informed consent",[233] *in relation to both the "establishment of national parks, and as to how the effective management of those parks is carried out*".[234]

96. Further, recognising that hunter gatherer livelihoods have been practised perfectly sustainably, and the increasing evidence that communities with secure rights over their land and resources are the better guardians of local ecosystems, a new conservation paradigm is developing, based on recognising land and resource rights of indigenous peoples. This is increasingly being recognised via international conservation policy initiatives,[235] and by conservation organisations themselves such as the International Union for Nature Conservation (IUCN), for example under the auspices of the IUCN's *'Whakatane Mechanism'*.[236] The Whakatane mechanism was successfully piloted with the Ogiek of Mount Elgon in 2011, but the valuable lessons learned

[233] CERD, 'Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana. 23/08/2002' (2002) UN Doc. A/57/18 paras. 292 - 314, 304, available at http://www.unhchr.ch/tbs/doc.nsf/0/f4b63c02a6cc5e33c1256c690034a465/$FILE/N0264357.pdf, accessed 11 November 2013

[234] CERD, '*Concluding observations of the Committee on the Elimination of Racial Discrimination: Ethiopia. 20/06/2007*' (2007) UN Doc. CERD/C/ETH/CO/15, para 22, emphasis added; available at *www2.ohchr.org/english/bodies/cerd/docs/CERD.C.ETH.CO.15.doc*, accessed 11 November 2013. These recommendations from the Committee are consistent with Decision VII/28 on Protected Areas, adopted by the 7th Conference of Parties to the CBD in 2004.

[235]For example see: Durban Action Plan and Recommendations as developed at the 5th IUCN World Parks Conference (2003), and the 2004 Programme of Work on Protected Areas (POWPA) of the United Nations Convention on Biological Diversity (CBD)

[236]For more information on the Whakatane Mechanism, see generally Whakatane Mechanism Website <http://whakatane-mechanism.org/> accessed 19 November 2013. The stated aim of the Mechanism is "to assess the situation in different protected areas around the world and, where people are negatively affected, to propose solutions and implement them. It also celebrates and supports successful partnerships between peoples and protected areas".

from that process have not been translated into Kenya's legislation, notably the Wildlife Conservation and Management Bill 2013.[237]

97. The Convention on Biological Diversity ("CBD")'s Programme of Work on Protected Areas, adopted in 2004, has set various targets for States parties – including Kenya – which reflect the conservationist role played by indigenous peoples such as the Ogiek. Goal 2.1.3 in particular recognises the consistency between "*the goals of conserving both biodiversity and the knowledge, innovations and practices of indigenous and local communities*".[238]

98. Further, the CBD governing body, the Conference of Parties, has made a number of decisions which firmly recognise the role of indigenous and community conserved areas. For instance, COP11 Decision XI/24 on Protected Areas, invites Parties to:

"*Strengthen recognition of and support for community-based approaches to conservation and sustainable use of biodiversity in situ, including indigenous and*

[237]One of two Whakatane Mechanism pilots took place with the Ogiek of Mount Elgon in 2011. Early indications are extremely positive that given the right framework, stakeholders (Kenya Forestry Service, Kenya Wildlife Service and other authorities) are able to appreciate that indigenous peoples' land and resource rights are not incompatible with conservation. On the contrary, the Ogiek's community structures and presence ensures that their byelaws help protect the forest, moorland and fauna. Other signs are also positive: forced evictions have so far ceased at Mt Elgon, access by road has improved, and there has been the re-establishment of primary schools in Chepkitale where formerly community-run schools and clinics had been burnt down by the police and Kenya Forest Service. The current draft Wildlife Bill and Policy fail to capitalise on lessons learned from such work, and stand to reverse the gains made to date.

[238] Convention on Biological Diversity, Programme of Work on Protected Areas, Goal 2.1.3, see further <https://www.cbd.int/protected/pow/?prog=p2> accessed 19 November 2013.

local community conserved areas, other areas within IUCN governance types and initiatives led by indigenous and local communities ..."[239]

99. Similarly, COP Decision X/31 on Protected Areas "*recognises the role of indigenous and local community conserved areas... in biodiversity conservation [and] collaborative management*".[240]

100. Further, at a recent meeting of the Intersessional Working Group on Article 8(j) (traditional knowledge) and Related Provisions of the CBD, it was recognised that:

"*Protected areas established without the prior informed consent or approval and involvement of indigenous and local communities can restrict access and use of traditional areas and therefore undermine customary practices and knowledge associated with certain areas or biological resources. At the same time, conservation of biodiversity is vital for the protection and maintenance of customary sustainable use of biological diversity and associated traditional knowledge. Customary sustainable use of biological diversity and traditional knowledge can contribute to the effective conservation of important biodiversity sites, either through shared governance or joint management of official protected areas or through indigenous and community conserved territories and areas. Community protocols and other community procedures can be used by indigenous and local communities to articulate their values, procedures and priorities and engage in dialogue and collaboration with external actors (such as government agencies and conservation organizations) towards shared aims, for example, appropriate ways to respect, recognise and support customary sustainable use of biological diversity and traditional cultural practices in*

[239] Convention on Biological Diversity, COP11 Decision XI/24, UNEP/CBD/COP/DEC/XI/24 at para 1, available at http://www.cbd.int/doc/decisions/cop-11/cop-11-dec-24-en.pdf, accessed 13 November 2013

[240] Convention on Biological Diversity, COP10 Decision X/31, UNEP/CBD/COP/DEC/X/31 at para 31, available at http://www.cbd.int/doc/decisions/cop-10/cop-10-dec-31-annex-en.pdf, accessed 13 November 2013

protected areas."[241]

101. In addition, over the past forty years, the IUCN has issued a number of resolutions and recommendations which clearly establish the key role that indigenous peoples play in the conservation of natural resources.[242]

C. Destruction and Degradation of Mau Forest by Government

102. In contrast to the sustainable forest use by the Ogiek, the Respondent Government - first during colonisation, and then after independence - has allowed large-scale destruction of the Mau.

103. In the 1930s, parts of the Mau Forest were cleared for the establishment of forest plantations using mainly exotic species, which occupied around 10 per cent of the forest.[243]

104. Since independence, Government mismanagement of the Mau Forest has resulted in severe damage to the forest. Extensive, and sometimes unregulated, logging has taken place, resulting in unsustainable cuts and the retreat of forest cover.[244] Much of the wood-cutting has arisen as a result of commercial and

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[241] UNEP, 'Report of The Eighth Meeting of the Ad Hoc Open-Ended Inter-Sessional Working Group On Article 8(J) And Related Provisions Of The Convention On Biological Diversity' (2013) UNEP/CBD/COP/12/5 para 9 of Annex, available at http://www.cbd.int/doc/meetings/cop/cop-12/official/cop-12-05-en.pdf, accessed 13 November 2013

[242] See IUCN Res. 1981 / 15/7; 1994 / 19.23; 1996/1.35; 1996/1.49; 1996/1.54; 1996/1.55; 2008/10 -4.052; 2008/10 - 4.056; 2012/094; 2012/0992012/179, available at http://www.iucn.org/, accessed 13 November 2013

[243] International Union for Conservation of Nature, *Kenya's Indigenous Forest: Status, Management and Conservation* (Nairobi 1995) 3; Ronoh, *supra* note 219, 65.

[244] See Lynette Obare & J B Wangwe, 'Underlying Causes of Deforestation and Forest Degradation in Kenya', published by the World Rainforest Movement, <http://www.wrm.org.uy/oldsite/deforestation/Africa/Kenya.html> accessed 18 November 2013, and Fred Pearce, 'Busting the Forest Myths: People as Part of the Solution', (Yale

large-scale operations, rather than through the direct involvement of the Ogiek community.[245]

105. Irregular settlement schemes and parceling of land to private parties has additionally resulted in degradation of the forest environment. One key example of this is the assignment of land to the Nyayo Tea Zones Development Corporation in 1986-88, which has resulted in the loss of large swathes of forest cover.[246]

106. In the 1990s, under the guise of settlement schemes for Ogiek and other marginalised groups, "*the government began handing out thousands of acres in the Mau Forest to political friends.*"[247] From independence to 2004, the Government excised nearly 300,000 hectares of forest land from the country's

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Environment 360 2012) < http://e360.yale.edu/content/print.msp?id=2495 > accessed 18 November 2013.

[245] See, in general, *ibid,* Pearce, at 243. See on state versus community-managed forests in general: Luciana Porter-Bolland and others, 'Community managed forests and forest protected areas: An assessment of their conservation effectiveness across the tropics' [2012] 6 Forest Ecology and Management 268, and Ashwini Chhatre and Arun Agrawal, 'Trade-offs and synergies between carbon storage and livelihood benefits from forest commons' (Proceedings of the National Academy of Sciences of the USA 2009) <http://www.pnas.org/content/early/2009/10/05/0905308106.full.pdf+html> accessed 18 November 2013.

[246] See generally, Ben Wandago, 'Tropical Secondary Forest Management in Africa: Kenya Country Paper' (Workshop on Tropical Secondary Forest Management: Reality and Perspectives December 2002) < http://www.fao.org/docrep/006/J0628E/J0628E54.htm> accessed 18 November 2013, and Violet Matiru, 'Forest Cover and Forest Reserves in Kenya: Policy and Practice' (World Conservation Union Report 1999) < http://cmsdata.iucn.org/downloads/forestcover.pdf> accessed 18 November 2013. *See also* Irene Makumbi, 'The Permanent Forest Estate in East Africa: a Status Report', (2005) < http://www.uws.or.ug/wp-content/uploads/PFE%20Status%20in%20East%20Africa.pdf> accessed 18 November 2013.

[247] Jeffrey Gettleman, 'Forest People May Lose Home in Kenyan Plan' (New York Times 14 November 2009) < http://www.nytimes.com/2009/11/15/world/africa/15kenya.html?_r=0> accessed 18 November 2013.

major forests. The Commission of Inquiry into the Illegal/Irregular Allocation of Public Land of 2004 (more commonly referred to as the "Ndungu Commission") concluded that "*most of excisions of forestland were done without technical consideration of the social, economic and ecological implications. Excisions continued even without application of the precautionary principle that requires the government to fulfil its responsibility to protect the public trust, to anticipate and avoid harm, and to foresee and forestall any catastrophic destruction*."[248] Even after the enactment of legislation meant to protect the forests, allocation of forest lands to private developers continued illegally.[249]

107. As a result of Government forest mismanagement, the Mau Forest was severely threatened. The closed canopy forest of Kenya made up, in 2009, approximately 1.7 per cent of the total land area. This can be unfavourably contrasted with other African countries, with an average of 9.3 per cent, and a world average of 21.4 per cent.[250] Over the 15 years leading up to 2009, Kenya witnessed the destruction of around 25 per cent of the Mau Forest Complex.[251]

108. The Government has continued to allocate land illegally to political allies under the guise of settlement schemes.[252] The Mau Forest Task Force, established by the Prime Minister to investigate the severe destruction of the

[248] Republic of Kenya, 'The Report of the Commission of Inquiry to the Illegal/Irregular Allocation of Public Land' (June 2004) (hereinafter the 'Ndungu Report') 152 at Annex 82. Daily Nation, 'Moi Mama Ngina in Ndungu Land Report', (17 December 2004) <http://www.ogiek.org/news/news-post-04-12-7.htm> accessed 19 November 2013.

[249] *Ibid.*

[250] See Prime Minister's Task Force, Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex, (Nairobi 2009) (hereinafter the 'Mau Forest Task Force Report') 17 at Annex 83

[251] The Mau Forest Complex is the Government term used for the 400,000 hectare closed-canopy forest ecosystem which is also known simply as the Mau Forest: see for example description found in the Africa Water Atlas <http://www.unep.org/dewa/Portals/67/thickbox/maucomplex.html> accessed 18 November 2013.

[252] See Film Evidence taken from Ogiek communities and Transcript, *supra* note 22

Mau, concluded in 2009 that areas of the Mau Forest had again been illegally allocated to "Government officials, political leaders and companies."[253] The task Force also rightly recognised the centrality of Kenya's forests, including the Mau Forest, to the life of the country.[254]

109. The degradation of the Mau Forest due to Government mismanagement has received international attention. In 2009, the *New York Times* reported:

"*No doubt the Mau Forest is crucial. It is — or more accurately, used to be — a thick, staggeringly beautiful forest in western Kenya, capturing the rains and the mist and, in turn, feeding more than a dozen lakes and rivers across the region, even contributing to the flow of the Nile.*

But in the past 15 years, because of ill-planned settlement schemes (the government essentially handed out chunks of forest to cronies), 25 percent of the trees have been wiped out. Much of the forest is now simply meadow. The Ogiek say there are fewer antelope and bees. They constantly use the Kiswahili word "haribika," which means spoiled. Scientists say the environmental destruction has led to flash floods, micro-climate change, soil erosion and dried up lakes."[255]

110. The previous UN Special Rapporteur on Indigenous Peoples has highlighted that indigenous communities neither participate in, nor benefit from, most if not all of Kenya's protected areas. He observed that "*a better practice, from the human rights and ecological perspectives, would be to involve the pastoralist and forest communities in the management and benefits of a conservationist*

[253] The Mau Forest Task Force Report, *supra* note 250 , at 12. Further the report refers to some 99% of the title deeds from the 2001 excisions being affected by irregularities (*supra* note 250, at 45).

[254] *Ibid*, at 17-18.

[255] Jeffrey Gettleman, 'Forest People May Lose Home in Kenyan Plan' (*New York Times*, 14 November 2009) <available at http://www.nytimes.com/2009/11/15/world/africa/15kenya.html> accessed 19 November 2013.

strategy".[256] In this vein, the Special Rapporteur made a number of key recommendations with the aim of reconciling conservation objectives with the rights of indigenous peoples, as yet unheeded by the Respondent Government.[257]

111. The disparities in the enjoyment of social, economic and cultural rights by hunter-gatherer and other minority and indigenous groups such as the Ogiek in Kenya, that result from discriminatory Government practices principally in relation to loss of land and natural resources, have been identified by the UN CESCR[258] and the Special Rapporteur on Indigenous Peoples.[259] Such disparities are indicative of structural discrimination and a lack of adequate policy measures to address it.

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[256] UNHRC, 'Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Mission to Kenya', http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/110/43/PDF/G0711043.pdf?OpenElement, accessed 15 November 2013, at paras 53 and 54.

[257] *Ibid.* at paras 102 - 107, noting "[t]he rights of indigenous hunter-gatherer communities…to occupy and use the resources in gazetted forest areas should be legally recognised and respected. Further excisions of gazetted forest areas and evictions of hunter-gatherers should be stopped. Titles derived from illegal excision or allocation of forest lands should be revoked, and new titles should only be granted to original inhabitants . . . Existing legislation should be amended to ensure the rights of local indigenous communities to access the natural resources in protected areas in their traditional territories . . . Pastoralist and hunter-gatherer communities should be involved in decisions concerning the management of and benefits derived from protected areas, game reserves and national parks. They should also be compensated for any loss derived from the creation of such areas, including any human and material losses derived from wildlife activities in the vicinities of these areas."

[258] CESCR 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kenya' (1 December 2008) UN Doc. E/C.12/KEN/CO/1, available at http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.KEN.CO.1_EN.pdf, accessed 11 November 2013

[259] UN HRC Report by Stavenhagen, *supra* note 256, at paras 41, 65 – 77.

112. The TJRC in its 2013 final report made an explicit finding that "*the expulsion of Endorois, Ogiek, Sengwer, Wataa, Bajuni, Boni, Talai and other communities from their ancestral lands, and the allocation of forest lands to other communities, have led to the destruction of forests upon which the traditional livelihood of these communities depends, and has rendered it virtually impossible for hunter-gatherers to practice their culture*."[260]

113. The Respondent Government recognises the ecological significance of the Mau Forest in its admissibility submissions to the Commission.[261] However, it proposes that the solution to 70 years of Government mismanagement of the forest is to deny Ogiek – "*traditionally hunter-gatherers whose lifestyle was relatively harmonious with the sustainability of the forest*" – their rights to land.[262]

114. This argument is not supported by any evidence. The Respondent Government argues that Ogiek livelihoods have changed to herding and cultivation, which are "*not compatible with the conservation of forests*."[263] But it admits that the Ogiek's changing livelihoods were "*due to influence from neighbouring communities . . . as well as due to dwindling natural resources on which their hunter-gatherer lifestyle [is] based*."[264] As explained in paragraphs 57-82 above, Ogiek hold tightly to their traditions; only displacement and lack of forest access has forced them to adopt new ways of life.

115. Ogiek people reject the Government's attempt to blame them for its own ecological mismanagement:

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[260] TJRC Report, *supra* note 121, vol. IV para 216 at Annex 84, and Affidavit of John Sitienei, *supra* note 69

[261] Written Submissions by the Republic of Kenya, March 2010, at paras. 1.1.2-1.1.4, already filed before this Court.

[262] *Ibid.* para. 1.1.5.

[263] *Ibid.* para. 1.1.7.

[264] *Ibid.* para. 1.1.5.

"*We strongly object to the Kenyan Government's characterization of us as destructive. We were born in the forest, we grew up in the forest. Our first food was in the forest. We love the forest. The first people to destroy the forest here were those in the Government! They destroyed indigenous trees and brought in exotic trees. They allowed destructive people into the forest. We received no compensation for the big trees sold to foreigners. We saw sawmills put in the forest to benefit outsiders and foreigners*."[265]

116. Further, they explain that the gradual introduction of livestock did not conflict with their role as conservationists of the forests. The cattle would graze in naturally occurring open areas within the forest. "*We call such areas* tirikweek *or* turgut," explains Christopher Kipkones.[266] "*The forest around these grazing fields was indigenous and we didn't let cows eat there*," says James Rana.[267] Another Ogiek elder, John Sitienei, notes that the community also is careful about the kinds of livestock they keep. "*You will never see an Ogiek person keeping goats," he said, "because goats will destroy the forest*."[268]

117. The Respondent Government provides no evidence that Ogiek have damaged the Mau. In fact, it cites Mau Forest Task Force findings that the Government's mismanagement - not the Ogiek - has been responsible for the destruction of the Mau. It recalls that the 2001 excision of the Mau Forest purportedly for the benefit of Ogiek "*opened the area up for encroachment by other ethnic groups. The ensuring massive deforestation caused by factors such as large-scale encroachment, charcoal production, logging of indigenous trees, and cash crops production for export has tremendously affected water resources*."[269]

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[265] Affidavit of Samson Kipkemboi Mutai, *supra* note 128

[266] Affidavit of Christopher Kipkones, *supra* note 118

[267] Affidavit of James Rana, *supra* note 169

[268] Affidavit of John Sitienei, *supra* note 69

[269] *Ibid*

118. The Government "*fully acknowledges the indigenous right of the Ogiek to their land*,"[270] but nevertheless calls for their permanent removal from—ostensibly in the name of conservation. The Government ignores evidence that despite displacement, harassment, and impoverishment, Ogiek continue to work to protect and reforest the Mau.

119. For example, Ogiek in Saino have created Bobo Farm, a private initiative to conserve the environment and practise Ogiek traditions. Charles Ruto Ngo Ngon, an Ogiek and trained conservationist, runs this non-profit initiative. Bobo Farm members have replanted five acres of land previously deforested by the Kenyan Government. They have planted long-growth indigenous trees and fruit trees on the land, and they maintain a plant nursery. "*We want to bring back the indigenous forest and practice Ogiek traditions*," the project members explain. They also want to protect the local environment and draw water to nearby rivers and catchment areas. In addition to growing indigenous trees, the Ogiek at Bobo Farm produce honey. To compensate for a lack of fully-grown trees in the area, they wrap hives in plastic instead of bark, and they hang hives in a constructed hive house. Ogiek on Bobo Farm choose to wear traditional skin garments because this clothing symbolises Ogiek culture. Charles Ruto Ngo Ngon uses Bobo Farm to teach visitors - Ogiek and non-Ogiek - about forest conservation and Ogiek culture. He has been recognised by the Respondent Government for his efforts.[271]

120. Even where Ogiek have had to adopt farming and cultivation in order to survive,[272] they incorporate ecologically-friendly practices. Many Ogiek cultivate indigenous trees and plants on their farmland.[273] A. Tulwet Lemisi, an elder

[270] *Ibid*

[271] Affidavit of Charles Ruto Ngo Ngon at Annex 31

[272] See paragraphs 57 – 82 above

[273] Affidavit of Jimmy Patiat Seina, *supra* note 10 noting "[w]e contribute to forest conservation even though we are farming. We plant trees while we farm"); Affidavit of Rose Chengetich Maritim, *supra* note 203 ("Today you can see how we practice forest conservation. You can see on this compound how we preserve indigenous trees. We have a nursery bed where we nurture young seedlings and plant them, in the forest".)

Ogiek, explains why he and other Ogiek in Ol Pusimoru plant indigenous trees on their farmland:

"*You can always tell when an Ogiek lives somewhere because there are indigenous trees growing on his property. We grow these indigenous trees here because it is our tradition and preserves our culture. Ogiek love the forest and know its importance. It's where we get medicine and honey and wild fruits*."[274]

121. Although Lemisi owns sheep and grows maize, he also keeps beehives. In the traditional manner, he hangs these hives in trees, and he uses bamboo and natural fibre twine to make ladders for climbing trees to collect honey.[275]

122. The critical role of forest peoples in forest conservation and the importance of ensuring the continuance of this role through providing for locally-controlled forests and recognising secure forest rights, including ownership, is increasingly being recognised internationally.[276] Indeed there is a growing body of evidence

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[274] Affidavit of A. Tulwet Lemisi, *supra* note 9.

[275] *Ibid*.

[276] Duncan Macqueen and others, 'Investing in locally controlled forestry: natural protection for people and planet' (International Institute for Environment and Development, 2012) <http://pubs.iied.org/17130IIED.html> accessed 19 November 2013. See also Peter Dewees and others, 'Investing in trees and landscape restoration in Africa: What, where, and how' (Program on Forests, 2012) <www.profor.info/profor/sites/profor.info/files/docs/Invest-Trees_Jan2012.pdf> accessed 19 November 2013; Dominic Elson, 'Investing in locally controlled forestry: reviewing the issues from a financial investment perspective' (The Forest Dialogue, 24 – 25 May 2010) available at < http://tfd.yale.edu/publication/investing-locally-controlled-forestry-reviewing-issues-financial-investment-perspective> accessed 19 November 2013; International Tropical Timber Organization Rights and Resources Initiative, *Tropical forest tenure assessment: Trends, challenges and opportunities*, (ITTO Technical Series No. 37, 2011) available at http://www.itto.int/technical_report/, accessed 15 November 2013; Duncan Macqueen, 'Investing in locally controlled forestry' (GFP Briefing, Growing Forest Partnerships (GFP) 2011), available at http://pubs.iied.org/G03079.html?k=investing forestry, accessed 15 November 2013; International Tropical Timber Organization, C*ommunity based forest*

that local control of forests can prove better for sustainable management.[277] As research for the Centre for International Forestry Research has found:

"*forests managed by local or indigenous communities for the production of goods and services can be equally (if not more) effective in maintaining forest cover than those managed under solely protection objectives.*"[278]

123. The common finding is that where local communities and forest-dwelling groups can receive a share in the long-term benefits of the forest land, in particular through community land tenure (as was the case for the Ogiek prior to colonisation and independence), there is an incentive for conservation and sustainable use.

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enterprises – their status and potential in tropical countries, (ITTO Technical Series No. 28, 2010) <www.rightsandresources.org/documents/files/doc_109.pdf> accessed 19 November 2013; Luciana Porter-Bolland and others, 'Community managed forests and forest protected areas: an assessment of their conservation effectiveness across the tropics' [2012] 6 Forest Ecology and Management 268; Nonetto Royo and Adrian Wells, 'Community based forest management in Indonesia: A review of current practice and regulatory frameworks', (The Forest Dialogue, 30 January 2012) <http://environment.yale.edu/tfd/uploads/ILCF%20Indonesia%20Background%20paper_English.pdf> accessed 19 November 2013; Chris Buss, 'Sustainable forestry: connecting local to global and vice versa', (Growing Forest Partnerships (GFP) Briefing, January 2011) <http://pubs.iied.org/pdfs/G03081.pdf> accessed 19 November 2013; Barbara L. Zimmerman & Cyril F. Kormos, 'Prospects for Sustainable Logging in Tropical Forests' [2012] Vol.62 No.5 BioScience 479.

[277] Andrew Nelson and Kenneth M. Chomitz, 'Effectiveness of Strict vs. Multiple Use Protected Areas in Reducing Tropical Forest Fires: A Global Analysis Using Matching Methods' [2011] PLoS ONE 9, available at http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0022722, accessed 15 November 2013

[278] Luciana Porter-Bolland and others, 'Community managed forests and forest protected areas: an assessment of their conservation effectiveness across the tropics' [2012] 6 Forest Ecology and Management 268

124. Kenya's Forests Act 2005, adopted in 2007, attempts to respond to calls for participatory forestry management. It allows communities to band together to form a Community Forest Association (CFA), which can then apply to the Director of the Kenya Forest Service for permission to participate in conservation and management of state or local authority forests.[279] But CFAs have very limited forest access. The Forest Act only confers upon CFAs the obligation to protect and conserve state or local forests. CFAs may request, but are not entitled to, forest user rights, and they may not create settlements in the forest.[280] Honey collection is prohibited.[281] Additionally, the Director of the Forest Service may unilaterally terminate any CFA agreement. [282]

125. The results of this variant of participatory forestry management, according to a 2012 survey, have been mixed.[283] Jephine Mogoi, et al., in their study, observed that "*communities are... burdened with most of the work with little benefits from the forest*."[284] On top of that, "*[t]he revenue currently collected from the forests does not benefit the communities, and large companies still dominate timber harvesting*."[285] As to the detail of the scheme, they observe that the "*arrangement is bureaucratic and under the whims of the [Kenya Forest Service and]... [i]n addition, forest user rights are not fully implemented... and communities still do not have access to valuable forest products*."[286] The risks of excluding or marginalising certain communities through the bureaucracy of the processes envisaged under the Act is also picked up by the World Bank's

[279] Kenya Forests Act 2005, section 45; see for example the documents relating to the CFA at Ndoinet, Western Mau, at Annex 88

[280] Kenya Forests Act 2005, section 46(1)-(2)

[281] Kenya Forests Act 2005, section at 52

[282] Kenya Forests Act 2005, section at 48

[283] Jephine Mogoi and others, 'Communities, Property Rights and Forest Decentralisation in Kenya: Early Lessons from Participatory Forestry Management' [2012] 10 Conservation and Society 182, 183

[284] *Ibid*

[285] *Ibid*

[286] *Ibid*

Strategic Environmental Assessment of the Kenya Forests Act 2005, which reads:

"*In Kenya many tribes attribute cultural values to forests, using them for different purposes and needs. While the new legislation provides for this continued use, a formal application is required to register and authorise existing practices. Not all communities or local groups will have the necessary capacity or support to enter this application process and so may be excluded, unintentionally*."[287]

126. Moving forward, Mogoi, et al., suggest that:

"*There is broad consensus that property rights provide a powerful set of incentives for sustainable forest management. Where property rights are unambiguous, justly enforced, and secure, rights holders are more likely to invest in forest enhancing behaviours because they are more likely to capture the benefits of their investments*."[288]

127. At present, the Forests Act prohibits the forest communities from building settlements within the forests,[289] any 'resource tenure' granted is insecure, subject to the discretion of the Kenya Forest Service or relevant local authority,[290] and the Act does not explicitly envisage the grant of land tenure to those communities. Moreover, it is unclear how inclusive of indigenous communities the policy of the Forests Act is, given that a high degree of literacy and understanding is required in order to properly engage with the relevant processes, and registering as a CFA requires paying a substantial fee. Ogiek

[287] The World Bank, *Strategic Environmental Assessment of the Kenya Forests Act 2005* (Report No. 40659-KE, International Bank for Reconstruction and Development, 2007) 40, <http://siteresources.worldbank.org/INTRANETENVIRONMENT/Resources/244351-1222272730742/KenyaForestESWFullReportWeb.pdf> accessed 19 November 2013.

[288] Jephine Mogoi and others, 'Communities, Property Rights and Forest Decentralisation in Kenya: Early Lessons from Participatory Forestry Management' [2012] 10 Conservation and Society 182, 185

[289] Kenya Forests Act 2005, section 52

[290] Kenya Forests Act 2005, sections 32, 35, 38, 45 and 48

elders of Sururu, for example, would like to register as a CFA, but they have not yet been able to raise the 5,000 Ksh required to do so.[291] Given, as well, that the registration of CFAs is not limited to those groups that have traditionally lived in the areas - the Act opens these up to companies and Government departments - there is a risk that communities indigenous to the forests will be overlooked. Lastly, hunting is restricted under sections 22 and 23 of the Wildlife (Conservation and Management) Act 1989 (Cap. 376) to appropriately licensed professional hunters. The current Wildlife Management and Conservation Bill 2013 proposes to entirely outlaw subsistence hunting.[292] "*The 2005 Wildlife Act set rules saying that if we are found hunting wild animals we will be arrested*," explains Julius Kiprono Munyereri. "*So we know if we hunt we'll be arrested, which makes us afraid. What used to be our right is now a crime*."[293]

128. The TJRC notes, "*While [the 2005 Forest Act] better incorporates communities in forest conservation [than the previous Forest Act, it] does not grant any concrete tenure rights in favour of forest communities*."[294]

129. Ogiek in Sorget, Saino, Nessuit and Kuresoi have formed CFAs. These Ogiek work to protect Government forests in their areas from encroachment and over-logging. As CFAs they are permitted to lease small plots of Government land, but they must pay fees to do so. They are not permitted to live on these plots or to hunt there.[295]

130. In addition to a community based organisation (see paragraph 93 above), Ogiek in Nessuit have formed a CFA, Gotop Sogot Community Forest Association. According to group leaders, the Government does not provide

[291] Affidavit of Jimmy Patiat Seina, *supra* note 10. See also for example, Documents relating to CFA at Ndoinet, Western Mau – *supra* note 279, which show a payment to the Kenyan authorities of 2000 Kenyan Schillings in order to establish the CFA.

[292] See draft Wildlife Management and Conservation Bill 2013, section 84

[293] Affidavit of Julius Kiprono Munyereri, *supra* at note 176

[294] TJRC Report, *supra* note 121, vol. IIC, para 158. Affidavit of John Sitienei, *supra* note 69

[295] Affidavit of Charles Ruto Ngo Ngon, *supra* note 271; see also Film Evidence taken from Ogiek communities and Transcript, *supra* note 22

sufficient support to the CFAs. "*Although we tried to work with the Government on removing squatters who were living in the forest, and the Government removed some, they have not completed the process and have not told us when the next phase will take place. Squatters are still there. We want the squatters removed and want the forest to be replanted*," said group member Mike Lenduse.[296]

131. The present state of affairs bears out the criticisms of Mogoi, et al., that Kenya's Forests Act does not create the necessary incentives for forest and indigenous communities to be able to sustain and conserve the forest.

[296] Affidavit of Mike Lenduse, *supra* note 231

3. THE MAU FOREST AND OGIEK EVICTIONS

132. The Mau Forest Complex[297] measures approximately 400,000 hectares. It is the largest remaining block of forest cover in Kenya. It serves as a key water catchment area, forming the upper catchment of 12 main rivers which in turn feed 5 major lakes, three of which are cross-boundary. Among the lakes is Lake Victoria, shared by Kenya, Tanzania and Uganda.

133. The Government itself divides the Mau Forest into 22 forest blocks.[298] However, these blocks do not necessarily bear a relation to the Ogiek's understanding of the forest. In rough terms, it is common for the Mau Forest to be divided into eight large areas:

a. Northern Tinderet (including Kipkurere, Serengonik, Kipsangang and Cengalo);

b. Londiani/Tinderet (including Sorget, Malagat, Tendeno and Masaita);

c. Koibatek (including Maji Mazuri, Lembus and Tinet-Timborora);

d. Maasai Mau [Narok South (including Sogoo,Kutungwo,Enkaroni, Eneikishomi, Ngareta, Sasimuani); North Narok (including Olokurto and Ol Pusimoru);

e. Eastern Mau (including Marioshoni, Ngongogeri, Nessuit, Sururu, Ndosa, Kiptunga, Elburgon and Bararget);

f. South West Mau (including Tinet);

[297] As stated above at note 251, the Mau Forest Complex is the Government term for the closed canopy system of the Mau, and is also known simply as the Mau Forest.

[298] See, for example, The Mau Forest Task Force Report, *supra* note 250. These blocks consist of 21 forest reserves i.e. government forest and Maasai Mau which is trust land forest. See also Map of Mau Forest Complex at Annex 89.

g. Western Mau (including Saino/Kuresoi and Ndoinet); and

h. Transmara (including Lemek and Keneti).

134. The Mau Forest Complex is not uniform in its tree coverage. The forest areas are on the sides of mountains and escarpments rising from the level of the plain or the valley to the escarpment top. Due to the rising altitude as one moves up such a gradation, the temperatures decrease while the annual rainfall increases. The result is a series of basically four forest types: (i) the lowest is a dry, fairly open forest; (ii) next a dense forest; (iii) then a lush, mature forest of large trees called *tirap*; (iv) finally, open glade or moorland with intermittent mature trees called mau.[299]

135. While, for the Ogiek, the Mau Forest has represented their ancestral home, a source of food and shelter, and a place of cultural, religious and spiritual identity, for outsiders it has represented a source of capital, something which has economic value in terms of either the logging of indigenous trees and the planting of non-native trees for further logging, or of land for ownership and for clearing to enable the establishment of large tea plantations, farms and estates.

A. Evictions under the British colonial administration

136. The Ogiek were first removed from their ancestral land under the British colonial administration through a series of evictions. Initially, these evictions were part of the more general plan of the colonialists to confine the different African tribes in designated native reserves. However, in the case of the Ogiek, given their scattered nature and the fact that they lived in small groups, a decision was taken not to establish a designated reserve for them but instead to move them into the native reserves of tribes with which they were considered by the British to have close affiliations, such as the Nandi and Maasai, with the view

[299] Roderic Blackburn, *supra* note 26 at 289. See also, Muchemi and Ehrensperger, *supra* note 11, at 17 – 19 noting that for the Eastern Mau Forest, a series of ten eco-climatic zones have been identified.

that they were "*more likely to progress and become useful citizens if they lived side by side with communities who have already advanced some way along the orad of orderly progress ...*".[300] For many Ogiek, it was not a question of a single eviction but a series of evictions, as their strong association and identification with their traditional forests meant that following their eviction they would seek to return to their original lands.

137. In the 1920s, records of the then Kenya Legislative Council show the colonists' debates about the problem of settling the Ogiek, then known as the Wanderobo. In a 1927 motion on the floor of the Council, the Hon. Conway Harvey proposed a plan for the Mau and Chepalungu Forests. He suggested that the Mau Forest be placed under the jurisdiction of the conservator of forests, but that the Chepalungu Forest (because it had less valuable timber stock) could:

"…quite properly form a reserve…into which might be concentrated those quite harmless little limiters the Wanderobo, who have been singularly neglected by the Native Affairs Department and the Government for a number of years. Their natural environment, Your Excellency, is the forests. That being the case nobody bothered much about them…the only way is to make proper provision for a very deserving people."[301]

138. However, as described throughout the following sections, proper provision was never made for the Ogiek, although some groups of Ogiek were forced to move to Chepalungu, where many died and where the community could not survive in the new environment.

[300] The Carter Commission, *supra* note 34, at para 980.

[301] Kenya Legislative Council (Hansard), 17 November 1927, 614 at Annex 78

a. Evictions in the 1920s and 1930s

139. The Ogiek now living in Saino/Kiptororo, Western Mau, are originally from Koibatek. The British repeatedly displaced these Ogiek to make way for European farmers:

"They assembled our grandparents and pushed them deeper into the forest. Although we lost part of our traditional land, we could still hunt, harvest honey and collect herbs in the forest. Each clan simply went farther into the bush of its own territory. But slowly, over the years, more settlers came, encroaching more and more on traditional clan lands, pushing the Ogiek farther and farther into the forest. Finally we were pushed to where we are now, the Saino/Kiptororo area. These evictions were always forceful and violent."[302]

140. The Ogiek of Kipkurere experienced a series of evictions by the British in the 1920s and 1930s. In the 1920s they were forced to move to Kabiyet and to Kapisaga:

"*People were tricked into coming out of the forest. They were told that a meeting was being held and then when they came out of the forest they were put into vehicles and taken to Kabiyet. When they arrived there it was just a grassland with no trees, no honey, no wild animals. When night fell, people immediately started trying to make their way back to Kipkurere as there was nothing for them in Kabiyet and Kipkurere was their home*".[303]

141. The next eviction for the Ogiek of Kipkurere was in the 1930s to a place called Chepkunyuk. Once again, people were told to come to a meeting so that the Government could to talk to them and they were then put in a vehicle and taken to Chepkunyuk. As with Kabiyet, Chepkunyuk was an open place where there was nothing to eat and nothing was provided for the people. Ogiek subsequently

[302] Affidavit of Elijah Kiptanui Tuei, *supra* note 16

[303] Affidavit of Samson Kipkemboi Mutai, *supra* note 128

returned to Kipkurere, walking at night and hiding during the day to avoid detection.[304]

142. The British ordered the Ogiek of North Narok to vacate their ancestral land in 1920. "*Because [our parents and grandparents] were afraid of the British, we had to move. We had no option*," explains Lemisi from Ol Pusimoru. The Ogiek had to move to territory belonging to another Ogiek clan. They left all of their honey and meat stores behind. "*Some of [our forefathers] died of hunger*," he recalls. "*It was very difficult*."[305]

143. After a decade, the Ogiek were permitted to return to North Narok. Their territory was circumscribed by the British, however, who controlled a portion of the region. The British had built sawmills in the forests and had begun felling indigenous trees and re-planting the forests with exotic trees. The Ogiek had to remain within what is now the sublocation of Olengape.[306]

144. The Ogiek of Kipkurere, Koibatek, Tindiret and Sorget were evicted from their homelands to Chepalungu in the late 1930s.[307] In 1936, the British rode in on horses and ordered the Ogiek of Sorget to leave the forest.

"*They shot in the air to instil fear in us*," remembers Kiplangat A Samoe Chebose, born in 1922. "*[But they promised us that] there would be plenty of honey and wild animals*" where the Ogiek were being taken.[308]

145. The Ogiek were forced to trek for about one month to reach Chepalungu. Each night the Ogiek camped, eating rations of flour that the British distributed

[304] Affidavit of Samson Kipkemboi Mutai, *supra* note 128; Affidavit of A. Tulwet Lemisi, *supra* note 9 and Ogiek Memorandum, North Tinderet Forest Reserve to the TJRC, *supra* note 205

[305] Affidavit of A. Tulwet Lemisi, *supra* note 9.

[306] *Ibid.*

[307] Kenya Legislative Council (Hansard), 18 August 1938, 306 (in which Mr. Gardner the Conservator of Forests refers to 800 "Dorobo" families from Tinderet who had been moved to Chepalungu.) at Annex 79

[308] Affidavit of Kiplangat A Samoe Chebose, *supra* note 18

among them.[309] At one point in what is now Kericho County, a group of Sorget Ogiek became separated from the rest of evictees. The place where this small group of Ogiek remained is called "Kapogiek," meaning "belongs to Ogiek."[310]

146. Life at Chepalungu was harsh. Chepalungu was adjacent to the forest, but the forest was not safe for the evictees - it lay in Kipsigi territory. "*The aim in moving us there seemed to be for us to be assimilated into [Kipsigi] culture so we would lose our own identity*," Chebose explains. Ogiek were exposed to anthrax, chicken pox, and sleeping sickness. Many died from these diseases and from malaria and contaminated water. Chebose became sick for a month. His uncle and several of his neighbours died of disease. Naomi Cherotich Tabelbech remembers how her father suffered from anthrax, leaving his skin scarred.[311] Kipruto Kosgei, from Maji Masuri, was born in 1926 and remembers the eviction:

"*We constructed shanties in Chepalungu and stayed there for about two years. The conditions there were not good. Animals died due to tsetse flies. There was also an outbreak of anthrax which killed the animals and then people, who—not knowing why the animals had died—ate the meat and became sick in turn. Because of the harsh conditions, people started returning to their original lands in secret*. "[312]

Esther Tabarno Chemeli recalls:

"*There was extreme cold and hunger. My parents had no options for me—as much as they tried to survive, when they planted maize, it wouldn't produce anything. Frost would destroy the plants. Also there was no school there. There was no hospital*."[313]

[309] Affidavit of Kiplangat A Samoe Chebose, *supra* note 18

[310] *Ibid*

[311] Affidavit of Naomi Cherotich Tabelbech , *supra* note 9.

[312] Affidavit of John Arusei, *supra* note 90

[313] Affidavit of Esther Tabarno Chemeli, *supra* note 179

147. After two years in the harsh conditions of Chepalungu, the Ogiek tried to return to their original lands but found that the British had claimed large portions for logging and farming. In Sorget, the British assembled the Ogiek into a small village called Mololo. The Ogiek secretly continued to practise traditional hunting and gathering in the forest, but these activities were now illegal. The British allotted the Ogiek small plots to farm in Mololo. The colonialists permitted to Ogiek to keep a maximum of five cows and one bull per family. Some Ogiek began working for the Forest Department as labourers. Life was a struggle in Mololo, and hunting was prohibited.[314] After returning to their homeland, the Ogiek of Koibatek hid themselves in the forest, trying to disguise themselves by intermingling with the Tugen. Although some worked for the British Government and European farmers, the Ogiek continued to hunt and gather.[315]

b. Eviction to Olenguruone

148. In the mid 1950s, the Ogiek of Kipkurere, Koibatek and Sorget were again evicted, this time to Olenguruone. The Ogiek of Sorget were forced to go in 1956. Some Ogiek managed to escape the eviction but most did not. Women, children and elderly Ogiek were taken to Olenguruone by lorry. Young men travelled slowly by foot with their animals.

149. Sorget elders recall that the British promised they were moving the Ogiek to a land filled with honey. Elders of Koibatek recall that the British promised Ogiek would be sent to school in their new home. But the Ogiek found that the British had once again lied about the conditions of their new location. There were no schools. Olenguruone was forested only with bamboo, providing little protection against the cold.[316] It contained no beehives. Hunger presented a serious challenge. Esther Tabarno Chemeli of Sorget recalls:

[314] Affidavit of Kiplangat A Samoe Chebose *supra* note 18

[315] Affidavit of John Arusei, *supra* note 90

[316] Affidavit of Tapkili Chepkirui, *supra* note 92

"I was a very young girl [in Olenguruone]. There was extreme cold and hunger. My parents had no options for me—as much as they tried to survive, when they planted maize, it wouldn't produce anything. Frost would destroy the plants. Also there was no school there. There was no hospital."[317]

150. Tapkili Chepkirui of Koibatek recalls:

"In the process of the eviction, we were scattered and some of us died. We had to survive on the trek from the milk of animals. We were moving with the children and sleeping in the cold. I lost my brother-in-law. While the rest were en route to Olenguruone, he died.

By the time of the Olenguruone eviction, I was mother of five. It was very difficult to care for my children there. The environment was very harsh—it was extremely cold. We had no food. There was no money for food. We made house structures made of leaves and lived there. My husband had to buy maize and bring it back to cook.

We took our animals to Olenguruone. But our animals died there, so we came back empty handed. "[318]

151. After several years in Olenguruone, most Ogiek returned to their general area of origin but were scattered across the land, sometimes away from family members.[319]

c. Evictions in Western Mau

152. After a series of evictions, some of the Ogiek originally from Koibatek were eventually restricted to Saino/Kiptororo in Western Mau. In 1941, these Ogiek

[317] Affidavit of Esther Tabarno Chemeli, *supra* note 179

[318] Affidavit of Tapkili Chepkirui, *supra* note 92

[319] Affidavit of Naomi Cherotich Tabelbech, *supra* note 9. Affidavit of Tapkili Chepkirui, *supra* note 92

were evicted again. The British issued a circulation notice ordering the Ogiek to leave the forest. "*But the British had encroached on all our land, and we had no place to go*," Elijah Kiptanui Tuei explains.[320] By this time the Ogiek of Saino/Kiptororo owned some cows, but the British seized them without compensating the Ogiek. Left without land or animals, the Ogiek had to perform wage labour on the farms of white settlers.

153. The 1941 eviction from Saino/Kiptororo was especially traumatic, Tuei recalls, because it interrupted an initiation process:

"*Newly circumcised young men had not yet completed their cultural rites when the British threw us out of our home. They had not yet completed their necessary training, and their ritual wounds had not yet healed. For a young man to fail to complete his rites is a very serious violation, a violation of the highest order. After the eviction, the elders took these boys deep into the bush to try to complete the rites, training and healing them*."[321]

154. The eviction displaced the Ogiek from their food sources: their beehives were still in the forest of Saino/Kiptororo. Seeking food, the Ogiek returned to Saino/Kiptororo. But in 1956, the British again forcefully evicted them. Again the Ogiek had to work on the farms of white settlers, tending to their crops and animals; again they returned to their land in Saino/Kiptororo. "*Despite these evictions,"* remembers Tuei, "*we continued to practice our Ogiek traditions - hunting and honey-collecting*."[322]

d. Other Evictions and Displacement

155. The Kiptyeromu clan - nearly a thousand people - of North Narok were forcibly relocated to Tinet in 1961. The British had planted wheat on thousands of acres of Kiptyeromu territory and demanded that the Ogiek move. "*We were told by*

[320] Affidavit of Elijah Kiptanui Tuei, *supra* note 16

[321] *Ibid*

[322] *Ibid*

the forest officers from Kiptunga Forest, which borders Olengape, that we were moving," remembers Osasi A Ngosas Latende. "*Forest officers used their power to force us to move—they didn't consult us. We were treated as inferior and had no powers*." The Ogiek were settled in Tangotonik (now called Kipsirat) in Tinet. The Forest Department gave the Ogiek land and instructed the Ogiek to farm.[323]

156. Even where the British did not evict the Ogiek completely from their ancestral land, they displaced the Ogiek and restricted their access to the forest. The Ogiek of Eastern Mau, for example, originally occupied a large expanse of territory across Eastern Mau. In 1923, colonial administrators claimed most of that territory, displacing the Ogiek of Eastern Mau. The Kapyegon clan, for instance, was forced to leave their ancestral territory in greater Marioshoni and move to Kiptunga, and then again to Keringet. Then the British told the Kapyegon clan to Narok. When the clan fared poorly in Narok, the British permitted them to return to greater Marioshioni.[324] However, even though the British ultimately permitted the Ogiek to remain in Eastern Mau, they forced them to congregate in small villages.[325] The British felled Eastern Mau's indigenous trees and replanted the forest with exotic trees for logging. White settlers cleared more land and established farms. The Forest Department strictly regulated Ogiek activity in the remaining forest. [326]

157. For example, the Kapsiondoi clan was evicted from Eastern Mau by the British in the same era. During the eviction process, the colonists gave each of the families a card telling them where they were supposed to move to, some were sent to Chepalungu and others went to Lessos, near Eldoret. The British told the Ogiek that if they wanted to stay near the forest they would have to work as forest guards and would have to give up all their cattle and keep only sheep.[327]

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[323] Affidavit of Osasi A Ngosas Latende at Annex 17

[324] Affidavit of James Rana, *supra* note 169

[325] Affidavit of Patrick Kuresoi, *supra* note 11.

[326] Affidavit of Jimmy Patiat Seina, *supra* note 10.

[327] Affidavit of Kiprono Arap Chuma Siondoi, *supra* note 68

e. Consequences of Evictions and Displacement during the colonial period

158. As well as the physical evictions with the attendant loss of property and the hardship suffered in the alien, unforested lands to which they were moved, changes were made to the very forest cover from which they were removed and to their ability to use it as a source of shelter, livelihood and identity when they returned. Thus hunting was banned in the late 19th or early 20th centuries.[328] Also, the traditional native species of which at least seventeen have been identified[329] were largely logged and exotic or non-native species planted, mainly non-honey producing evergreens.[330]

159. As well as evicting the Ogiek to enable them to be confined within the boundaries of native reserves set aside for other tribes, their eviction from the forest was required to enable extensive logging alongside commercial pine tree planting to take place. For example, Lembus Forest in its entirety was awarded to a commercial company for the development of a timber industry in what has been described as "*one of the largest and most favourable land concessions made to Europeans in Kenya*".[331]

160. In Eastern Mau, British logging had severe consequences for the Mau forest and the Ogiek. Logging transformed the forest and left the displaced Ogiek living in open, deforested land. "*The British harvested the trees all the way up to the small mountain range in Eastern Mau*," elder Ogiek from Eastern Mau explain. "*The remaining Ogiek now lived in open land. They had never experienced this before. The climate was different and warmer. They were exposed to harsh conditions and infectious diseases*."[332]

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[328] The Report of the Carter Commission, *supra* at note 34, refers to "game and forest laws [which] interfered with the primitive way of life led by the Dorobo" at para 973

[329] G W.B. Huntingford, *supra* note 37 at 603

[330] See Roderic Blackburn, *supra* note 24 at 70

[331] David Anderson, *Managing the forest: the conservation history of Lembus, Kenya 1904-63,* (1988) 209.

[332] Affidavit of Patrick Kuresoi, *supra* note 11.

161. British deforestation made it extremely difficult for the Ogiek to continue practising their traditional livelihood. The deforestation of indigenous trees drove away wild animals and caused a sharp decline in honey production. Ogiek from Eastern Mau explain, "*[The British] felled indigenous trees and transported them away by train, leaving us only stumps. After this, many things began disappearing [including] honey and wild animals. This meant our traditional medicine disappeared*."[333] Moreover, the Ogiek were not permitted to continue their traditional honey harvesting practices on British-occupied land.[334]

162. Unable to survive in deforested land, Ogiek began migrating to areas of Eastern Mau that the British had not deforested, seeking trees for food and security.[335] But due to the overall decline in access to honey and wild animals, the Ogiek had to adopt some cultivation practices introduced by the British.[336]

163. The British Forest Department needed workers to tend to its growing exotic trees, which took years to mature. The Department therefore instituted a shamba system, whereby Ogiek and other Kenyan tribes were permitted to live in British-occupied forests and raise their own crops and animals, as long as they weeded and pruned British trees. When the trees were fully grown, these people were required to move elsewhere. In Eastern Mau, the shamba system led to an influx of Kikuyu into area that was formerly occupied only by Ogiek.[337] At independence, the forests of Eastern Mau - the Ogiek's ancestral home - became Government land.[338] The shamba system continued, but operated by Kenya Forestry Service.[339]

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[333] *Ibid.*

[334] *Ibid.*

[335] *Ibid.*

[336] *Ibid.* See also paras 1-82 above

[337] *Ibid.*

[338] *Ibid.*

[339] See generally Affidavit of Naomi Cherotich Tabelbech, *supra* note 9.

164. The Ogiek who were evicted to Chepalungu and Olenguruone faced problems similar to those experienced by Ogiek in Eastern Mau. When these Ogiek returned to their ancestral territory in Kipkurere, Koibatek and Sorget, they found the areas deforested. Moreover, the British restricted hunting and gathering. Joseph Sigowo from Koibatek, age 73, remembers:

"*When we came back [to Koibatek], life was difficult. We had come back illegally and had to hide in the forest. We still went hunting and collecting in the forest. But others—Kikuyus—had harvested our honey, and we found that our hives were in a poor state so we had to start over with them. So those who lived along the border of the forest and farms worked for the British*."[340]"

165. Many Ogiek in Sorget also had to turn to shamba farming and wage labour to survive.[341] Likewise, some Ogiek in Sururu - where the British strictly regulated forest use - worked for the British as guards on farms or in tree nurseries.[342]

166. When Ogiek from North Narok returned to their ancestral land after their first eviction, they felt they had to work for the British as labourers in the forest and sawmills. "*The British gradually dominated, subjected, and controlled our parents and grandparents*," elders explain. "*We didn't know how to read and write so they told us what to do*."[343] The British paid Ogiek labourers in cash, altering traditional Ogiek practices: with cash, the Ogiek now purchased beads and cloth

[340] Affidavit of Jonathan K.K. Tarigo, *supra* note 10.

[341] After returning to Mololo from Olenguruone, many Ogiek of Sorget farmed on the shamba system. Some laboured for British farmers, milking cows. Labour for the colonialists was difficult. See Affidavit of Naomi Cherotich Tabelbech , *supra* note 9, noting that "[t]he British gave us flour and condensed milk, which we thought was free—but they were in fact deducting the price from our wages"; others plucked pyrethrum flowers, which the British used to make chemicals for Round-Up; "We were paid .20 Ksh per month for the work. If we plucked flowers that were not ready to be harvested we wouldn't be paid, so we were very careful plucking flowers." See also Affidavit of Jonathan K.K. Tarigo , *supra* note 10, explains "[w]e were not allowed inside the forest for hunting or burning fire."

[342] Affidavit of Jimmy Patiat Seina, *supra* note 10.

[343] Affidavit of A. Tulwet Lemisi, *supra* note 9.

to wear in addition to animal skins. The Ogiek nevertheless continued to keep beehives and, in secret, hunt wild animals.

167. Some Ogiek in North Narok and in the Koibatek area worked for the Forest Department and during the Mau Mau Rebellion were hired as police to fight against the Mau Mau. A. Tulwet Lemisi and Osasi A Ngosas Latende, who served as police, recall that twenty Ogiek were killed in this fight.[344] Kiprono arap Chuma Siondoi also recalled that the British sought Ogiek help in flushing the Mau Mau out of the forest, but that the Ogiek guards were reluctant and decided not to show the British the hiding places of the Mau Mau in the forest.[345]

f. Lack of Consultation and Compensation

168. Throughout the colonial period, the British evicted the Ogiek without consultation or compensation. While recommendations were made as to consultation with the Ogiek, records indicate that this was limited to consultation as to whether they wished to move to a place called Chepalungu or to an existing native reserve rather than as to whether they wished to move at all.[346] It is not clear whether even that limited form of consultation ever took place, with those who can remember the move to Chepalungu saying that they had no choice. Ogiek throughout the Mau were evicted notwithstanding their clear protestations to the contrary during their giving of evidence to the Carter Commission:

"*Formerly we had a big forest area where we could get everything we wanted. We would like to be left where we are*."[347]

[344] *Ibid.* and Affidavit of Osasi A Ngosas Latende, *supra* note 323

[345] Affidavit of Kiprono arap Chuma Siondoi, *supra* note 68

[346] The Carter Commission, *supra* note 34, at para 979.

[347] Evidence of Musachi Ole Nangurusa from Nakuru to The Carter Commission, *supra* note 34, Evidence vol 1,1802.

"All we have to say is that the Government told us they want to move us but we do not want to move. Our country is here … We do not want to go anywhere else."[348]

"I am an old man. My father and grandfather lived and died here. Since the great eclipse of the sun we were here … I am now an old man and I want to stay here and die where my father and grandfather died."[349]

169. Equally, there was a recommendation to the payment of some compensation given that "*[M]any of them have good claims of right to the areas where they now reside and their removal, although for their own benefit, is also governed very largely by dictates of administrative convenience*."[350] However, the recommended level of compensation seems to have had no bearing to the spiritual, cultural and economic value of their land but was instead limited to their being fed while they adjusted to their new environments and a possible tax exemption. Ultimately though, there was no compensation given to the Ogiek.

B. Evictions after Independence

170. Following the departure of the British and Kenya gaining independence in 1963, things did not improve for the Ogiek. The Mau Forest continued to be subjected to logging and clearance operations as the post-colonial Kenyan administration parcelled and distributed land to leading members of the Government, political supporters and allies. Indeed the rate of destruction of the forest increased to such an extent that, there has been a destruction of around

[348] Evidence of Sigowa Arab Tariko from Londiani to the Carter Commission, *supra* note 34, Evidence vol 1, 1868

[349] Evidence of Kibinie Arap Kimainong from Tinet to the Carter Commission, *supra* note 34, Evidence vol 1, 1896.

[350] The Carter Commission, *supra* note 34, at para 981.

25 per cent of the tree cover (some 107,000 hectares) in a single 15 year period.[351]

171. It is clear from documented debates in the Kenyan Parliament that the problem of land allocation for the Ogiek remained unresolved as the Respondent Government began creating settlement schemes for communities across the country. In a lengthy debate related to the multiple problems with settlement schemes generally, Member of the House of Representatives Mr. arap Too recalled the situation of the Ogiek:

"*We have the Wadorobos [sic] who are living in the forest and I am sure that the Government will agree with me that these people own all the forests. Because the Government has taken away the forest from them I want the Government to look for a scheme for them. Up to date…the Waderobos are running away into the forests…I would like the Government to consider a special forest to be set aside for the Wadorobos so that they can learn to live like any other citizen of this country*".[352]

172. The Final Report of Kenya's TJRC 2013, concluded that

"*Pastoralists and hunter-gatherers in Kenya have been affected most severely, by land loss, land fragmentation and forced evictions. The result has been increased marginalisation, deepening poverty and cycles of conflict with neighbouring communities and with the state....*

The Kenyatta Government ignored the demands for land redistribution and instead nurtured elite accumulation of land.

[351] See Prime Minister's Task Force, *Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex*, (Nairobi 2009), *supra* note 250 at 17-18; and Jeffrey Gettleman, 'Forest People May Lose Home in Kenyan Plan' (New York Times 14 November 2009) < http://www.nytimes.com/2009/11/15/world/africa/15kenya.html?_r=0> accessed 18 November 2013.

[352] House of Representatives (Kenya) (Hansard), 14 July 1965, 990 at Annex 80

Instead, land distribution for the most part in the former White Highlands favoured the Kikuyu, leading to tension between them and other communities particularly within the Rift Valley. In fact there are claims that Kenyatta's Government is not only the reason for existence of minorities in Kenya today but it laid the foundation for the systematic violation of the rights of indigenous peoples to natural resource ownership and use."[353]

173. While evictions of the Ogiek, particularly in the northern parts of the Mau Forest Complex, continued with the post-independence governments, the difference this time was that their nature was often such that it was impossible for the Ogiek to return to their original lands after the eviction and instead they remain squatters.

a. Settlement schemes

174. In contrast to the approach of the colonial Government, which had been to move the Ogiek away from the forested areas, successive Kenyan Governments have excised areas of the forest (i.e taken them out of their category of forest land such that they can be settled by individuals) purportedly for the purposes of settling the Ogiek. While potentially beneficial to the Ogiek in ensuring them land within the forest, the fact that many such settlement schemes have proven to be irregular with the land being allocated to wealthy and influential members of the ruling party or to non-Ogiek communities, has meant that often Ogiek have not benefited from them. At the same time, the large influx of commercial farmers, loggers and companies who do not share the same respect for the forest has impacted the Mau ecosystem deleteriously.[354]

175. The Final Report of Kenya's TJRC 2013, found that

[353] TJRC 'Final Report' (23 May 2013), Vol. IIC, *supra* note 121, paras 136 – 139

[354] See generally, Daily Nation, Daily Nation, 'Moi Mama Ngina in Ndungu Land Report', *supra* note 248

"In an exercise that was intended to settle members of the Ogiek community, both the local chief and the assistant chiefs who were trusted with the process of issuing title deeds sold them to non-deserving individuals, even in the presence of landless community members who were waiting to be issued with the same".[355]

and further

"*During the exercise intended to re-settle members of the Ogiek community, a DC also, with the aid of administration police, forcibly evicted some genuine landless who should have been allocated land and in the process, forcefully took away their livestock, leaving them destitute*".[356]

176. A legal challenge was also brought by the Ogiek of South Western and Western Mau to a resettlement scheme which was ostensibly for them but which was based on what was termed the Blue Book.[357] This was meant to be a census of all Ogiek but included many non-Ogiek. There were also claims that members of the resettlement task force itself had allocated some of the land to themselves and to family and friends.

177. Eventually, following the defeat of the Kenyan African National Unity party (KANU), a Commission was set up to examine the extensive land grabbing in relation to public lands nationwide that had taken place throughout Kenya during the period of rule by KANU: the Ndungu Commission. This signalled the Ogiek out for special mention:

"... settlement schemes were established in forest areas ostensibly to resettle indigenous minorities whose lifestyles depend on forest habitats. Such

[355] TJRC Report, *supra* note 121, Vol. IIB, at para 485

[356] *Ibid* at para 487.

[357] *William Kipsoi Kimeto and Others v Commissioner of Lands and Others* 157 of 2005: Annexes 31 and 32 to Complainants' Admissibilty Submissions, already filed before this Court.

minorities have been systematically displaced from their ancestral lands by the Government through protectionist policies that do not recognise the historical claims of the people to the forest areas. A leading example of the displaced minorities is the Ogiek People. The Ogiek have struggled and continue to struggle to make successive governments recognise their way of life as a forest dwelling community."[358]

178. Commenting on one particular settlement scheme for the Ogiek in 1997, the Commission concluded that:

"*[f]rom the list of beneficiaries of this illegal allocation ... the real intention was definitely not to resettle the Ogiek community. The objective was to allocate forestland as political reward to influential personalities in the former KANU regime. The listed allottees can neither be described as Ogiek or landless*."[359]

179. Despite the unequivocal findings of the Commission of illegality in the allocation of public lands and its clear recommendations, including that "*all forest excisions (however regular) and consequent allocations to individuals for personal gain should be revoked*", little was done by the Government to ensure that the Ogiek were indeed made the beneficiaries of the settlement schemes originally intended for them.

b. Mau Forest Task Force[360]

180. On 15 July 2008, following the constitution of a coalition Government based on the National Accord,[361] the Prime Minister of the Republic of Kenya

[358]Ndungu Report, *supra* note 248, at 154; see also the TJRC Report, *supra* note 121, at Vol. IIB paras 377 – 380.

[359] *Ibid.,* Ndungu Report.

[360] The Mau Forest Task Force Report, *supra* note 250, at 36, ft 2 , acknowledges the fact that "[h]istorical records show that the Ogiek/Dorobo community have been living in and using the Mau Forest Complex for at least 150 years. Since the gazettement of the Mau Forest Complex starting from 1932, the Ogiek have been subjected to evictions severally."

[361]Kenyan National Accord and Reconciliation Act 2008

established a "Task Force on the Conservation of the Mau Complex" in response to the environmental destruction of the forest that had resulted in the near drying up of important water sources originating from the Mau.[362]

181. The report of the Prime Minister's Task Force, published in March 2009, was presented to the Kenyan National Assembly which duly adopted it on 14 September 2009. Its key findings in relation to the audit of land ownership illustrate how little had been done in the wake of the Ndungu Commission:

"(a) The purposes of the 2001 excisions in the Mau Forest Complex was to resettle the Ogiek and the victims of the 1990s land clashes. The Task Force established that beneficiaries included non deserving people, such as Government officials, political leaders and companies ...
(c) Multiple parcels of land amounting to area well in excess of the normal land size of 2.02 hectares (5 acres) were allocated to the same beneficiaries
(d) Ecologically sensitive areas, including critical water catchments were allocated
(e) In the Maasai Mau trust land forest, claims have been made on extensive areas in Nkareta ... In addition, five Group Ranches have encroached tremendously into Maasai Mau trust land forest, through the creation of land parcels beyond the Group Ranches adjudicated boundaries. Many beneficiaries of the original sub-division of the Group Ranches were not original members of the Group Ranches. They include leaders, such as Government officials, Members of Parliament, Chiefs, Councillors and employees of Narok County Council."[363]

182. As a result, the Mau Forest Task Force recommended that Ogiek who were to be settled in the excised areas and had not yet been given land should be settled, though outside critical catchments and biodiversity hotspots, while in

[362] See also, para 108 above

[363] The Mau Forest Task Force Report, *supra* note 250, at 12.. The report refers to some 99% of the title deeds from the 2001 excisions being affected by irregularities. See also Affidavit of Daniel Kobei, *supra* note 53 and Affidavit of John Sena at Annex 36

relation to Maasai Mau trust land forest, all title deeds for land encroaching into the trust land forest were to be revoked (without consideration of the particular position of the Ogiek). Although the Task Force recommended the fast-tracking of "participatory forest management" to enhance the livelihoods of forest adjacent communities with their inclusion in afforestation and reforestation, there was no recognition of Ogiek ownership of their traditional forests and their long-established and critical role in preserving that forest, as distinct from the destructive actions of other forest adjacent communities. Indeed, the Task Force specifically found that the "*sustainable management of the forest will not be possible unless those who are residing in the protected forest, the critical water catchment areas and the biodiversity hotspots are relocated*."[364]

183. In spite of the near universal acknowledgement of the Ogiek's dependence on the Mau Forest as a space for the exercise of their traditional livelihoods and as the source of their sacral identity, in October 2009, the Government of Kenya through the Kenya Forest Service, issued a 30-day eviction notice to the Ogiek and other settlers of the Mau Forest, demanding that they move out of the forest, on the grounds that the forest constituted a reserved water catchment zone, and was in any event part and parcel of Government Land under section 4 of the Government Lands Act.[365] Although these evictions were, for the most part, temporarily prevented - due to much advocacy and campaign work by the Ogiek community, relevant civil society organisations, NGOs, and the intervention of a number of international bodies - the situation of the Ogiek remains precarious.

184. In April 2010, the Interim Coordinating Secretariat,[366] whose task it is to coordinate the implementation of the recommendations of the Mau Task Force, established a 60-member Ogiek Council of Elders, who were to be consulted on matters of social welfare and environmental conservation. This included the

[364] The Mau Forest Task Force Report, *supra* note 250, at 69.

[365] Government Lands Act, Chapter 301 of the Laws of Kenya; see Annex 10 of Complainants' Admissibility Submissions, already filed before this Court, for copy of eviction notice .

[366] Now the Kenya Water Towers Agency.

establishment of an Ogiek register based on family lineages, the development of proposals for resettlement and restoration of the forest as well as for supporting livelihood development of the community.[367] However, in the event, the Council achieved very little as it lacked power.[368] Its mandate ended when the new Government assumed office in 2013, since it was being coordinated by the former Office of the Prime Minister, which has since been abolished. The established Council of Elders therefore remains inactive and its activities are not coordinated.

c. Evictions in Northern Tinderet

185. The Ogiek of Kipkurere were evicted without notice in 1986 from the forest and forced to live in a small village, Ngatipkong. They were not compensated for the eviction. "*Life [in the village] was hard*," Samson Kipkemboi Mutai remembers. "*We were all squeezed in one place and were no longer free... There was no hospital. Few children went to school*."[369] Kipkoech Sang petitioned the District Commissioner of Uasin Gishu on behalf of the community. The District Commissioner at one point introduced a settlement scheme, but the matter was transferred to Nandi District administrators and no Ogiek were settled.[370]

186. During the same period, in 1986, the Ogiek of Nabkoi and of Cengalo were evicted with a considerable loss of property including beehives and food reserves. Those evicted were forced to live along the roadside and along the forest edges or to squat on other peoples' farms. To this date, the majority of

[367] See further Office of the Prime Minister, Ogiek Council of Elders Formed to Address Community Concerns (1 April 2013) <http://www.kws.org/export/sites/kws/info/news/2010/2010_download/ogiek_community_for_MAU.pdf > accessed 20 November 2013.

[368] See Affidavit of Frances Maritim, para 21 at Annex 25; Affidavit of Kipkoech Sang at Annex 35 and Affidavit of Daniel Kobei, *supra* note 53 at paras 30-32

[369] Affidavit of Samson Kipkemboi Mutai, *supra* note 128

[370] Affidavit of Kipkoech Sang, *supra* note 368. See also Ogiek Memorandum, North Tinderet Forest Reserve to TJRC, supra note 205.

them await resettlement.[371] For the Ogiek of North Tinderet Forest and Kipkurere Forest there were plans to settle them through the excision of forest land at Cengalo and Nabkoi forest.[372]

187. In 2006, two District Commissioners came to the village of Ngatipkong, to which Ogiek of Kipkurere had been evicted, and told them that everyone was being evicted from the forest in 21 days. The Ogiek had nowhere to turn. When the Ogiek complained, District Commissioner Eliud Barsangul promised that they would be resettled after the eviction. "*We could not oppose the eviction further because we were so politically weak*," Ogiek explain.[373]

188. On 23 March 2006, Government officials set fire to Ogiek homes in Ngatipkong, even those with people inside them. Ogiek lost food stores and other personal property, and they abandoned their beehives. "*We were very angry*," Samson Kipkemboi Mutai remembers. "*There was nowhere to go. We had to sleep outside in the burned village. Elderly people and children had to do this, sleeping beneath trees for shelter. We never received any compensation*."[374] 949 Ogiek from the Timboroa sub-location alone were evicted from Kipkurere.[375]

189. The District Commissioner did not fulfil his promise to resettle the evicted Ogiek. Only a small portion of the evicted Ogiek were given land after the

[371] Ogiek Memorandum, North Tinderet Forest Reserve to TJRC, supra note 205. A settlement scheme established in 1995 was not sufficient to accommodate all those who had been evicted.

[372] See letter by Ogiek elders of Kipkureri to the Njonjo Commission dated 23 October 2000 at Annex 60. See also the letters of the Chief of Timboroa location to the District Officer dated 3 August 2009 at Annex 61 and that of the Permanent Secretary to the Cabinet to the Permanent Secretary to the Ministry of Lands dated 21 December 2007 both calling for the settlement of the Ogiek community evicted from Kipkurere Forest at Annex 71.

[373] Affidavit of Kipkoech Sang, *supra* note 368

[374] Affidavit of Samson Kipkemboi Mutai, *supra* note 128

[375] Letter from the Office of the Chief, Timboroa Sub-Location, to District Officer, Lesse dated 3 August 2009 at Annex 61

eviction. "*When the rest of us seek title, we are bounced from [administrative] office to office*," says Kipkoech Sang. The Ogiek of Kipkurere are scattered far apart, living on land belonging to other groups, and cannot meet as clans to make decisions.[376] The Ogiek of Kipkurere have sought redress but received no assistance from the Government. Among other measures, they have requested meetings with the Ministry of Forestry and Wildlife[377] and presented memoranda to President Moi and the Njonjo Land Commission in 2000.[378] "*In this country there is no justice. If you cry out loud, no one can hear you. If you cry out about the reality you're facing, no one listens*." [379] President Kibaki issued a Presidential Directive to the Ministry of Lands in 2007 to resettle the "*Ogiek Community evicted from of Kipkurere Forest in Nandi North District,"*[380] but the Ministry apparently ignored the instruction.

190. Ogiek from Kipsangany (now living along the roadside in Serengonik) were among the few Ogiek not evicted by the British. They did not experience their first eviction until after independence. In August 1981, forest wardens came to the Ogiek of Kipsangany bearing guns. They destroyed the Ogiek's homes with power saws and fire. Around 500 Ogiek were forced to scatter and flee to the edges of the forest. The Ogiek had to leave their food stores behind, and they were forced to abandon most of their personal property. "*We were forced to leave the forest; we didn't want to leave*," remembers an Ogiek from Kipsangany.[381]

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[376] *Ibid*

[377] Letter from Kipkoech Sang, Chairman, to Permanent Secretary, Ministry of Forestry and Wildlife, Re: Request for Appointment dated 26 November 2009 at Annex 64

[378] See memo to the Njonjo Commission, *supra* note 372

[379] Affidavit of Kipkoech Sang, *supra* note 368. See also Ogiek Memorandum, North Tinderet Forest Reserve to TJRC, supra note 205

[380] Letter from President Moi to Kombo Mwero, Permanent Secretary, Ministry of Lands dated 21 December 2007.

[381] Affidavit of Samuel Kipkorir Sungura, *supra* note 17

191. A month after this violent eviction, Government representatives told the Ogiek that they could return to the forest; only Nandi people, they said, were now banned from living in the forest. The Ogiek returned and rebuilt their homes.[382]

192. In 1991, the District Commissioner ordered the eviction of the Ogiek from Kipsangany once again. The Ogiek were told that the forest was being encroached, and they were given seven days to leave. "*The forest officers told us to leave the forest but didn't say where to go. We were not previously consulted*," remembers an elder.[383] Nearly 200 people had to leave Kipsangany. They moved to the border of the forest in Serengonik.

193. In Serengonik, the Government gave each Ogiek family five points of land and instructed them to cultivate their land. "*We were not happy with this—the five points was supposed to be temporary, but the Government never gave us more. When we tried complaining, we were told, 'Go look for land then if you know of any other place that's better*.'" The community built homes and a school. Meanwhile, the Ogiek witnessed the increasing deforestation of nearby forests by large companies.

194. In 2006, the Respondent Government issued an order to evict the Ogiek of Serengonik. The Government claimed that the Ogiek were responsible for destroying the forest, even though the Ogiek had witnessed deforestation by corporate loggers. Without consulting the Ogiek, the District Forest Officer gave the Ogiek 14 days to leave Serengonik. Several people complained to the District Commission and District Forest Officer, who told them that they were only required to leave for one week and would be allowed to return to their homes. The community moved to the side of a road and waited for the Government to give them back their land and homes—but they never did. "*At the time we thought, 'Since it's just a week, we'll come here to the roadside.' But six years later, that week has never ended*." The community lives in shacks on

[382] Affidavit of Samuel Kipkorir Sungura, *supra* note 17

[383] *Ibid*

the side of the road in desperate poverty. Community activists are arrested and harassed by local administrators.[384]

d. Evictions in Londiani/Tinderet

195. By independence, the Ogiek of Londiani were scattered throughout Londiani. In 1982, the Government began evicting Ogiek from four villages in Tindiret Forest. Houses, property and food were destroyed. In 1983, the Ogiek were allowed to inhabit one village in the area, called Koikener. Over the next two decades, the Ogiek enjoyed uninterrupted occupation of the village and continued to draw sustenance from natural resources found within the forest. However, in 2006, the Government issued an eviction notice giving the community 21 days to leave the village, on the basis that the population rise required a new settlement. The community refused to leave. The Government, through the police, subsequently demolished the Ogiek settlement and forced the community to leave. The Government's promise to resettle the community was never fulfilled, and the majority of the community were forced to seek temporary shelter in the nearby Tindiret Tea Estate where they remain to the present day.[385] Families moved wherever they could find work, or where they could obtain schooling for children.

196. In November 1988, everyone in Tindiret Forest was evicted from the forest. The District Commissioner and Provisional Commissioner called a meeting and ordered people to move within a month. This was accompanied ordering everyone to move from the forest, even the forest workers, which stated that all had to demolish their own homes. At the end of the month, the Government returned with bulldozers. The reason given for the eviction was an increase in population, but the Ogiek realised that politics was at play. The previous Kalenjin Government had demolished the homes of the Kikuyu; but a change in Government had led to the Kikuyu being in power (KANU), who now wished to retaliate against the Kalenjin. This affected the Ogiek, since the evicted Kalenjin

[384] Affidavit of Samuel Kipkorir Sungura *supra* note 17

[385] See further Affidavit of Barno Christopher Kipsang, *supra* note 126

had land to go back to, whilst the Ogiek did not. They had to scatter far apart. Everybody had to find their own place to go and many ended up squatting on Kipsigi land.[386] The Ogiek were given no compensation after this eviction.

197. In 1990, land was excised from Sorget forest and demarcated for settling of 3700 members of the Ogiek community but such settlement never took place.[387] As in other cases, the evictions impacted on the schooling of Ogiek children. For example, Moi Sorget Secondary School (whose foundation stone had been laid by the then President, Arap Moi) was closed down.[388]

198. After their 1988 eviction, the Ogiek of Londiani (Masaita, Sorget, Malagat, and Tendeno) petitioned the Government for a settlement. In response to their requests, the District Commissioner of the Londiani Division repeatedly wrote to the Senior District Commissioner acknowledging that the Ogiek had been evicted in 1988 and had been landless ever since. He urged the Senior District Commissioner to provide the Ogiek with famine relief and to resettle them.[389]

199. In 1997, the Ogiek of Londiani visited President Moi, who assured them that they would be settled.[390] The President referred the matter to the District Commissioner of Kericho District, who instructed the Ogiek to provide a register

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[386] Affidavit of Francis Maritim, *supra* note 368

[387] Memorandum prepared by leaders of the Ogiek community living in five districts in the North of Rift Valley Province to the President dated 5 October 2005 at Annex 56.

[388] See Sorget, Makutano, Malaget and Tendeno Ogiek Memorandum to the NARC Government *supra* note 210. *See also* Letter from H. K. Rono, District Officer, Londiani Division, to the Office of the President dated 3 October 1999, LON/LOD.16/1 VOL.IV(185) at Annex 68.

[389] Letter from G.L. Lesootia, District Commissioner, Londiani Division, to Nicholas K. Mberia, Senior District Commissioner dated 7 April 1995 (referring to letter of 16 August 1993 by the previous District Commissioner, also seeking assistance for the Ogiek) at Annex 67; Letter from G.L. Lesootia, District Commissioner, Londiani Division, to Nicholas K. Mberia, Senior District Commissioner dated 21 August 1995, LON/LND.16/5(80) at Annex 66

[390] Letter from H. K. Rono, to the Office of the President, *supra* note 388

of names of Londiani Ogiek.[391] Government surveyors came to survey what the Ogiek thought was called the "Mololo-Sorget Settlement Scheme."[392] The Ogiek were never settled, however. They continued to advocate for their settlement, meeting with the District Commissioner of Kericho in 1998.[393] The District Commissioner promised to hold a public meeting on the issue the following week. At that meeting, the Ogiek were greatly outnumbered by other ethnic groups seeking settlement and achieved no results.[394]

200. A confidential letter from the District Commissioner of Kericho in 2000, however, reveals that there never was a Sorget Settlement Scheme because "politics set in and the exercise was shelved indefinitely." Instead, the Respondent Government embarked upon a scheme called the "*Soina* Settlement Scheme in Sorget-Londiani."[395] The local area MP Kipngeno Arap Ngeny hailed from Soin. He renamed the settlement scheme so that his people could be settled there instead of the Ogiek.[396]

201. The Ogiek of Sorget have actively sought redress, but to no avail. They have sent letters of complaints to the Respondent Government[397] and met with the Rift Valley Provincial Commissioner,[398] but they have not received assistance.

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[391] *Ibid*

[392] Affidavit of Francis Maritim, *supra* note 368

[393] Letter from G.L. Lesootia to District Commissioner, Kericho District dated 26 May 1998, *supra* note 389

[394] Affidavit of Francis Maritim, *supra* note 368

[395] Confidential letter from A. B. Shauri, District Commissioner, Kericho District, to Provisional Commissioner, Rift valley Province dated 12 April 2000, G.43/Vol.I/88 at Annex 69.

[396] Affidavit of Francis Maritim, *supra* note 368

[397] See for example, Letter to Provincial Commissioner, Chief, District Officer, and District Commissioner dated 16 November 2000 at Annex 70

[398] See Memorandum of OWC meeting, at Annex 59

e. Evictions in Koibatek

202. The Ogiek of Koibatek struggled under the restrictions of the new independent Government. "*When Kenya became independent, the Government became even more strict than it had been under the whites*," says John Arusei. "*If we were found living in forest, we were arrested for trespass by forest guards... Life became very difficult; we started struggling with life. We went to farms to work and live, to look for employment and live with other people's families. We started taking our children to school while working on white farms*." Ogiek scattered, searching for somewhere to buy land. "*We went to the Government seeking assistance, but we've never been given assistance*."[399]

203. In 1988, the Ogiek of Koibatek (which covers such smaller forests as Maji Mazuri, Tinet and Timboroa)[400] were forcefully and violently evicted.

204. Jonathan Karek Tarigo is an Ogiek who had been appointed as administrative chief in the area during the 1980s. He described how difficult the evictions were for the community:

"The process of the eviction in the 80s was very difficult. I had to do barazas and tell people what the Government wanted. There was no option provided for people, they were just evicted and there was no alternative offered. The Government was trying to protect some springs in the forest as a water catchment but they didn't offer anyone any assistance. People were evicted and that was it; the Government didn't give our people anything. Up to now our people have not settled, they are scattered…

[399] Affidavit of John Arusei, *supra* note 90

[400] According to elders from this community, the Koibatek Ogiek originated from the Marishoni area, further south, but relocated in the seventeenth/eighteenth century. Additionally, the name Koibatek district comes from 'koi-po-tek' which means 'house of bamboo', a direct reference to its Ogiek inhabitants. See *Koibatek Ogiek at a Glance.* Note also that reference here to Tinet is separate to the Tinet of South Western Mau (there are 2 locations called Tinet).

All of our shirnes, our food stores and such were destroyed by the forest guards during the evictions because they didn't want us to go back…. Some tried to return to the forest in the 80s after the evictions, but the forest guards were there and they arrested people and put them in jail. Our people would come to me to ask for help, but there was nothing I could do."[401]

205. Arusei also remembers:

"*The chief, district officer, police, forester, and forest guards came and burned down all our huts. Some of us had stores of maize, and these were burned. Other tribes had places to go to, but the Ogiek community had nowhere to go. We were thrown out of the forest and everyone was scattered. Women had to divorce their husbands and go to their parents' homes because the couples had no place to live together. It broke up families. We sought work as labourers on Tugen farms and on sawmills. Women worked as maids; small girls married very early. We received no education or schooling*."[402]

206. The nearly 800 Ogiek of Koibatek have never been able to return to their forest and, as a consequence, there is a whole generation of Ogiek from the affected clans who are growing up without having had contact with their traditional forests.[403] Girls often become pregnant at a young age, marry early, but are forced out of their husband's homes and must return to their parents' houses. Poverty forces girls to marry young. "*Girls are keen to have husbands with land so that they can have access to farming and basic needs*," explains Tapkili Chepkirui.[404]

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[401] Affidavit of Jonathan K.K. Tarigo, *supra* note 10.

[402] Affidavit of John Arusei, *supra* note 90

[403] See Letters of Koibatek Ogiek to the Provincial Commissioner dated 24 June 2004 and 30 August 2004 and to the MP for Eldama Ravine dated 18 August 2004 at Annex 72, calling for their permanent settlement in their ancestral lands

[404] Affidavit of Tapkili Chepkirui, *supra* note 92

207. The Ogiek of Koibatek have sought redress through numerous channels, but never receive meaningful responses to their efforts. These efforts include sending a memorandum to President Kibaki,[405] a letter to President Odinga,[406] letters to the Prime Minister,[407] and making a presentation to the Prime Minister in 2010, which received no response.[408] The community has written many letters[409] to and held meetings with administrators requesting settlement. "*We went to Nakuru to the Provincial Commissioner's office from 2004 to 2006*," Jonathan Tarigo explains. "*He always said, 'We are doing something, we're doing something.' These meetings were never fruitful*."[410]

f. Evictions in Maasai Mai

208. In other areas of the Mau Forest, there was a different series of events. To the south of the Mau escarpment, in Narok District, the group ranch system was developed, as provided for in the Land Group Representatives Act 1968.[411] The original purpose of the group ranch system was to protect grazing lands from fragmentation, and involved the establishment of land groups with registered members who held collective title to an area of land that was not meant to be subdivided. Although the Ogiek of Narok District did not live in the savannah but in rich forest land, the system was extended to them. While potentially beneficial to the Ogiek of the Narok District in providing them with collective title to their traditional lands, the Group Ranch system came to be exploited by others. As described by Kratz:

"*The registration and land adjudication processes provided opportunities for land grabs by powerful politicians who had never set foot in the forest and*

[405] See 2005 Memorandum at note 387 *supra*

[406] The Ogiek People's Memorandum, dated 28 December 2010 at Annex 57

[407] See Letters to Prime Minister dated 17 March 2011 and 20 August 2011 at Annex 73

[408] Affidavit of Jonathan K.K. Tarigo, *supra* note 10.

[409] See Letters to Provincial Commissioner and District Commissioner dated 30 August 2004, 24 June 2004, 1 September 2004, 18 August 2004, *supra* note 403

[410] Affidavit of Jonathan K.K. Tarigo, *supra* note 10.

[411] See further paras 285-288 below for details of the Land Group Representatives Act 1968.

manipulation of registration lists to include people who did not live there and did not have customary land rights. As problems with the group ranch system developed in the 1980s, ranches were allowed to subdivide in a process that would give each member individual title to a piece of land. This introduced another process through which land titles and tract sizes were manipulated."[412]

209. As described earlier, relationships between the Ogiek and neighbours from other tribes had generally been cordial, partly due to mutual need but also the fact that migratory patterns of one or both of them meant that they were not in permanent, year round coexistence. However, as the forest land came up for demarcation, those outsiders saw it as "*capital and a universally exploitable and alienable resource*"[413] resulting in a new relationship between them and the Ogiek marked by tension and, at times, violence.

210. Two particular group ranches established in Narok district were Enkaruni and Eneikishomi, which were created in 1973. The Ogiek initially had no issue with such establishment. Instead, problems began to arise in 1996 when the two group ranches were formerly subdivided and individual title deeds issued.[414] Between 2000 and 2005, the community lived in fear and uncertainty as to the validity of their titles.[415] In 2005, notice was given to the community over the

[412] Letter in response to 60 minutes Broadcast , *supra* note 6.

[413] Corinne A Kratz, *supra* note 150 at 197

[414] In 1999 members of Nkaroni Group Ranch brought legal proceedings challenging the fact that some of the areas within the group ranch had been allocated to non-members (*Johnstone Kipketer Talam and Others v Principal Land Adjudication and Settlement Officer* 446 of 1999, see Annex 34 to Complainants' Admissibility Submissions, already filed before this Court).

[415] For example, in 2005 legal proceedings were brought by some Ogiek of Nkaroni Group Ranch challenging the allocation of land to a company (Ilngina Contractors Ltd) and at a rate of 1364.70 hectares: see documents in case *Joseph Kimetto Ole Mapelu and Others v Narok County Council* 157 of 2005; Annex 39 to Complainants' Admissibility Submission, already filed with this Court

local radio requiring them to leave the area or be evicted.[416] The community challenged the threatened evictions in the Nairobi High Court (case 664/2005).[417] They successfully obtained an interim injunction restraining the local council from "*harassing, intimidating, threatening, provoking, inciting, detaining, arresting, trespassing into, demolishing and burning*" their property.[418]

211. Despite this, on 10 June 2005, while the main court case was still pending, tens of armed forest rangers came and set fire to the homes in the area, destroyed other buildings (including six primary schools and several churches), property (e.g. grain) and confiscated livestock. A further attack was then carried out on 3 August 2005.[419] This resulted in further satellite litigation and a finding that the local council "*had been in contumelious defiance of the lawful order of the court*".[420] For the community, it resulted in their being forced to live in inadequate temporary shelter, with no Government support, for nearly a year during which time vulnerable members (particularly the elderly and children) were exposed to disease and, in some cases, there were deaths.[421] Subsequently, the boundaries of the original trust land have been redrawn, without any consultation with the Ogiek, with the effect that much of the land which had formed part of the two group ranches and to which individual title had been granted now falls within the trust land, thereby invalidating the individual

[416] See UNEP 'Maasai Mau Forest Status Report' (2005), which refers to how the Government, without any apparent involvement of the Ogiek, reached a decision to evict 10,290 people from Maasai Mau in May and June 2005 at Annex 85

[417] See also the pleadings in Nakuru High Court Civil Case no 157 of 2005 regarding evictyions from the Enkaroni and Enakishomi Group Ranches, *supra* note 415

[418] Order of Ransley J, 2.6.2005 in *Kalyasoi Farmers Cooperative Society and others v County Council of Narok* 664 of 2005, Annex 42 to Complainants' Admissibility Submission, already filed with this Court

[419] Affidavit of Kimetto Mapelu para 5 at Annex 24

[420] *Kalyasoi Farmers Cooperative Society and others v County Council of Narok* 664 of 2005, ruling of 2 December 2005.

[421] Affidavit of John Sena, *supra* note 363, and Affidavit of David Sulenya and Nayieyo Olole Sirma, *supra* note 211

titles.[422] This is notwithstanding correspondence of 27 June 2000 from Narok County Council expressly confirming that "*the Group Ranch did not encroach into the Council Forest*".[423] There has been some talk of compensation but, to date, the community has not received anything.

212. In approximately 1979, Ogiek land at Sasimuani and Olokirikirai, Maasai Mau block, Olokurto division, was demarcated as trust land, administered by Narok County Council. The land at Sasimuani was officially given to the Ogiek and the community was given papers denoting parcel numbers in relation to their individual plots of land.[424] However, in 1986, during President Moi's era, police and security forces and forest guards forcibly evicted the Ogiek from their homes in Sasimuani, destroying houses, food stores, and livestock.[425] For the following 10 years, the community lived in makeshift houses nearby, despite threats and intimidation from the neighbouring Maasai. Given their precarious existence in such conditions, the community eventually returned to Sasimuani despite the fact that they continue to be regularly threatened with eviction, in particular in 2005 by the Maasai Administration of Chiefs and more recently in 2009 by the Kenya Forest Service. [426]

g. Evictions in North Narok

1975 Settlement

213. In 1975, the Government of Kenya decided to demarcate Olengape, an area of North Narok, for settlement. The Ogiek of North Narok - who had been landless since their eviction by the British in 1920 - were allocated land in Ol Pusimoru as part of this settlement. Ogiek elders formed a demarcation

[422] Affidavit of Kimeto Mapelu, *supra* note 419 at para 11

[423] See documents at Annexes 34 and 35 to Complainants' Admissibility Submission, already filed with this Court

[424] See further Affidavit of Wilson Mamusi Ngusilo at Annex 32

[425] *Ibid*

[426] *Ibid*

committee and worked with the Government surveyor to map Ol Pusimoru and allocate smallholdings to Ogiek families. The Ogiek were relieved to have land of their own at last, and they built houses and established small farms.[427]

1986 Eviction

214. However, in April 1986, the Ogiek settled in Ol Pusimoru were suddenly and violently evicted. They had been living on their allotments for over a decade without interference from the Government, and they had never been consulted or given notice about an impending eviction. Without warning, Provisional Commissioner Ezekiah Oyugi and police officers arrived and declared that the residents of Ol Pusimoru - mostly Ogiek, but including some non-Ogiek - were encroaching on the forest and living in Ol Pusimoru illegally. Groups of armed police officers threatened and assaulted the Ogiek and burned down their houses, forcing them to flee. Julius Kiprono Munyereri recalls the invasion:

"*The police came to our village carrying guns and whips. Three police went house to house telling people to leave. They said, 'Take out everything from the house and put everything on the road.' The police pushed inside my house and said, 'Get out of the house! If you have anything worth saving, put it on the road.' A second group of police then came and set fire to houses. None were spared. The police demanded bribes, saying, 'Give me money and I won't burn your house," and people paid bribes but their houses were burned anyway. They used the fires in our homes to set fire to our houses. They would even order us to burn our own homes*.'" [428]

215. Ogiek who tried to defend their homes and property were threatened, beaten, or arrested. "*Because I resisted [leaving my house]*," Munyereri remembers, "*a policeman ... whipped me on my back. I was injured on my spinal cord, and it has left a scar*."[429] Osasi A Ngosas Latende, too, was threatened for trying to

[427] Affidavit of A. Tulwet Lemisi, supra note 9.

[428] Affidavit of Julius Kiprono Munyereri, *supra* at note 176

[429] *Ibid*

save his home. "*I tried to stop them from setting fire to my house, but the police pointed a gun at me and so I left. They were yelling, 'Go back where you came from!'*"[430] Some Ogiek—including one of Munyereri's relatives—were arrested for resisting the eviction and taken away in Land Rovers.[431]

216. Police beat men and women.[432] Many people were injured during police beatings. Several Ogiek developed long-term pain as a result.[433]

217. The Ogiek lost not only their homes during the invasion, but also valuable personal property. "*With everyone afraid of being beaten, we had to leave most of our belongings behind*," Grace Chepkemoi Lemisi recalls. "*We lost plates, sufuria (very valuable cooking pot), mattresses, bedding, and vital documents. All of this was burned*."[434] The police burned stores of food. Ogiek had to leave their animals behind to flee from the police, and the animals, scattered and unprotected, were eaten by hyenas and leopards.[435]

218. The Ogiek of Ol Pusimoru were given no alternative shelter after the eviction and had to take cover in the bush. Grace Chepkemoi Lemisi recalls that women, men, and children spent the night after the eviction in the rain, without food or blankets. The Government provided no treatment for the injured[436]. The Provisional Commissioner then ordered those evicted to move near the Olmariku Primary School.[437]

219. After the eviction, the elders that had helped the Government allocate land in Ol Pusimoru sent grievances to the Ministry of Lands. They forwarded documents showing that the Government had allotted land to the Ogiek in

[430] Affidavit of Osasi A Ngosas Latende, *supra* note 323

[431] Affidavit of Julius Kiprono Munyereri, *supra* at note 176

[432] Affidavit of Grace Chepkemoi Lemisi, *supra* note 101

[433] Affidavit of Julius Kiprono Munyereri, *supra* at note 176

[434] Affidavit of Grace Chepkemoi Lemisi, *supra* note 101

[435] *Ibid*

[436] *Ibid*

[437] Affidavit of Julius Kiprono Munyereri, *supra* at note 176

1975.[438] Consequently, the Minister of Lands ordered a new survey to demarcate yet another settlement. The new settlement, however, was smaller than the previous one - the redrawn boundary between forest and settlement meant that some Ogiek lost their allotments. Ogiek were prohibited from entering the forest to hunt or collect honey.[439]

220. After the violent eviction of 1986, the Ogiek of Ol Pusimoru were too afraid of the Government to make any attempts at obtaining redress. They remembered the arrests during the eviction. "*This was intimidation*," Munyereri explains. "*That makes everyone afraid to complain—we were suppressed and afraid to raise complaints*."[440] The Ogiek felt they would only suffer from complaining to the same Government that had targeted them. "*The Government was doing this [to us], so how could we complain to the same Government? ... We believed that if we were to complain to the Government, they'd arrest us*."[441]

2000 Settlement

221. From 1986 to 2000, the Ogiek of Ol Pusimoru lived in fear that they would be evicted again. In 2000 they finally received title deeds to their allotments under the 1986 settlement. They still suffer, however, from lack of access to the forest,[442] lack of political representation, and discrimination in employment and education.[443] They have never received compensation for all they lost in the 1986 eviction. "*My house was burned down during the eviction*," Grace Chepkemoi Lemisi explains. "*It took me a month to build it, myself, by hand*." She wants to be compensated for her house and her personal property—such as animals and household goods—destroyed by the police.[444]

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[438] These documents are now lost. Affidavit of A. Tulwet Lemisi, *supra* note 9.

[439] *Ibid.*

[440] Affidavit of Julius Kiprono Munyereri, *supra* at note 176

[441] Affidavit of A. Tulwet Lemisi, *supra* note 9.

[442] Affidavit of Julius Kiprono Munyereri, *supra* at note 176

[443] Affidavit of Grace Chepkemoi Lemisi, *supra* note 101

[444] *Ibid*

h. Evictions in Eastern Mau

222. For the Ogiek of Eastern Mau, there were initial attempts by the Kenyan Government to evict them and relocate them in South West Mau, purportedly to allow tree planting in the original lands. In the end, they were not evicted and instead there was subsequent talk of them being given title to their ancestral land.[445] However, due to people misrepresenting themselves as Ogiek, as well as tribal favouritism, much of the land was in fact allocated to non-Ogiek (Kipsigis and Tugen due to political affiliations).[446]

Sururu 1963

223. The Ogiek of Sururu - whose territory had been circumscribed by British colonialists - were evicted from their remaining land in 1963, Kenya's first year of independence. Government administrators took all 300 or so Sururu Ogiek to a camp near Sururu Forest Station. "*We were removed from the forest to live in [the] camp, in the name of development*," Thomas Museiyie remembers. "We had no power to resist."[447] Jimmy Patiat Seina recalls that while the Ogiek were glad the camp was close to a school and health care, life at the camp was otherwise difficult. The Ogiek had to leave their homes behind and build new homes from scratch; the Government provided no money or materials. They did not own the land where they now lived, and they were not permitted to build permanent houses or food stores. "*We were just squatters there*" on the Forest Department's land, he explains.[448]

[445] Affidavits of Joseph Nburumaina at Annex 30 and of Linah Taploson, *supra* note 42

[446] Tugens and Kipsigis were staunch supporters of President Moi and the 'free land' was meant to reward them.

[447] Affidavit of Thomas Museiyie, *supra* at note 202

[448] Affidavit of Jimmy Patiat Seina, *supra* note 10.

1970 Failed Lari Settlement

224. By 1970, elders from across Eastern Mau were advocating for the Ogiek of Eastern Mau to have their own reserve. The Government finally agreed to allocate land in Lari, a location in Eastern Mau, to the Ogiek of Eastern Mau. The land was gazetted, and newspapers published reports that Lari was being given to the Ogiek. President Kenyatta himself was present at a ceremony marking the land allocation. The Ogiek of Eastern Mau followed the Government's instructions, giving their names to the District Officer for land allocation.

225. Few Ogiek were actually allotted land in Lari, however - the allotments were given to Kikuyus, members of the President's tribe. "*The Government was theirs, and the rest of us were powerless and had no voice*," remembers James Kasoi of Sururu. "*We were dominated and had no representation*."[449] Kasoi recalls that a maximum of fifty Ogiek of the 300 living at a camp near Sururu Forest Station received allotments in Lare. The rest had to return to the camp. John Sitienei described the fact that during the Lari allocations, he observed Ogiek attempting to claim their land, but when their names were called they were stopped from going forward by Administration Police and a non-Ogiek would go forward and claim that allotment.[450]

226. By contrast, the community of Lari location in Eastern Mau were moved from the villages of Likia, Sururu, Lare and Teret to Nessuit in 1992. Although they were allocated small parcels of land in Nessuit location (5 acres each), their own land in Lari was given to Kikuyu, while that in Likia, Sururu and Teret was given to Kipsigis. In both cases, the Ogiek saw their traditional forests which had been so important as sources of honey, medicines and their very identity, destroyed to allow the new settlers to cultivate the land.[451]

[449] Affidavit of James Kasoi at Annex 9

[450] Affidavit of John Sitienei, *supra* note 69, see also Affidavit of Zakayo Lesingo at Annex 20

[451] Affidavit of John Lesingo Lembigas at Annex 18

1989 Eviction

227. In 1987, the Government ordered residents of Eastern Mau to leave the forest.[452] Initially, Ogiek were not required to leave - the Government evicted Kikuyus from the forest. Nevertheless, the eviction had consequences on the Ogiek: all Government facilities were closed, including schools and health care providers.[453] "*We couldn't go to school; we became a dormant people*," says James Rana.[454] Mike Lenduse, who was just beginning primary school at the time the schools were closed, recalls how difficult it was to have to change schools and go to a primary school that was a 3 kilometre walk away.[455]

228. The Government told the Ogiek of Eastern Mau in 1989 that they would be resettled in Tinet, South-Western Mau. The same year, the Government published an eviction notice and the District Commissioner held a meeting to tell the Ogiek of Eastern Mau that they were required to leave the forest because the land was being designated as Forest Department land. Even Ogiek who had worked for the Forest Department for years and retired in Eastern Mau were forced to abandon their homes.[456] "*The Forest Department wanted to possess the forest themselves without the interference of Ogiek, but they forgot that Ogiek were there long before the Forest Department was established in 1952*," says Christopher Kipkones.[457] The District Commissioner told the Ogiek to go to Tinet; most Ogiek refused. Those who went found the environment harsh and soon returned to Eastern Mau.

[452] Affidavit of Patrick Kuresoi, *supra* note 11.

[453] Affidavit of James Rana, *supra* note 169

[454] *Ibid*

[455] Affidavit of Mike Lenduse, *supra* note 231

[456] Affidavit of Patrick Kuresoi, *supra* note 11.

[457] Affidavit of Christopher Kipkones, *supra* note 118

Mid-1990s Settlement

229. "*Those of us who had remained in Eastern Mau [were] struggling and championing our rights to land*," explain Ogiek of Marioshoni.[458] The Ogiek of Eastern Mau repeatedly expressed their grievances to the Government. "*We complained [many times] to the District Commissioner and Provisional Commissioner, but they wouldn't respond to our grievances*," explain the Ogiek of Sururu.[459]

230. In the early 1990s, Provincial Commissioner John Chelanga[460] publicly addressed the Ogiek of Eastern Mau and promised that they would not be evicted again as long as they avoided the upper forests of Eastern Mau. He encouraged them to live in villages such as Nessuit, Ngongogeri and Marioshoni, located in the lower forest. If they did so, he said, they would be provided with schooling and other Government services and eventually be settled there. "*He told us that wherever we saw that the Forest Department had cut down trees, we were allowed to build structures. So we built where loggers ... were felling the forest*," remembers Kipkones. "*We then waited for surveyors to come and demarcate the land to us*."[461]

Finally, in 1994, the Government began allocating land to the Ogiek of Eastern Mau. Eastern Mau was divided into several settlement schemes with Government administrators appointed to oversee them. Despite the fact that traditional Ogiek family territories would have been in the range of 100 acres as desired and despite the Ogiek's expectations, the allotments were 5 acres per person,[462] prompting another protracted battle with the Government.

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[458] Affidavit of Patrick Kuresoi, *supra* note 11.

[459] Affidavit of Jimmy Patiat Seina, *supra* note 10.

[460] Chelanga was sent by then President Moi to tell the Ogiek that they would be given their lands back and that the areas around Nessuit would be made into a reserve for the Ogiek instead of individual allotments

[461] Affidavit of Christopher Kipkones, *supra* note 118

[462] Affidavit of John Sitienei, *supra* note 69

231. Every Ogiek over age 18 with a national identification card was supposed to receive an allotment card. Each Ogiek clan provided the Government with a list of its members. Most Ogiek received allotment cards, although a number did not. In Sururu, for example, approximately 200 people were eligible for allotment cards, but only about 150 people received them. Some people initially received allotment cards, but the District Officer later took them away. Those who were never given allotment cards had to begin squatting.[463]

232. Surveyors then came to demarcate the land allotments. During the demarcation, the surveyors told each Ogiek which allotment was his or hers. Understanding this to mean that they now owned this land, the Ogiek settled on their allotments and immediately began building homes. The District Commissioner and Forest Officer came to the allotments and signed the Ogiek's allotment cards.[464]

233. The Ogiek observed that non-Ogiek received some of the allotments during the demarcation process.[465] The situation rapidly worsened, however, when the Government issued titles to the newly-allocated land in 1997. In each of the land settlement schemes, administrators overseeing settlement irregularly gave title to members of their own tribes.[466] "*We waited and waited for the Government to settle us here in Ngongogeri*," says Patrick Kuresoi, "*but we found that the Government was giving land to Tugen*." The Tugen were a wealthy tribe compared to the Ogiek, and the administrator overseeing the Ngongogeri settlement scheme was himself a Tugen.[467]

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[463] Affidavit of Jimmy Patiat Seina, *supra* note 10.

[464] Affidavit of Jimmy Patiat Seina, *supra* note 10. *See also* Affidavit of Patrick Kuresoi , *supra* note 11; Affidavit of Christopher Kipkones, *supra* note 118

[465] Affidavit of Jimmy Patiat Seina, *supra* note 10.

[466] See The Ndungu Report, *supra* note 248, at 154

[467] Affidavit of Patrick Kuresoi, *supra* note 11.

234. Even some Ogiek who received allocation cards *and* titles in their names have lost their land to non-Ogiek squatters. Kipsigis have squatted on land belonging to Jimmy Peitat Seina's son since 1997. Seina explains how difficult it is to access justice in this situation:

"*When Ogiek try to go to our land and say, 'This is my title,' these trespassers will scream at us and their family will come with arms and try to start a fight. They tell us, 'You're coming to start a war!' This happened to me when I tried to help my son. [But] it costs 30,000Ksh to get the court to evict someone from your property; this is the fee for eviction. Because we can't pay, my son hasn't been able to evict the trespasser. Even [though] the title deed [is] in court—there's proof, but no justice*."[468]

235. In response, during the 1990s, the Ogiek engaged in a huge but peaceful demonstration protesting against the mis-allocation, marching to the state house in Nakuru, some 40 km away, on 18 November 1995. However, they were met with violence and arrests as the police, Presidential guards and General Service Unit[469] sought to break up the demonstration.[470] Ogiek who were involved in the demonstration described the fact that riot police met the Ogiek demonstrators outside of town and used tear gas against them to stop them from reaching Nakuru town. Several demonstrators were arrested and jailed, while others had to be taken for treatment as a result of injuries they received.[471] This included pregnant women.

236. With no other avenue left, the Ogiek took their plight to Parliament, submitting a memorandum to MPs in 1996 entitled "Help us live in our ancestral lands as Kenyans of Ogiek origin", which explained the situation and requesting respect for their ancestral rights. However, only a handful of MPs (33 in number) were prepared to show support for their cause.

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[468] Affidavit of Jimmy Patiat Seina, *supra* note 10.

[469] Paramilitary wing of the Kenyan police and Kenyan military.

[470] Affidavit of Joseph Nburumaina, *supra* note 445, and of Linah Taploson, *supra* note 42

[471] Affidavit of John Sitienei, *supra* note 69

237. Having exhausted other means for obtaining redress, in 1997, the Ogiek of Eastern Mau turned to the domestic courts for recourse, challenging the purported settlement schemes and seeking recognition of their land rights. That case (*Letuya and others v Attorney General* – HCCA case no 635 of 1997) remains pending before the Nairobi High Court. In the meantime, and despite an interim injunction to stop the further allocation of any of the disputed lands, yet more outsiders have come to the area with title deeds and claiming ownership of the land resulting in further displacement of the Ogiek from their traditional lands.[472]

238. In 2001, the Government attempted to further alter the boundaries of Mau Forest to give effect to large scale settlement plans, purportedly for the Ogiek as well as victims of 1990 clashes.[473] Those notices are the subject of at least two separate sets of court proceedings (HCCA case no 228 of 2001, which relates to East Mau, and HCCA case no 421 of 2002 which is a legal challenge to a number of Gazette notices regarding the Mau, including East Mau).[474]

Mau Task Force: Ongoing Tensions and Lift of Land Transaction Ban

239. The corrupt land settlement process left the Ogiek of Eastern Mau outnumbered and vulnerable. "*Now the majority of people in our community are Kipsigis. They are 90% of inhabitants in Sururu*," explain the Ogiek of Sururu location. "*We are voiceless now*." The Ogiek of Sururu have been harassed for a holding a meeting with Ogiek from Nessuit: "*The District Officer and other Government officials came to investigate this meeting. We showed documents [regarding forming a self-help group], confirming we had no agenda except*

[472] Order dated 26 November 1997 (see Annex 19 to Complainants' Admissibility Submissions, already filed with this Court) and Affidavit of Christopher Kipkones, *supra* note 118

[473] The Mau Forest Task Force Report, *supra* note 250, at 36.

[474] Affidavit of Christopher Kipkones, *supra* note 118, paras 19 and 20.

development. But we were nearly arrested."[475] The Government so intimidated the Ogiek of Sururu that the Ogiek now hold meetings with their legal representatives in secret, far from the village of Sururu. "*We are afraid of arrest. ... [W]e don't want to take our chances*."[476]

240. Since 1997, the Ogiek of greater Marioshoni have faced harassment and violence from Tugen who hold irregularly-issued title. Tugen falsely accuse the Ogiek of crimes - such as trespassing and theft - in order to have Ogiek arrested and brought to court. In Ngongogeri, around 30 people have been arrested in this manner. Tugen target Ogiek activists such as Patrick Kuresoi and James Rana of Ngongogeri. Rana has been arrested three times. In 2011, assailants surrounded Kuresoi's house; Kuresoi and his family fled to avoid physical violence. The assailants also attacked Rana and beat him on the head.[477] Tugen intimidation has led many Ogiek to abandon their homes and flee out of Ngongogeri, leaving only a very small Ogiek population there.[478]

"The conflict between Ogiek in Isingetit[479] (Ngongogeri) and non-Ogiek who want our land continues. Most of the time, this conflict arises during January during the time that Ogiek start cultivation. We worry about potential violence this January, especially because of the political environment. The other day the Prime Minister was in Mau-Che,[480] and he said he was going to lift the injunction on the title deeds—so our community is really worried."[481]

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[475] Affidavit of Christopher Kipkones, *supra* note 118, paras 19 and 20.

[476] *Ibid*

[477] Affidavit of James Rana, *supra* note 169

[478] Affidavit of Patrick Kuresoi , *supra* note 11.

[479] Isingetit is the original name of the place, while the origin of the term "Ngongogeri" is not known to Ogiek.

[480] Mau-Che is a combination of two words coined by Kipsigis beneficiaries of land in Mau. The term Mau refers to Mau while the Che connotes Chepalungu denoting their place of origin in Bomet county.

[481] Affidavit of Patrick Kuresoi, *supra* note 11.

241. Ogiek in other areas of Eastern Mau feared a similar attack. "When the violence erupted in Nessuit, all 200 of us [from Sururu] spent the night [hiding] in the bush," Jimmy Patiat Seina from Sururu remembers.[482]

242. Government administrators in Eastern Mau are predominantly non-Ogiek and are not responsive to Ogiek complaints. "*We face great challenges seeking justice*," explains Seina. "*The people we report our grievances to—the District Officer, Provisional Commissioner, and District Commissioner—are representatives of the culprits. We complain often, but we never get results. They tell us, 'I will come visit to see the situation,' but they don't come. Or they say, 'Just go away and we'll take care of it,' [but they don't.]"*[483]

243. After the Mau Task Force released its report,[484] the Government suspended land transactions in the Mau.[485] "*That's good because it protects the 200 or so Ogiek in Sururu without land or title*," explain Ogiek of Sururu.[486] In the autumn of 2012, a rumour spread that the Government would lift the ban on land transactions in the Mau. This created great concern among the Ogiek, who already feared increasing violence in the March 2013 elections. "*The conflict between Ogiek in [Ngongogeri] and non-Ogieks who want our land continues*," says Kuresoi, *"[and] we worry about potential violence*" if the ban is lifted.[487]

244. However, on 9 November 2012, the Ministry of Lands instructed the Nakuru District Land Registrar to lift restrictions on transactions for all parcels of land measuring five acres or less within Mau Forest Complex Area.[488] This meant that land could again be parcelled out to non-Ogiek.

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[482] Affidavit of Jimmy Patiat Seina, *supra* note 10.

[483] *Ibid.*

[484] See paras 180-182 above

[485] See Letter from Ministry of Lands to Nakuru District Lands Office dated 15 March 2012 at Annex 62

[486] *Ibid*

[487] Affidavit of Patrick Kuresoi, *supra* note 11.

[488] See Letter from Ministry of Lands to Nakuru District Lands Office dated 9 November 2012 at Annex 63

i. Evictions in South West Mau

245. The Kiptyeromu clan forcibly resettled in Tinet in 1961[489] was evicted from Tinet by the Kenyatta Government in March 1970. The Ogiek were evicted as a result of the Kikuyu-dominated Government targeting non-Kikuyus in Tinet, especially Kipsigis.[490] At 5 o'clock in the morning, the Provisional Commissioner and police officers arrived in Tinet. The Ogiek had been given no notice or warning. The police divided up into groups and destroyed the community: some set fire to homes and food stores, while others seized the Ogiek's animals. Terrified, the Ogiek fled.[491]

246. Osasi A Ngosas Latende remembers the violent eviction. "*The eviction was conducted in an inhuman way... It was an invasion. [Families] were scattered—everyone ran for their lives. Children ran into the bush*."[492]

247. Many Ogiek in Tinet were arrested and taken to court, where they had to pay fines for their release. Latende was arrested. He recalls that he asked the police why he was being arrested. "*They said, 'You're in the forest illegally.' When I asked why we had no notice to leave, they threatened and intimidated me*."[493]

248. After the eviction, the Kiptyeromu clan returned to Olengape in North Narok and stayed until they were evicted again in 1986.

249. In 1999, the Ogiek of Tinet Forest were issued with an eviction notice which they challenged in the court (*Francis Kemai and others v Attorney General* no. 238 of 1999). The challenge was unsuccessful: the court found that the Ogiek were not lawfully living in the forest but had repeatedly re-entered and re-

[489] See further paragraph 155 above

[490] Affidavit of Osasi A Ngosas Latende, *supra* note 323

[491] *Ibid*

[492] *Ibid*

[493] *Ibid*

occupied it in breach of domestic legislation relating to the forest and to wildlife management and that they had been given alternative lands (albeit without any consultation). As one of the few substantive domestic judgments on Ogiek land issues, the ruling evinces a clear mis-appreciation of indigenous peoples property rights as protected under international law: "*It is our considered opinion that as the applicants, in common with all other Kenyans may still have access to the forest under licences and permits the eviction order complained of has not encroached on the fundamental rights of the applicants ... their livelihood can still be earned from the forest as by law prescribed*."[494]

250. The Ogiek of South West Mau have also been involved in a legal challenge to a resettlement scheme which was ostensibly to benefit the Ogiek but which was based on what was termed the Blue Book.[495] This was meant to be a census of all Ogiek but included many non-Ogiek (see further paragraph 176 above).

251. In 1977, the Respondent Government evicted the Ogiek living in Olenguruone.[496] The Provisional Commissioner and armed police officers arrived at dawn one morning - without any warning or notice - and ordered everyone to leave immediately. Police assaulted women and men. "*If you misbehaved the police beat you*," explains James Rana. "*The Government violated rights of women, beating them. The women were ambushed, and there was nowhere to go*."[497]

252. Christopher Kipkones remembers that his uncle, a forest guard, was beaten for asking permission to take his personal property with him:

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[494] See Annex 27 to Complainants' Admissibility Submissions, already filed with this Court, at page 13.

[495] *Supra,* note 357

[496] Some Ogiek—the Kiptyeromu, Kapyegon, and Kimeitok clans—lived in Olenguruone after the colonial period. Olenguruone is in South West Mau.

[497] Affidavit of James Rana, *supra* note 169

"*My uncle said, 'I'm a forest guard, I'll show you my uniform, let me go and let me take my property.' He was badly beaten. He couldn't go to hospital because these were Government hospitals—run by the perpetrators—and these were far away, so he had to use traditional medicine*."[498]

253. Police arrested Ogiek, and those arrested were taken by lorry to Nakuru Prison, where the Government established a temporary court to fine them. The Government also seized the Ogiek's animals and sold them without compensating the Ogiek.[499]

j. Evictions in Western Mau

254. Throughout the 1960s, the Ogiek of Western Mau petitioned the Government for land, but their requests were ignored. During this decade, Ogiek activists were frequently arrested and harassed. Many Ogiek living in the forests of Western Mau were seriously beaten so that they would be too afraid to return to the forest. Others were arrested for trespassing, found guilty, and imprisoned.

255. In 1971, the Ogiek of Western Mau were given a notice to leave the forest. "*But because this was our ancestral land and we knew we had a right to live there, we didn't leave*," elders explain. Then, in 1974, there were mass arrests for ignoring the order. "*We were taken to court and fined. The Government did this to instil fear in us and threaten us*."[500]

1975 Eviction

256. The Government violently evicted the Ogiek of Western Mau in 1975. The police raided, burning houses, food stores, and animals. William Kiptanui Koskei remembers when police raided and destroyed his village. "*We saw that a helicopter was giving directions to police on the ground to conduct the raid. The*

[498] Affidavit of Christopher Kipkones, *supra* note 118

[499] Affidavit of James Rana, s*upra* note 169

[500] Affidavit of Elijah Kiptanui Tuei at *supra* note 16

police burned down the schools that our fathers had built," he recalls. "*I was never able to finish school*." Two children fled into the bush and disappeared forever, probably eaten by wild animals. One woman in the village was arrested, taken to prison, and beaten to death. Her husband, grief-stricken, died shortly thereafter. "*We felt emotionally tortured by the Government*," Koskei says. "*People's lives spiralled out of control because they had nothing to depend on*."[501]

257. The Government gave the Ogiek no compensation for the eviction and no alternate housing. The Ogiek had to seek refuge with others. "*We had to live in other people's houses*," Koskei explains. "*After several months, it became too uncomfortable to impose on others, so we returned here [to the forests of Western Mau]. We were afraid, but we had to return. We crept back one by one."*[502]

Promised Settlement in 1980s

258. Koskei met then-President Moi in 1981 and expressed the grievances of the Ogiek of Western Mau. President Moi sent a committee of local administrators to speak to the Ogiek. The administrators instructed the Ogiek to move "temporarily" to the village Saino, within Saino Forest Station, pending a resettlement. The Ogiek followed these instructions, moving to Saino in 1982.[503] They gave their names to a district officer. They were never settled in the 1980s, however. Between 1979 and through the 1990s, Government officials created settlement schemes in Western and South West Mau merely to provide land to political cronies.[504] They continued to be harassed by the Government in the forest. In 1991 the Director of Forestry sent a letter to the Provincial Forest

[501] Affidavit of William Kiptanui Koskei at Annex 15

[502] *Ibid*

[503] *Ibid*

[504] TJRC Report, *supra* note 121, at Annex 11.

Officers of Narok, Nakuru, and Kericho reminding them to leave the Ogiek in the forest alone.[505]

Settlement in the 1990s

259. The Ogiek of Western Mau visited President Moi in October 1994, petitioning him for land. President Moi promised the Ogiek that they could "reside as they used to" on their ancestral land and that they would be given a reserve.[506] The Government never established a reserve in Western Mau. Instead, in 1995 the Government allotted land to some—but not all—of the Ogiek living in Western Mau.[507] Those given land were told to go to their respective District Officers for their title deeds. The Ogiek provided the Government with lists of their names. Local administrators created their own lists, however, replacing Ogiek names with the names of non-Ogiek who bribed administrators in exchange for title.[508]

260. Six Ogiek elders - including Elijah Tuei from Saino/Kuresoi - formed a committee of elders and worked with local administrators to arrange land titling. In 2004, the District Officer of Kuresoi held a meeting between the Ogiek elders and administrators. The administrators - the Deputy Provisional Commissioner, Provisional Land Surveyor, Land Settlement Officers, and local chiefs - asked Tuei to sign a document on behalf of the committee of elders and all Ogiek. This document, the administrators said, listed the names of all Ogiek to be awarded title. Tuei cannot read and write, however. The list actually contained names of non-Ogiek people. "*They were aware I couldn't read or write and were taking advantage of me*," Teui explains. When Tuei realised he had been tricked, he told his community. The Government responded by accusing him of incitement to cause violence and arresting him. "*This was really a warning to the Ogiek.*

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[505] *Ibid*, at Annex 7.

[506] Memorandum of Visit to President, dated 15 October 1994 at Annex 58

[507] See allocation cards, TJRC Report, *supra* note 121

[508] See Memorandum to TJRC, *supra* at note 205. *See also* Affidavit of Charles Ruto Ngo Ngon, *supra* note 271; Affidavit of William Kiptanui Koskei, *supra* note 501, and Affidavit of Elijah Kiptanui Tuei, *supra* note 16.

The administrators told me, 'It's too late, you've already signed the document." Tuei has been arrested a further two times in response to his advocacy.[509]

261. The Ogiek of Western and South-West Mau have repeatedly sought recourse from the Government, including through complaints to the National Coalition of Cohesion and Integration, the Office of the Ombudsman of the Commission on Administrative Justice, and the TJRC.[510] These mechanisms have not helped them. The TJRC merely instructed the District Commission to maintain the status quo until the resolution of the matter.[511] The Office of the Ombudsman instructed the Commissioner of Lands to issue the Ogiek their title deeds, but no deeds have been issued.

Violence against Ogiek by title-holders

262. The Government issued title deeds in Western Mau in 2005. When Ogiek went with their identification cards to be given their title deeds, they discovered that title to their allocated plots had been given to non-Ogiek people.[512] Ogiek who had been living on land allocated to them in 1995 were now harassed by non-Ogiek holders of irregular title. In 2006, around 200 Ogiek homes were burned. William Koskei's home was burned down by individuals bearing irregular title to his land. Koskei has been arrested three times by police collaborating with his harassers.[513] Holders of irregularly-issued title continue to occupy land allocated to Ogiek.

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[509] Affidavit of Elijah Kiptanui Tuei, s*upra* note 16. *See also* Summons of Elijah Kiptanui Tuei dated 28 April 2006 at Annex 75

[510] Ogiek Memorandum to TJRC, *supra* note 205

[511] *Ibid*

[512] Affidavit of Elijah Kiptanui Tuei, *supra* note 16

[513] Affidavit of William Kiptanui Koskei, *supra* note 501; Summons of William Kiptanui Koskei dated 7 November 2008 at Annex 74; Charge Sheet of William Kiptanui Koskei dated 20 February 2007 at Annex 76

4. DISCRIMINATION AGAINST THE OGIEK

263. The Ogiek have routinely suffered discrimination by the Respondent Government on a number of grounds, namely ethnicity, religion and social origin.[514] The disparities in the enjoyment of social, economic and cultural rights by hunter-gatherer and other minority and indigenous groups in Kenya that result from such discrimination, has been widely recognised by international bodies.[515] This discrimination has impacted on the Ogiek's ability to access education, health services, employment opportunities and justice. It has also had a disproportionate effect on Ogiek women and girls, rendering them particularly vulnerable, since the Ogiek live in informal settlements which raises the risk of violence due to insecurity from overcrowding.[516]

A. Education

264. Due to ethnic discrimination, Ogiek children rarely receive bursary funding from the Government for their education. 'We experience discrimination when we apply for bursary funds, which are meant to be given by the Government to needy students. I have applied three times for bursary funding for one of my sons and have never received it (...) I see that the majority of non-Ogeik living

[514] See, for example, TJRC Final Report, *supra* note 121, Vol IIB at para 505 at regarding the use of ethnic stereotyping, including derogatory terms. See also Film Evidence taken from Ogiek communities and Transcript, *supra* note 22

[515] See for example, CESCR 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kenya' (1 December 2008) UN Doc. E/C.12/KEN/CO/1, and UNHRC, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples', *supra* note 256, at paras 41 and 65-77.

[516] This vulnerability of indigenous women was highlighted by the TJRC Final Report, *supra* note 121, which stated that 'minority and indigenous women suffered multiple forms of discrimination. They bore the brunt of inter-ethnic conflicts and insecurity and had difficulty accessing social services and goods from education to health services.'

here receive bursary funds. So this is evidence of discrimination.'[517] Furthermore, many Ogiek students do not put the fact that they are Ogiek on the application form, 'I would not apply for a bursary for studies as an Ogiek since I know I would never get it.'[518]

265. Access to education for Ogiek girls is also hindered by discrimination and poverty. Due to a high rate of early pregnancy from girls engaging in early marriage or transactional sex in exchange for money for food, shelter and land, they are forced to abandon their studies, 'my daughter had children at age 16, 17. She went to school up to class 8. She didn't even do the national exam for class 8...I (...) was told my daughter had left school. My daughter kept disappearing until she gave birth to her first.'[519]

266. The TJRC also noted in its Report, the difficulties faced by Ogiek in obtaining access to education and the fact that the Respondent Government banned some of the Ogiek from attending a school located close to Kipkurere Forest where they lived.[520]

267. In addition, Ogiek children were left with no schools or any alternative learning during closure of all schools in 1989 in Eastern Mau forest, resulting in more than 500 members of the Ogiek community being illiterate. In 1987, the Government banned the keeping of livestock and farming activities in the forests. This ban was applied selectively and targeted only the Ogiek and other non-Kalenjin communities. In 1989, the District Officer in charge of Njoro Division, Ms A S Abdullahi, is believed to have told the Ogiek on behalf of the Government that *'The Government will not reconsider its decision on this [closure of schools in Ogiekland] on the grounds that you are just a "minute*

[517] Affidavit of Mary Ruto, *supra* at note 192 at para. 8. See also the Affidavit of Rose Chengetich Maritim, *supra* note 203 at para 5; and the Affidavit of Grace Chepkemoi Lemisi, *supra* note 101 at para 10

[518] Affidavit of Judy Jemutai Kipkenda, *supra* at note 196, at para. 4

[519] Affidavit of Seli Chemeli Koech *supra* note 49 at para 24

[520] TJRC Final Report, *supra* note 121, Vol. IIC para 240

community" with no apparent effect; just like a drop of ink in an ocean[521]*',* shattering hopes for the Ogiek to continue with education and prompting the closure of all schools in Eastern Mau in 1989. This affected 500 Ogiek school children who had no alternative schools to go to. Ironically, during the same period, the Government initiated a settlement scheme in Ndoinet, Western Mau, in which members of the Kipsigi community were settled alongside the Ogiek. The Ogiek refused to participate in this scheme.

B. Health

268. In terms of health, the Ogiek face a multitude of problems brought about during the forced evictions. Due to assaults of Ogiek by the police during those times, there is a fear of similar treatment and they do not seek medical attention from Government hospitals.

269. Ogiek struggle to pay medical fees and the cost of transportation to hospitals. Kenya has no national health insurance, so already-impoverished families are left to bear the costs of caring for people with disabilities or major illnesses on their own and are forced to take out loans to pay for the medical care leaving them deep in debt. As Mary Ruto recounts, 'my five-year-old son has (...) has a disability. He developed eye cancer, and there was no option but to have his eyes removed. We took him to Kenyatta Hospital in Nairobi for the operation. It cost 140,000 Ksh. I don't know why the Government wouldn't pay for the operation but because we wanted to save our child we had to do everything we could to save him. We had to buy the medicine and everything. I was unable to raise the money to pay the bill, so I had to borrow the money (...) but now we are struggling to pay this debt (...) we make at most 2000 per month on average as a family- but our income is very unsteady.'[522]

270. Separated from the forest, the Ogiek cannot easily access traditional medicines such as *kapkukeriet*, to treat respiratory illness, and the African wild

[521] Njoro District Officer Mrs A S Abdullahi addressing Ogiek community members at Cheptoroi Secondary School in 1989.

[522] Affidavit of Mary Ruto, *supra* at note 192, at para 9

olive, to treat malaria. Poverty is so severe in some communities that Ogiek experience chronic hunger. The Kenyan Government provides only occasional food relief, which is insufficient to prevent hunger.

271. As mentioned above, early marriage and transactional sex are serious problems among adolescent Ogiek girls. Seeking income and food, girls are thus pushed to engage in transactional sex with adult men or to marry before they turn 18. Girls who engage in transactional sex or marry early are vulnerable to high-risk pregnancies, sexually transmitted infection including HIV/AIDS and abuse. In one community, there have been reports of rape and sexual abuse of girls by people from outside the community, in some cases leading to child pregnancy. The local government has done nothing to investigate the crimes or help the girls. When community members reported the crimes to a journalist, local officials finally visited the community- but only to publicly criticise the complainants and victims, calling them troublemakers and liars.[523] Pregnant Ogiek girls often hide their pregnancies, preventing them from obtaining appropriate prenatal care. Sometimes communities are not aware that girls are pregnant until they are in labour, when it is too late to take girls to distant hospitals. This means that girls must deliver in unsafe conditions.

C. Employment

272. The Ogiek face discrimination when seeking employment and are not given priority for Government or higher paying jobs, 'whenever any opportunity is there for a Government job, our children are discriminated against. They aren't even informed of vacancies (...) We should be first to be considered because of our history of marginalisation.'[524] Even when Ogiek are given priority by virtue of the Constitution, they face problems with other groups claiming to be Ogiek and thus taking away any employment opportunities for the Ogiek.[525]

[523] See Affidavit of Mary Jepkemei, *supra* note 204 at paras 20-22

[524] Affidavit of James Kasoi, *supra* note 449, at para 6

[525] Affidavit of Samson Kipkemboi Mutai, *supra* note 128 at para 45

D. Access to justice

273. A mixture of corruption and under-representation of Ogiek in Government agencies and legal systems, has led to the Ogiek not believing nor having adequate access to justice. Often the DO, PC and DC, whom the Ogiek complain to, are corrupt and make promises to rectify the problems with land, but nothing happens.[526] 'We don't want to bring cases because we are told by the Government to be patient and that they will solve our problems. This means we cannot sue the Government or go to court. We believe that if we go to court now, the Government will act but only for a very few Ogiek- few will be helped and most will be left out.'[527] It is also believed by the communities that the Government will use the opportunity to give land to others.[528] Indeed, these issues have also been highlighted by the TJRC in its Report, which states, 'minority and indigenous communities face major barriers in accessing the formal courts because of nationwide lack of court infrastructure and because of a failure to equitably distribute court services in all parts of the country.'[529] The TJRC also noted that there is a lack of access to legal aid for these communities and that the courts are ill-equipped to address and accommodate cultural factors, [530] finding that "a multitude of Ogiek claims in domestic courts have not successfully vindicated Ogiek land claims after many years."[531]

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[526] See the Affidavit of Jimmy Patiat Seina, *supra* note 10, para 43 noting "once an Ogiek man was arrested over a land dispute and released by bond. The court ordered destruction of his home. We believe this was due to court corruption. His home was destroyed in 2011. On appeal he proved the land was hi, but it was already destroyed, and now he lives homeless on this land. The case is still in court."

[527] Affidavit of Kipkoech Sang, *supra* note 368 at para 21.

[528] *Ibid*

[529] TJRC Report, *supra* note 121, at Vol. IIC 268 para 202.

[530] *Ibid.*

[531] *Ibid.*

5. LEGAL BACKGROUND

A. Relevant domestic law

Background

274. Colonial laws promulgated in 1939[532] created two separate domains namely "Crown Land," radical title to which remained vested in the colonial sovereign, and "native areas", the radical title to which was now vested in a Native Lands Trust Board sitting in London. Most Ogiek land, to the extent that they were forests, became part of "Crown Land" under the Crown Lands Ordinance, leaving the community to continue occupying the Mau Forest as squatters of the state. At independence, "Crown Land" became "Government Lands", the juridical character of which is discussed below.

Crown Land Ordinance 1902, 1915

275. The Crown Lands Ordinances were critical in legalising the manner of colonial acquisition of title to lands in the Kenya protectorate. The 1902 Ordinance clarified the Crown's assertion of original title to land in the protectorate and in effect extinguished any notion that Africans had original title to their lands. Under this legislation, Africans only had rights to occupation, and only so long as that occupation was "beneficial". The ordinance created incentives for evictions in that it provided that in any land grant, the portion of land occupied by native villages was excluded from the grant only as long as it was "occupied". As soon as the area ceased to be occupied, the title immediately transferred to the granted holding the surrounding lands.[533]

276. The 1915 Ordinance went even further and section 5 declared that Crown Land included "all lands occupied by the native tribes of the Protectorate and all

[532] See further para 279 below

[533] See Crown Lands Ordinance 1902. See also, H.W.O. Okoth-Ogendo, *Tenants of the Crown* (African Centre for Technology Studies 1991), 13-15

lands reserved for the use of the members of any native tribe." It also maintained the practice of confining African communities into "reserves" on the basis of ethnicity, although the Colonial governor retained the ability to cancel the allocation of land to "native reserves" at any time.[534] Moreover, these acts vested all rights to subsurface resources, such as minerals and waters, in the Crown. The 1915 Ordinance extended the period of leases of Crown land from 99 years, to 999 years and ensured that only Europeans would be allowed to hold land in certain areas.

Native Lands Trust Ordinance 1930

277. The Native Lands Trust Ordinance was ostensibly designed to formalise the boundaries of the native reserves, to reserve them "for the use and benefit of the native tribes of the Colony forever" and to provide the native tribes with maps of their reserves.[535] In practice, however, the ordinance continued the policy of controlling all lands in the colony for the benefit of settler communities. While the 1930 ordinance created requirements for consultation and compensation of communities when parts of their reserve land were taken for Crown use, a later amendment eliminated this requirement for consultation entirely.[536]

278. As much as these ordinances were extremely problematic for Kenyan tribes that were granted reserves, for those communities left out of the reserve system, such as the Ogiek, these land laws left them without any recognition even of their occupation of certain lands.

Native Land Trust Ordinance (1938)

279. The late 1930s saw colonial legislative attempts to implement the recommendations of the Carter Commission, referenced at paragraph 48 above. This Commission recommended that all African rights to land outside of the

[534] See Crown Lands Bill 1908; Crown Lands Ordinance 1915; Okoth-Ogendo, *ibid* at 32.

[535] Native Trust Lands Ordinance 1930, section 2

[536] See Okoth-Ogendo, *supra* note 535 at 55-58.

established reserves be extinguished. In 1938, the Native Lands Trust Board was created, which vested control of reserves and other native lands, determined by the colonial government, in the Board. The Ordinance then extinguished all African land rights in Kenya outside of these designated areas. Accordingly, communities that had never been allocated a reserve, lost all land rights.[537]

Constitution of Kenya (1969)[538]

280. The 1969 Constitution of Kenya provides for a right to property (though not described as such) in Article 75:

"No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied –

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation."

[537] *Ibid.* Okoth-Ogendo, *supra* note 533 at 58-60.

[538] The 1969 Constitution, which was in force at the time of the original filing of this complaint before the African Commission on Human and Peoples' Rights, has since been replaced with the 2010 Constitution, approved by the people of Kenya in a referendum on 4 August 2010.

281. However, the only category of land which is addressed in detail in the Constitution is Trust Land (Chapter IX, Articles 114-120). Trust land was defined in Article 114 as including "the areas of land that were known before 1st June, 1963 as Special Reserves, Temporary Special Reserves…[or] communal reserves." Further, Article 115 of the Constitution provided:

"(1) All Trust Land shall vest in the county council within whose area of jurisdiction it is situated (.....)

(2) Each county council shall hold the Trust Land vested in it for the benefit of the persons ordinarily resident on that land and shall give effect to such rights, interests or other benefits in respect of the land as may, under the African customary law for the time being in force and applicable thereto, be vested in any tribe, group, family or individual: Provided that no right, interest or other benefit under African customary law shall have effect for the purposes of this subsection so far as it is repugnant to any written law."

282. Consequently, a community such as the Ogiek that was previously not vested with a "special reserve", "temporary reserve" or "communal reserve" under colonial law, were not beneficial owners of land vested to county councils by virtue of their being "persons ordinarily resident in that land" within the meaning of Article 115(1) of the Constitution. The concept of Trust Land is of limited application to the Ogiek, being of relevance only to those Ogiek located at Maasai Mau (see further paragraph 295 below).

Government Lands Act (Cap. 280)

283. The Government Lands Act (GLA) is a successor of the English Foreign Jurisdiction Act 1890, as amended by the 1901 East African (Lands) Ordinance in Council and the Crown Lands Ordinance of 1902 and 1915. Under these laws, the Crown (as represented by the colonial Governor in Nairobi and thereafter by the Kenyan President) was given unfettered discretion to control and dispose of all "waste and unoccupied land in the Protectorates with no settled forms of government and where land had not been appropriated to the

local sovereign individuals."[539] Under the GLA, the President, through the Commissioner of Lands, has the unfettered power to allocate any unalienated land to any person.[540] Unalienated land is defined by the GLA as Government Land which is not for the time being leased to any other person or in respect of which the Commissioner of Lands has not issued any letter of allotment[541] – in other words, lands which are vested in the Government and over which no private title has been created. Once allocated, such land is held as a grant from the Government on payment of such rents to the Government as the Government wishes.[542] Most of the zones occupied by the Ogiek are covered by the Forest Act (see below) and thus deemed unalienated land, in the sense that it is not occupied.[543]

Land Adjudication Act (Cap. 284)

284. This Act provides for the ascertainment and recording of rights and interests in Trust Land. The Act can only be engaged when the relevant Minister, by order, applies it to an area of Trust Land. He or she can make such an order in the circumstances set out in section 3 of the Act. A demarcation officer is empowered under the Act to survey, demarcate and title land contained within the adjudication area.[544] This Act has a limited application, being restricted only to Trust Land and, therefore, within the Mau Forest Complex to Maasai Mau.

[539] The Crown Lands Ordinance 1902, sections 30 and 31

[540] Kenyan Government Lands Act 1984, section 3(a) allows the President to "make grants or dispositions of any estates, interests or rights in or over unalienated Government land."

[541] Kenyan Government Lands Act 1984, section 2.

[542] Kenyan Government Lands Act 1984, section 3.

[543] The TJRC Report, *supra* note 121, has noted that over time, the safeguards in the Government Lands Act have been blatantly disregarded as senior government officials, their cronies and relatives enrich themselves, at the expense of the public.

[544] See Kenyan Land Adjudication Act (Cap. 284), section 15

Land (Group Representatives) Act (Cap. 287)

285. The Land (Group Representatives) Act (GRA) is closely connected with the Land Adjudication Act and provides for the incorporation of representatives of a group who have been recorded as owners of land under the Land Adjudication Act. The rationale behind the GRA was for group ranch status to be given to a group of herders that can be shown to have customary rights over the ranch or pastureland in question. A group for the purpose of the Act is a "*tribe, clan, family or other group of persons, whose land, under recognised customary law, belongs communally to the persons who are for the time being the members of the group, together with any person of whose land the group is determined to be the owner, where such person has, under recognised customary law exercised rights in or over land which should be recognised as ownership*."[545]

286. Under the GRA, the procedure of acquiring group ranch status is sophisticated: there are requirements that the group must have a constitution and elected group officers in accordance with their constitution; and that they hold meetings of members to make resolutions pursuant to which the group representatives are incorporated. The group after incorporation becomes a legal entity to sue and be sued. The group officers have to exercise their powers on behalf and for the collective benefit of its members. The group representatives are also enjoined to maintain an office and a postal address for the group, hold regular meetings, and keep books of account, which should be open for inspection, by all members of the group.[546]

287. The summation of these requirements is that, although the law tries to conceptualise the African notion of collective property rights, it does not effectively serve the interests of such a people. The GRA also provides an

[545] An approximate paraphrase. The Land (Group Representatives) Act (Cap. 287), section 2 and Land Adjudication Act (Cap. 284), sections 2 and 23(2)(*a)*. See also, Patricia Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya: the Case of Land Tenure and Wildlife,* (ACTS Press 2002) 71 – 72.

[546]The Land (Group Representatives) Act (Cap. 287), sections 2, 5 and 7

element of confusion and uncertainty in respect of the disposition of land. Although the group representatives are to hold the land and other assets on behalf of the group for the collective benefit of all members, disposition of group land may be made simply with approval of the group representatives alone.[547]

288. In practice, this law has been applied in a limited sense only in some areas of Narok, Kajiado, Samburu and Laikipia district where former Trust Lands have been converted to Group Ranches. The Ogiek in Narok are the only members of the community to be affected by the GRA.[548] Indeed, most of the Group Ranches have been individualised, hence defeating the purpose of the legislation.[549]

Trust Land Act (Cap. 288)

289. The Trust Land Act (TLA) is the law which governs trust lands. Section 53 of the TLA confers direct power on the Commissioner of Lands to administer Trust Lands on behalf of the council including the power to "*execute on behalf of the council such grants, leases, licenses and other documents relating to its Trust Land as may be necessary or expedient*."[550]

Registered Land Act (Cap. 300)

290. Under the Registered Land Act, any person could acquire absolute ownership to any land once he or she had been registered as the absolute owner. On registration, such a person acquired freehold or leasehold interests on the land.[551] Freehold implied absolute proprietorship. Between 1988 and 1997, the

[547] See The Land (Group Representatives) Act (Cap. 287), Schedule

[548] See Affidavit of David Lekuta Sulunya and Nayieyo Olole Sirma, *supra* note 211

[549] Marcel Rutten, *Selling wealth to buy poverty: the process of the individualisation of landownership among the Maasai pastoralists of Kajiado District, Kenya 1890-1990* (Nijmegen Studies in Development and Cultural Change 1992) 10

[550] Kenyan Trust Lands Act (Cap. 288), section 53(b)

[551] Kenyan Registered Land Act (Cap. 300), section 27 provides that '(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land

President through the Minister for Environment de-gazetted Government forests amounting to 107,000 hectares which the Ogiek claim as their ancestral land, and converted it to absolute proprietorships under the Registered Land Act.

Wildlife (Conservation and Management) Act (Cap. 376)

291. The Wildlife Act of 1989 applies alongside the Forests Act to regulate the exploitation of natural resources. Under this Act, hunting is restricted, by sections 22 and 23, to appropriately licensed professional hunters. Section 22 prohibits unlicensed hunting and stipulates that any person who does hunt any protected or game animal is guilty of an offence. Section 23 provides that a game licence can be issued, but only to a professional hunter, a person accompanied by a professional hunter, or if the licence-holder has been individually certified as fit to hunt unaccompanied by a professional hunter. A fee is prescribed in connection with the issue of such a licence. Professional hunters are defined as the holders of a valid licence issued under section 27 of the Act.[552] A professional hunter's licence, under section 27, must be obtained from the Director of the Kenya Wildlife Service and a prescribed fee paid. The draft Wildlife Management and Conservation Bill 2013 proposes to entirely outlaw subsistence hunting.[553] The clear effect of this legislation is the criminalisation of the hunting activities of the Ogiek, which are not carried out under the authority of a licence and, indeed, in reality, could not be.

Forest Act (Cap. 385) and the Forests Act (No. 7 of 2005)

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together with all rights and privileges belonging or appurtenant thereto; and (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.'

[552] Kenyan Wildlife Act 1989, section 2

[553] See the Draft Kenyan Wildlife Management and Conservation Bill 2013, section 84

292. The Forest Act, first enacted in 1942 and amended at the turn of Kenya's independence in 1964, gave the Minister of Environment wide powers to declare any unalienated land to be a forest area and to declare the boundaries of a forest and to alter those boundaries.[554] The Minister was also vested with powers to declare that a forest area cease to be a forest, in which case, all he had to do was give a 28-day notice to the public via a Kenyan gazette notice.[555] The Act prohibited numerous activities within a forest except under authority of a licence from the Minister. Such prohibited activities included:

i. Felling, cutting, taking, burning, injuring or removing any forest produce

ii. Being or remaining in the forest between 9pm and 6am unless using a recognised road or in occupation of an authorised building

iii. Erecting any building

iv. Setting fire to any grass or undergrowth

v. Capturing or killing any animal, setting or being in possession of any trap or snare or digging any pit for the purpose of capturing any animal

vi. Collecting any honey or beeswax or hanging on any tree or elsewhere any honey barrel or other receptacle for the purpose of collecting any honey or beeswax or entering for the purpose of collecting honey.

293. Under this Act, the Ogiek found that they were contravening the law by living in their traditional forests and practising their traditional livelihood of hunting and honey gathering without the consent of the Minister. Engaging in any of these prohibited acts is a criminal offence punishable by fine and/or imprisonment, with forest authorities entitled to take enforcement steps, including making arrests

[554] Kenyan Forest Act (Cap 385), section 4(1)

[555] Kenyan Forest Act (Cap 385), section 4(2)

and using firearms against those escaping or attempting to escape custody.[556] The provisions of the Act have also resulted in the excision of much Ogiek ancestral land and their eviction at very short notice.[557]

294. This law was succeeded by a new Forests Act of 2005 that sought to better incorporate communities into forest conservation through the establishment of CFAs (see further paragraph 124 above). There are, however, numerous difficulties with this Act, not least of which is that it does not grant any concrete tenurial rights in favour of a "forest community" such as the Ogiek and the collection of forest resources continues to remain subject to licensing requirements.

Summary of effect of domestic legislation

295. Each of the above land regimes has affected the Ogiek in different ways. The Ogiek close to the Maasai Mau found themselves in the Narok County Council, hence the land under their occupation became Trust Land at independence. In contrast, Ogiek in Central Mau-Tinet, Marioshoni, Baraget and other areas were designated as Government forest areas under the Government Lands Act and Forest Act, hence the Ogiek communities in these areas became squatters on Government Land.

2010 Constitution

296. The new Constitution adopted in 2010 has altered land law in Kenya. One of the changes significant to the Ogiek land claim is the constitutional recognition of community land in article 63 to include "ancestral lands and lands traditionally occupied by hunter-gatherer communities." In theory, this provision appears designed to address the Ogiek land question, but its effect can only be realised if the law governing the management of community land is adopted by parliament

[556] Kenyan Forest Act (Cap 385), sections 50 and 51

[557] TJRC Report, *supra* note 121, Vol. IIC para 157

and provides clearer language on how communities such as how the Ogiek can receive legal protection of their property. This legislation remains to be adopted.

297. Unfortunately, the Constitution is clear that prior to the enactment of this law and the registration of title in favour of a specific community, community land during the transitional period will be held in trust for communities by the County Governments in which the land is situated. This predicament creates a residual trust in favour of the County Government which may deal with the land during the transition in a manner incompatible with the interests of a claimant community. Worse still, the National Land Commission created by article 68 of the Constitution to "initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress" has been constrained by law to recommend to Parliament a mechanism for executing this mandate within two years of its establishment (section 15 of the National Land Commission Act, 2012). This has not yet taken place.

298. Indeed the Final Report of the TJRC refers several times to the provisions of the 2010 Constitution which aim at securing an efficient legal framework for the protection and promotion of the rights of minorities and indigenous peoples, including the Ogiek, but states that these provisions need "statutory and institutional mechanisms for the realisation of these objectives".[558]

B. Applicable international law

299. The Ogiek seek to rely, principally, on the protections enshrined within the African Charter on Human and Peoples' Rights. More particularly, the rights that are submitted to be engaged in this matter are Articles 1, 2, 4, 8, 14, 17, 21 and 22 of the Charter.

300. Nevertheless, in exercising its jurisdiction the Court shall, by virtue of Article 7 of the Protocol on the Establishment of an African Court on Human and Peoples'

[558] *Ibid* Vol. I and Vol. IIC para 45.

Rights, “apply the provisions of the [African] Charter and any other relevant human rights instruments ratified by the States concerned.”

301. The most relevant other human rights instruments for present purposes are:

(i) The International Covenant on Civil and Political Rights (“ICCPR”) and associated General Comments. In particular, Article 1 on the right to self determination and related General Comment no.12; Articles 2 and 26 on non-discrimination and equality before the law and General Comment no. 18; Article 6 on the right to life and General Comment no 6; Article 18 on freedom of religion and General Comment no. 22; and Article 27 on rights of persons belonging to minorities and General Comment no. 23.

(ii) The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) and associated General Comments of the Committee on Economic, Social and Cultural Rights. In particular, Article 2 on non-discrimination and related General Comment no. 20; Article 11 on adequate standard of living, General Comment 4 and General Comment 7; Article 15 on right to culture and General Comment no.21.

(iii) The International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) and associated General Recommendations of the Committee on the Elimination of Racial Discrimination. In particular, Article 2 and Article 5 prohibiting racial discrimination and General Recommendation no. 23 specifically concerning indigenous peoples.

Kenya is party to each of these conventions with no relevant reservations or declarations.

302. In addition, reference will be made to the International Labour Organization Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent

Countries ("ILO 169") [559] and the American Convention on Human Rights ("ACHR") (together with the associated jurisprudence of the Inter-American Commission and Court of Human Rights). Kenya is not party to either of these Conventions. However, while they cannot, therefore, constitute applicable law for this Court, they may, as submitted below, be used as an interpretive aid, particularly in respect of indigenous rights.[560]

Interpretation of the Charter provisions

303. In addition to the applicable law, a question arises as to how the provisions of the Charter which are applicable are to be interpreted by the Court. In this regard, it is respectfully submitted that the Court should be informed by the approach established by the Commission which, under Articles 60 and 61 of the Charter, is expressly enjoined to:

"draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members" (Art 60); and

"take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules

[559] See *Kichwa Indigenous People of Sarayaku v Ecuador,* Inter-American Court of Human Rights, Merits and reparations. Judgment of June 27, 2012. Series C No. 245. (para 164) where the Inter-American Court of Human Rights held that the obligation to consult, in addition to being a conventional standard is also a general principle of international law.

[560] See *Saramaka People v Suriname,* Inter-American Court of Human Rights, Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172 paras 92-93, in which the Inter-American Court of Human Rights made reference to ILO Convention No. 169 notwithstanding the fact that Suriname had not ratified that Convention.

expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine" (Art 61).

304. Invoking these two Articles, the Commission has, when considering communications before it, in addition to its own previous decisions, referred frequently to the jurisprudence of the Inter American Court on Human Rights ("IACtHR") and the European Court on Human Rights ("ECtHR");[561] provisions of UN human rights treaties and General Comments of UN treaty bodies;[562] other legal instruments ranging from the OAU Convention Governing the Specific Aspects of Refugees[563] to the Four Geneva Conventions and the two Additional Protocols regarding armed conflict;[564] and programmatic and standard setting documents such as the Vienna Declaration and Programme of Action[565] and the UN Basic Principles on the Independence of the Judiciary.[566]

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[561] See *The Social and Economic Action Rights Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) Communication 155/96 ("the *Ogoni* case") where reliance was placed on the Inter American Court of Human Rights case of I/A Court H.R.,*Angel Manfredo Velasquez Rodriguez v Honduras.* Merits, Reparations and Costs. Judgment of 19 July 1988. Series C No. 4 and the European Court of Human Rights, Case 8978/80 of *X and Y v Netherlands* [1985] 8 EHRR 235 in finding that Nigeria was under an obligation to protect persons against interferences in the enjoyment of their rights by private parties.

[562] See for example, the *Ogoni* case*, supra* note 561, where reliance was placed on General Comment no 4 of the Committee on Economic, Social and Cultural Rights regarding the right to adequate housing; and *Media Rights v Nigeria* (1998) AHRLR 200 (ACHPR 1998) Comm. 105/93, 128/94, 130/94, 152/96 where reliance was placed on General Comment no 13 of the Human Rights Committee on the right to a fair trial.

[563] *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004) Communication 249/02.

[564] *Democratic Republic of Congo v Burundi, Uganda and Rwanda* (2004) AHRLR 19 (ACHPR 2003) (2004) AHRLR 19 (ACHPR 2003) Communication 227/99.

[565] See *Purohit and Moore v The Gambia,* (2003) AHRLR 96 (ACHPR 2003) Communication 241/2001*,* regarding the "universal, indivisible, interdependent and interrelated" nature of all human rights.

305. Of particular relevance for present purposes in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of the Endorois Welfare Council) v Kenya,*[567] the Commission, in considering the meaning of "indigenous peoples", referred extensively to the relevant work of the Commission's own Working Group of Experts on Indigenous Populations/Communities as well as the UN Working Group on Indigenous Populations; to the Commission's Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples ("UNDRIP"); to ILO 169 (even though Kenya is not a party to this Convention); to the reports of the UN Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous People; and to jurisprudence of the IACtHR. In considering the specific Articles of the Charter which were claimed to have been violated, the Commission *additionally* referred to jurisprudence of the ECtHR; General Comments of the UN HRC and CERD as well as Concluding Observations of such treaty bodies; the UNDRIP[568], the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and the UN Declaration on the Right to Development; UN Commission on Human Rights Resolutions on Forced Evictions; and reports of the UN Independent Expert on the Right to Development.

306. In this sense, the approach of the Commission is not unique. For example, the IACtHR in its well established body of case law on indigenous peoples property rights, has drawn repeatedly on General Comments, Concluding

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[566] See *Media Rights v Nigeria, supra* note 562

[567] *Centre for Minority Rights Development. v Kenya* 27th ACHPR AAR Annex (Jun 2009 - Nov 2009) Communication 276/2003 ("the *Endorois* case").

[568] The Declaration was adopted on 13 September 2007 by a vote of 144 states in favour, 4 votes against and 11 abstentions (including Kenya). Since its adoption all 4 states voting against the Declaration have reversed their position. Furthermore, during the Durban Review Conference in April 2009, 182 states (including Kenya) reached consensus on an outcome document in which they welcomed the adoption of the Declaration and urged all states to take all necessary measures to implement the rights of indigenous peoples in accordance with international human rights instruments without discrimination.

Observations and decisions on individual complaints of the UN HRC, the Committee on Economic, Social and Cultural Rights (CESCR) and CERD; on the reports of the UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous Peoples; on decisions of other regional human rights bodies, including the African Commission and the ECtHR; on legal instruments, even when not always binding on the party before it, including ICCPR and ILO 169; and on non-binding instruments, most notably the UNDRIP.[569]

307. Such an approach has been adopted by the IACtHR, notwithstanding the fact that the ACHR and the IACtHR's Statute and Rules contain no equivalent to Articles 60 and 61 of the African Charter. Instead Article 29 of the ACHR determines the ways in which the Convention are *not* to be interpreted. Article 29 precludes interpretations which would suppress or restrict the rights beyond the limits already set down in the Convention; interpretations which would restrict the enjoyment of rights recognised under domestic or international law; and interpretations which would limit the effect of other international human rights instruments. In other words, the Inter American Court is required to interpret the American Convention consistently with other relevant international human rights treaties (including as those treaties have been applied by those bodies tasked with considering violations of them).

308. A similar approach has been adopted by the UN HRC with reference to the complaints procedure under the ICCPR. In the absence of any express reference to interpretation in either the ICCPR or the Optional Protocol, the HRC has informed its approach by reference to Articles 31 and 32 of the Vienna Convention on the Law of Treaties. Article 31 requires that a treaty is interpreted in good faith and in light of its object and purpose and taking account of subsequent practice in the application of the treaty and relevant rules of applicable international law. Thus, for example, in the case of *Angela Poma Poma v Peru,*[570] while the HRC did not explicitly refer to the UNDRIP, its

[569] See for example *Saramaka v Suriname, supra* note 560*,* and *Kichwa Indigenous People of Sarayaku v Ecuador*, *supra* note 559

[570]*Poma Poma v.Peru*, Comm. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (HRC 2009).

conclusion that minority communities had to effectively participate in the decision making process around measures which would substantially interfere with their way of life and that to be effective such participation required not mere consultation but obtaining the free, prior and informed consent of the community was clearly informed by the provisions of the UNDRIP.

309. In light of the well established practice of both the African Commission and other international and regional human rights tribunals, it is respectfully submitted that the Court should similarly inform its interpretation of human and peoples' rights under the African Charter with reference to the general body of international human rights law to be found in other human rights instruments (both binding and non-binding) and as applied, inter alia, by UN treaty bodies (through their General Comments, Concluding Observations and jurisprudence), by UN Special Procedures (in both thematic reports and country missions) and the jurisprudence of other regional human rights tribunals.

6. THE OGIEK AS AN INDIGENOUS PEOPLE

310. The African Charter of Human and Peoples' Rights is unique among regional human rights instruments in placing special emphasis on the rights of peoples.[571] The Ogiek are an indigenous people, thus entitling them to benefit from the provisions of the African Charter that protect collective rights, as well as from internationally recognised standards which have been developed regarding indigenous peoples' rights in relation to their lands, properties and natural resources.

311. The African Commission affirmed the right of peoples to bring claims under the African Charter in the *Ogoni* case, stating "*The African Charter, in its Articles 20 through 24, clearly provides for peoples to retain rights as peoples, that is, as collectives. The importance of community and collective identity in African culture is recognised throughout the African culture*".[572]

312. The Commission has recently confirmed this right in the *Endorois* case, in which it found that "*The African Commission agrees that the Endorois are an indigenous community and that they fulfil the criterion of 'distinctiveness.' The African Commission agrees that the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion. The African Commission is satisfied that the Endorois are a "people", a status that entitles them to benefit from provisions of the African Charter that protect collective rights."*[573]

313. In such situations, the Commission can adjudicate the rights of a people as a collective. Therefore, the Ogiek, as a people, are entitled to bring their claims collectively under relevant provisions of the African Charter.

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[571] See *Endorois* decision, *supra* note 567, at para 149; see also Expert Report of Albert Barume at Annex 39

[572] See the *Ogoni* case, *supra* note 561, at para 40

[573] See *Endorois* decision, *supra* note 567, at para 162.

A. Indigenous peoples

314. There is no single internationally agreed definition of "indigenous peoples". Nevertheless, a common starting point in determining whether or not a group is indigenous is the Study on Discrimination in Respect of Indigenous People by the Special Rapporteur for the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, Martínez Cobo, which produced a widely-cited working definition of indigenous peoples:

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."[574]

315. ILO 169 refers to indigenous peoples as:

"Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."[575]

[574] PDPM (Sub-Commission), 'Study of the Problem of Discrimination Against Indigenous Populations' (1986) UN Doc E/CN.4/Sub.2/1986/7/Add.4

[575] Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169) (entered into force 5 September 1991) 72 ILO Official Bull. 59, art 1(1)(b).

316. ILO 169 further emphasises that a people's self-identification as indigenous "shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply".[576]

317. The importance of this notion of "self-identification" is further stressed in General Recommendation VIII of the CERD, which stated that membership in a group "*shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned*".[577]

318. Moreover, the former UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous People also supported self-identification as a key criterion for determining who is indeed indigenous.[578]

319. While there is general acceptance of the importance of self-identification in determining who are indigenous peoples, there has been criticism expressed that some of the earlier approaches to identifying who were indigenous peoples placed too much emphasis on original or pre-colonial inhabitants when such a requirement may either not be relevant (e.g. various Asian countries which were not subject to European colonisation) or may not be particularly helpful (e.g. many African countries where all non-European settlers could claim to be indigenous). The African Commission, through its Working Group of Experts on Indigenous Populations/Communities, has examined in depth the question of indigenous peoples within the African context, their human rights situation and criteria for identifying them.[579] In particular, the Working Group observed that:

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[576] *Ibid* at art 1(2).

[577] CERD General Recommendations VIII, Membership of Racial or Ethnic Groups Based on Self-Identification (Thirty-eighth session, 1990), UN Doc A/45/18 at 79. See also, CERD Conclusions and Recommendations Denmark UN Doc CERD/C/60/CO/5. (2002).

[578] UNHRC, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people', UN Doc E/CN.4/2002/97 para 100.

[579] See Report of the African Commission on Human and Peoples' Rights, *supra* note 8, at 87, which emphasises that a "strict definition of indigenous peoples is neither necessary nor desirable".

"Domination and colonisation has not exclusively been practised by white settlers and colonialists. In Africa, dominant groups have also after independence suppressed marginalised groups, and it is this sort of present-day internal suppression within African states that the contemporary indigenous movement seeks to address ... The favouring of settled agriculture over hunting, gathering and nomadic cattle herding has been instrumental in both marginalising and stigmatising some peoples ...

It is often being argued that all Africans are indigenous to Africa. Definitely all Africans are indigenous as compared to the European colonialists who left all of black Africa in a subordinate position ... However, if the concept of indigenous is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing internal structural relationships of inequality that have persisted after liberation from colonial dominance.

We should put much less emphasis on the early definitions focussing on aboriginality, as indeed it is difficult and not very constructive ... to debate this in the African context. The focus should be on the more recent approaches focussing on ***self-definition*** *as indigenous and distinctly different from other groups within a state; on a* ***special attachment to and use of their traditional land*** *whereby their ancestral land and territory has fundamental importance for their collective physical and cultural survival as peoples; on an experience of* ***subjugation, marginalisation, dispossession, exclusion or discrimination*** *because these peoples have different cultures, ways of life or modes of production than the national hegemonic and dominant model."*[580] (Emphasis in original)."

[580] *Ibid.* at 92-3. See also UNHRC, 'Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mission to Kenya', *supra* note 256 at para 9, where the UN Special Rapporteur on the Rights and Fundamental Freedoms of Indigenous Peoples stated that "from a human rights perspective, the question is not 'who came first' but the shared experiences of dispossession and marginalization. The term "indigenous" is not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities."

320. The approach of the Working Group draws on the work of Erica-Irene Daes, the chairperson of the UN Working Group on Indigenous Populations, who, when tasked to come up with a note on the criteria for a definition of the concept of indigenous, avoided coming up with a single comprehensive definition and instead identified particular factors internationally considered relevant to the understanding of the concept of "indigenous". The four factors she identified are:

- Priority in time with respect to the occupation and use of a specific territory;
- The voluntary perpetuation of cultural distinctiveness;
- Self-identification as a distinct collectivity, as well as recognition as such by other groups;
- An experience of subjugation, marginalisation, dispossession, exclusion or discrimination.[581]

321. The World Bank Group, in its *Operational Policy 4.10 – Indigenous Peoples*,[582] adopted in July 2005, echoed in part the Working Group's four characteristics. The Bank observed, first, "there is no universally accepted definition of 'Indigenous Peoples'"[583] but that, second, "the term... can be used in a generic sense"[584] to refer to distinct groups and communities that possess the following characteristics in some form and to varying degrees:

- Self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;

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[581]The Working Group on Indigenous Populations **(**WGIP), **'**Standard Setting Activities: Evolution of Standards Concerning the Rights of Indigenous Peoples', (1998) E/CN.4/Sub.2/AC.4/1996/2.

[582] The World Bank Group, '*O*perational Policy 4.10 – Indigenous Peoples' (July 2005) <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html> accessed 20 November 2013.

[583] *Ibid.* at para 3.

[584] *Ibid.* at para 4.

- Collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;[585]
- Customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
- An indigenous language, often different from the official language of the country or region.[586]

322. The African Commission directly addressed for the first time in its case law the issue of indigenous peoples rights, in the *Endorois* case. As with the Working Group, in examining whether the Endorois were an indigenous peoples, the Commission very much rooted its considerations in the reality of the African context:

"While the terms 'peoples' and 'indigenous community' arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems. [The Commission] is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms."[587]

323. The Commission went on to demonstrate awareness of the "emerging consensus" in relation to "objective features that a collective of individuals should manifest to be considered as 'peoples'."[588] Of central importance in seeking to

[585] See *Ibid.,* the Bank's Policy is clear that "a group that has lost 'collective attachment to geographically distinct habitats or ancestral territories in the project area'... because of forced severance remains eligible for coverage".

[586] *Ibid.*

[587] See *Endorois* decision*, supra* note 567, at para 148.

[588] *Ibid*, para 151.

define indigenous peoples, in the Commission's view, were two principles. First, is the idea of linkages between peoples, their land and culture.[589] Second, is that a group express its desire to be identified as a people or have "the consciousness that they are a people."[590]

324. The Commission, then, in *Endorois*, identified what the overwhelming consensus of international legal opinion asserts to be foundational in defining an indigenous people, namely *(i)* a specific relationship to a defined territory and *(ii)* self-identification.

B. The Ogiek as an indigenous people

325. In the light of the background facts, set out at paragraphs 1 to 56 above, it is clear that the Ogiek community meet the accepted criteria required for the community to constitute an indigenous population for the purposes of both the African Charter and general international law.

326. First, the community self-identify as Ogiek, a distinct socio-cultural entity. The Ogiek consider themselves to be a distinct people, sharing a unique common history, culture and religion. Ogiek dress codes, greetings, and eating customs are "totally different from other communities."[591] Their style of dress, based on materials hunted and gathered in the forest, "is special to the Ogiek. It is unique to us."[592] Their wedding customs are unique to the Ogiek.[593] Ogiek teach their children ancestral customs and practices, conveying on them the importance of the Ogiek role of "guardians of the forest."[594] Those Ogiek who grew up during

[589] *Ibid*. paras 151 and 154.

[590] *Ibid*. paras 151 and 157.

[591] Affidavit of Samuel Kipkorir Sungura, *supra* note 17

[592] Affidavit of Elijah Kiptanui Tuei, *supra* note 16

[593] Ibid. *See also* Affidavit of Patrick Kuresoi, *supra* note 11.

[594] See Affidavit of Samson Kipkemboi Mutai, *supra* note 128

the colonial period explain their parents' fears that by attending schools, Ogiek would lose their unique identity.[595]

327. There has been external recognition of their identity, most significantly, by the Government of Kenya.[596] Second, the community have a clear attachment to, and relationship with, a defined territory, namely the Mau Forest Complex. This too is recognised by the Government of Kenya.[597]

328. These points are buttressed by the comments of observers on the regional and international plane. For example, the 2003 report of the African Commission's Working Group on Indigenous Populations/Communities specifically refers to hunter-gatherers as an example of indigenous peoples and, in turn, refers to the Ogiek as an example of a hunter-gathering community.[598]

329. Additionally, the Working Group on Indigenous Populations/Communities conducted a research and information visit to Kenya in March 2010.[599] From this visit, the Working Group reiterated their earlier views, stating that:

"The Ogiek are a hunter-gatherer indigenous minority group with a population of around 20,000. About 15,000 of them live in what is known as the Mau Forest Complex and its adjacent environs. Their livelihood involves hunting, fruit gathering, beekeeping and, in the recent past, small-scale farming... The Mau

[595] Affidavit of A. Tulwet Lemisi, *supra* note 9.

[596] See Respondent's Submissions on Admissibility, paras. 1.1.8, 1.2.9; TJRC Report, *supra* note 121, Vol. IIC paras. 204, 240; and UNHRC, 'Cases examined by the Special Rapporteur (June 2009 – July 2010), *supra* note 8, at para 268.

[597] *Ibid;* see also Expert Report of Albert Barume, *supra* note 571

[598] Report of the African Commission's Working Group on Experts on Indigenous Populations/Communities, supra note 159, at 15.

[599] See, ACHPR, 'Report of the African Commission's Working Group on Indigenous Populations/Communities, Research and Information Visit to Kenya, 1-19 March 2010', *supra* note 8.

Forest is their natural and ancestral habitat in which they have lived since time immemorial and on whose livelihood they depend."[600]

330. At the UN level, in a series of country missions to Kenya by UN Special Rapporteurs the situation of the Ogiek as an indigenous people has been taken up. Thus, the then UN Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living, Miloon Kathari, in a report on his 2004 mission to Kenya refers to the "*indigenous Ogiek community*" of the Mau Forest and the fact that Government sanctioned logging of the Mau Forest if not stopped "*threatens to destroy [Ogiek] cultural identity and the community as a whole*."[601]

331. Similarly, the then Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, in a report on his 2006 mission to Kenya makes the observation that:

"[P]astoralists and hunter-gatherers are normally regarded as indigenous peoples in the international context, and they increasingly come to identify themselves as such in many countries, including in Africa. In Kenya they include pastoralist communities such as the Endorois, Borana, Gabra, Maasai, Pokot, Samburu, Turkana, and Somali, and hunter-gatherer communities whose livelihoods remain connected to the forest, such as the Awer (Boni), Ogiek, Sengwer, or Yaaku."[602]

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[600] *Ibid*, at 41-42.

[601] UNESC, 'Adequate Housing as a Component of the Right to an Adequate Standard of Living, Mission to Kenya (9-22 February 2004), E/CN.4/2005/48/Add.2 para 61. Available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/168/86/PDF/G0416886.pdf?OpenElement, accessed 14 November 2013

[602] UNHRC, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples' , *supra* note 256, at para 10
This was an observation "noted" by the African Commission in the *Endorois* decision, *supra* note 567, at para 154.

332. The Special Rapporteur's goes on to describe the history of the struggle of the Ogiek People, noting that "*[t]he way of life of the Ogiek is well adapted to the Mau Forest environment where they have lived for centuries.*"[603]

333. More recently, the present Special Rapporteur on the rights and fundamental freedoms of indigenous peoples, James Anaya, clearly accepted that the Ogiek are indigenous peoples in taking up with the Kenyan Government concerns arising from a communication sent to him on the issue of the eviction of the Ogiek from the Mau Forest complex.[604] Not only did the Kenyan Government not dispute the application of the Special Rapporteur's mandate to the situation of the Ogiek but, in its detailed response, the Government acknowledged that "*[t]he Ogiek who predominantly inhabited the Mau Forest Complex from time immemorial have aboriginal title over the Mau as their ancestral land.*"[605]

334. At a domestic level, the Ogiek have also received recognition in Indigenous Peoples Planning Frameworks (IPPF) developed between the Government of Kenya and the World Bank. Both the IPPF for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project, finalised in December 2006, and for the Kenya Agricultural Productivity and Agribusiness Project (KAPAP), finalised in May 2009, expressly cover the way of life of hunter-gatherer tribes, including specifically the Ogiek.[606]

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[603] *Ibid*, para 37. A similar point is recorded in UNESC, 'Adequate Housing as a Component of the Right to an Adequate Standard of Living, Mission to Kenya (9-22 February 2004), *supra* note 601, at paras 59-62.

[604] UNHRC, 'Cases examined by the Special Rapporteur (June 2009 – July 2010)', *supra* note 8, section XIX.

[605] *Ibid* at para 269.

[606] Office of the President & Ministry of Water and Irrigation & Ministry of Environment and Natural Resources, 'Final Report for the Indigenous Peoples Planning Framework for the Western Kenya Community Driven Development and Flood Mitigation Project and the Natural Resource Management Project' (December 2006), para 2.1 and 2.2; Kenya Agricultural Productivity and Agribusiness Project (KAPAP), 'Indigenous Peoples Planning Framework (Ogiek and Sengwer)' (May 2009) para 3.1.

335. The Final Report of the TJRC described the Ogiek as one of several indigenous peoples in Kenya.[607] It also highlighted their land loss and the problems with settlement schemes throughout the decades.

336. Indeed, Kenya's recently adopted Constitution specifically recognises hunter-gatherers like the Ogiek as an indigenous community, "*an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy*"[608].

337. All the above references make it clear that the Ogiek satisfy the second criteria, that is, that they hold a specific relationship to a defined territory. In fact, the Respondent Government in its submissions to the African Commission in this case acknowledges that the Ogiek are an indigenous people with intimate connection to their land, stating "*The Ogiek have lived since time immemorial in the forest*"[609] and then, "*Recognizant of the Ogiek's indigenous right to the land and the fact that some of their traditional practices were still practiced*".[610] It further states "*The Government is aware that there exist certain minority communities, who, because of their way of life, attachment to land, culture and historical injustices, have become marginalised by the rest of dominant groups, denied ownership of an access to land rights...*"[611].

338. On the preceding grounds, the Ogiek's culture, religion and traditional way of life are intimately intertwined with their ancestral lands in the Mau Forest (see further paragraphs 1-131 above). Both affidavit evidence and the reports of African Commission, UN and the Respondent Government recognise the ancient ties the Ogiek enjoy with their traditional lands and natural resources in the Mau Forest, and the Ogiek self-identify as an indigenous peoples and are recognised

[607] TJRC Report, supra note 121, Vol. IIC para. 23.

[608] Kenya Constitution 2010, section 260

[609] Government submissions to the ACHPR, 15 March 2010, para 1.1.5.

[610] Government submissions to the ACHPR, 15 March 2010, para 1.1.8.

[611] Government submissions to the ACHPR, 15 March 2010, para 7.1.4.

by others as such. As a consequence, the Ogiek are to be considered both an indigenous people and "a people" for the purposes of the African Charter.

C. Effect of 'modern society' on the Ogiek's cultural distinctiveness

339. It is recognised that the eviction of the Ogiek from many of their traditional locations within the Mau Forest, the banning of hunting and the drive by both the colonial and subsequent governments to "modernise" them through their engagement in livestock keeping and farming, has necessarily restricted the Ogiek's capacity to continue practising their traditional livelihoods and engaging in their cultural and spiritual activities to the same extent as in earlier generations. In response to their displacement, the activities of the Ogiek have diversified, as set out above at paragraphs 57 to 82, to include elements of livestock keeping and subsistence farming.

340. Such changes forced upon them by external circumstances, however, do not suffice to negate the Ogiek's claim to either their status as an indigenous hunter-gatherer group or to their ancestral lands. A number of decisions by courts under other human rights mechanisms support this proposition.

341. Firstly, the UN HRC has supported the view that "*Article 27 [the right to enjoy one's culture in community with others] does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology*."[612] Furthermore, in an earlier decision, the Committee, in determining that reindeer husbandry formed an essential element of the author's culture, was of the view that the fact "*that some of the authors practice other economic activities in order to gain supplementary income does not change this conclusion."*[613]

[612] *Apirana Mahuika et al. v New Zealand*, Communication No 547/1993 (HRC 2000) para 9.4.

[613] *Jouni E Lansman et al. v Finland*, Communication No 671/1995, (HRC 1996) para 10.2.

342. Secondly, the case law of the Inter-American Court of Human Rights similarly makes clear that, for a peoples to be recognised as indigenous does not require that their culture remains ossified at some point in the past. In particular, the *Case of the Sawhoyamaxa Indigenous Community v Paraguay* is instructive given the similarity between the experiences of the Sawhoyamaxa community and the Ogiek.[614] The economy of this indigenous group was based principally on fishing and gathering plants and fruit and honey. Traditionally, therefore, they had occupied a very large area of territory, roaming across it in search of food. Over the year, however, as their traditional lands were bought up by outsiders and estates/farms established, members of the community began to be employed as farmhands and workers of the new owners. Consequently, "*although they continued to live in their traditional lands, the effect of the market economy activities into which they were incorporated resulted in the group becoming sedentary."*[615] Further transferral of their lands to private owners followed by subdivision "*increased the restrictions for the indigenous population to access their traditional lands, thus bringing about significant changes in its subsistence activities. They increasingly depended on their salary for food ..."*[616]

343. Notwithstanding the shift from a nomadic to a sedentary lifestyle and the change in the group's subsistence activities, the Court concluded that the Sawhoyamaxa Community "*is an indigenous community, typical of those traditionally living in the Paraguayan Chaco that has become sedentary*."[617]

344. Later, in the same judgment, the Court addressed the question of whether the right to restitution of traditional lands by indigenous peoples lasted indefinitely in time. Given that their unique relationship with their traditional lands formed the spiritual and material basis for indigenous identity, the Court concluded that *"[a]s long as [the unique relationship with their traditional lands] exists, the right to*

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[614] I/A Court H.R.,*Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146.

[615] *Ibid,* at para 73(3).

[616] *Ibid,* at para 73(4).

[617] *Ibid,* at para 73(5).

claim lands is enforceable, otherwise, it will lapse."[618] However, in so concluding, the Court recognised that the relationship with the land had to be possible such that, as in the case of the Sawhoyamaxa before the Inter-American Court and for the Ogiek before this Court,

"*if the members of the indigenous people carry out few or none of such traditional activities within the lands they have lost, because they have been prevented from doing so for reasons beyond their control... restitution rights shall be deemed to survive until said hindrances disappear.*"[619]

345. Again, the fact that the Sawhoyamaxa community's traditional relationship with their ancestral lands was no longer possible was considered by the Inter-American Court to go to the question of restitution and not to the question of whether or not they remained indigenous. Accordingly, the simple fact that an indigenous group are unable to continue all of their traditional activities for reasons beyond their control does not result in the group losing its indigenous character.

346. Additionally, in one of the leading domestic judgments on indigenous peoples' property rights emanating from the High Court of Australia, in which the doctrine of *terra nullius* was held not to apply to traditional aboriginal territory, Brennan J, writing for the majority, accepted that

"*Of course in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs*."[620]

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[618] *Ibid,* at para 131.

[619] *Ibid,* at para 132 (*emphasis* supplied).

[620] *Mabo v Queensland (No 2)* [1992] HCA, para 68.

347. It follows from such international and domestic jurisprudence that where an indigenous community are prevented, by reasons beyond their control, from engaging in traditional activities in connection with their ancestral lands, they do not lose their indigenous status or their rights over those lands because of that fact. In addition, some shift or change in the activities of indigenous groups over time is permitted, whether or not this change is as a result of external pressures.

348. In recent times, as set out at paragraphs 57-82 above, the Ogiek have found themselves unable to pursue their traditional activities to the extent that they previously could. This can be largely attributed to the activities of the colonial and post-colonial administrations, following, *inter alia*, the Carter Commission in 1933 and the various decisions to evict the Ogiek, culminating in the 2009 notice.[621]

349. The Ogiek continue to pursue, where possible and sustainable, their traditional activities, including hunting game and gathering honey in the forest. Given that the Ogiek have been forced out of their ancestral lands, in the Mau Forest, it is understandable that they have not been able to continue their activities to the same extent as previously.[622] Despite this they consider themselves, and are considered by others, to continue to be an indigenous people.

The Constitutional Court of South Africa, albeit on a different point, has also recognised that indigenous law changes and evolves through usage in *Alexkor Ltd and Another v Richtersveld Community and Others*, 2004 (5) SA 460 (CC) (14 October 2003) (Constitutional Court of South Africa) para 53.

[621] See ACHPR 'Report of the African Commission's Working Group on Indigenous Populations/Communities, Research and Information Visit to Kenya, 1-19 March 2010', *supra* note 8, paras. 41 - 42.

[622] While the Kenya Forests Act 2005 does contain provisions for allowing gathering of forest produce subsequent to the grant of a licence, the process of obtaining a licence is both cumbersome and alien to the majority of the Ogiek given their previous unencumbered access to the resources of the forest.

7. VIOLATION OF ARTICLE 1: STATE OBLIGATIONS

350. Article 1 of the Charter provides that:

> *"The Member States of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them*."

351. While the Court has not previously had the opportunity to adjudicate on this Article, it has come before the African Commission on numerous occasions. Essentially, "*Article 1 gives the Charter the legally binding character always attributed to international treaties of this sort. Therefore a violation of any provision of the Charter, automatically means a violation of Article 1. If a State party to the Charter fails to recognise the provisions of the same, there is no doubt that it is in violation of this Article*. *Its violation therefore goes to the root of the Charter.*"[623]

352. Furthermore, the Commission has held that Article 1 imposes a positive obligation on States "*not only to 'recognise' the rights under the Charter but to go on to 'undertake to adopt legislative or other measures to give effect to them.' The obligation is peremptory, States '*shall *undertake'. Indeed, it is only if the States take their obligations seriously that the rights of citizens can be protected*."[624]

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[623] *David Jawara v Gambia* (2000) AHRLR 107 (ACHPR 2000) Communications 147/95 & 149/96, para 46.

[624] *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) Communication 211/98, para 62. See further decisions such as *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) Communications 279/03-296/05 at para 227 where the nature of Article 1 as expressed in *David Jawara* (*supra* note 623) and *Legal Resources Foundation* are succinctly combined: The African Commission concludes further that Article 1 of the African Charter imposes a general obligation on all State parties to recognise the rights enshrined therein and requires them to adopt measures to give effect

353. The nature of Article 1, and earlier decisions regarding it, were analysed in considerable detail by the African Commission in the case of *Association of Victims of Post Electoral Violence & Interights v Cameroon.*[625] In that case, having referred to the *sui generis* nature of Article 1, the Commission identified the obligation of the State Party established by virtue of Article 1 as being one of respecting, protecting, promoting and implementing the rights set out in the Charter.[626] Furthermore, the Commission concluded that the obligation imposed by Article 1 was not one of diligence but one of result. In so deciding, the Commission emphasised that " *[I]t is also important to clarify that the signature, acceptance and ratification by the States of the provisions contained in the Charter, the preparation or the adoption of legal human rights instruments only constitute, in themselves, the beginning of the indispensable exercise of promotion, protection and the reparation of human and peoples' rights. The practical implementation of these legal instruments through the State Institutions endowed with creditor, material and human resources, is also of considerable importance. It is not enough to make do with taking measures, these measures should also be accompanied with institutions that produce tangible results.*"[627]

354. The peremptory nature of Article 1 has meant that at times the African Commission has found a violation of Article 1 even though the claimant him or herself has not pleaded that particular Article. For example, in *Kevin Mgwanga Gunme et al v Cameroon*, the Commission stated that "according to its well established jurisprudence, the African Commission holds that a violation of any other provision of the African Charter automatically constitutes a violation of Article 1 as it depicts a failure of the State Party

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to those rights. As such any finding of violation of those rights constitutes violation of Article 1.

[625] *Association of Victims of Post Electoral Violence & Interights v Cameroon* (2009) Communication 272/03

[626] *Ibid,* at para 87.

[627] *Ibid,* at para 108.

concerned to adopt adequate measures to give effect to the provisions of the African Charter. Thus, having found violations of several provisions in the above analysis, the African Commission also finds that the Respondent State violated Article 1."[628]

355. The Court is respectfully invited to follow the approach adopted by the Commission in respect of Article 1.[629] Accordingly, if the Court finds a violation of any or all of the other Articles pleaded below, it follows that the Respondent State is also in violation of Article 1.

[628] *Kevin Mgwanga Gunme et al v Cameroon* (2009) Communication 266/03, at para 213.

[629] Something that it has already shown itself willing to do in respect of the Commission's approach to other Articles e.g. *Tanganyika Law Society and Legal and Human Rights Centre v United Republic of Tanzania* (2011) Communication 009/2011, where the Court endorsed the Commission's approach to Article 27(2); see also paras 299-309 above.

8. VIOLATION OF ARTICLE 2 – RIGHT TO NON-DISCRIMINATION

356. Article 2 of the Charter provides:

"Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or status."

357. Article 2 provides a non-exhaustive list of prohibited grounds of discrimination. The reference to "*or other status"* widens the group to include statuses not expressly noted. Regardless, any discrimination against the Ogiek community would fall into the definition of "race", "ethnic group", "religion" and "social origin" referred to in Article 2.

358. This Article, unlike its counterparts in the ICCPR Article 2, the European Convention on Human Rights (ECHR) Article 14 and the ACHR Article 1, uses the term "distinction" rather than "discrimination". However, nothing would appear to turn on this different terminology, with the African Commission itself stating explicitly in its consideration of Article 2:

"The principle of non-discrimination is a fundamental principle in international human rights law. All international and regional human rights instruments and almost all countries' constitutions contain provisions prohibiting discrimination. The principle of non-discrimination guarantees that those in the same circumstances are dealt with equally in law and practice."[630]

359. The African Commission has further stated that Article 2 constitutes "*a basic and general principle relating to the protection of human rights*".[631]

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[630] *Kenneth Good v Republic of Botswana*, (2010) ACHPR, Communication 313/05, para 218.

[631] *Ibid,* para 1.

360. The African Commission has described Article 2, together with Article 3, as forming the anti-discrimination and equal protection provisions of the Charter:

"*Article 2 lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises, while Article 3 is important because it guarantees fair and just treatment of individuals within a legal system of a given country. These provisions are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.*"[632]

361. Neither the terms "distinction" nor "discrimination" are defined in the Charter. Nevertheless, drawing on other international human rights instruments in accordance with the approach set out in paragraphs 299-309 above, the African Commission has stated that:

"*Discrimination can be defined as any act which aims at distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms*."[633]

362. The importance given by the African Commission to the right to non-discrimination is echoed in the decisions of other regional human rights tribunals. Indeed the high priority given in international law to combating and redressing

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[632] *Purohit and Moore v The Gambia, supra* note 565, para 49.

[633] *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Zimbabwe* (2008) AHRLR 120 (ACHPR 2008) Communication 293/2004, para 91. (The Commission drew in particular on General Comment No. 18 of the United Nations Human Rights Committee (United Nations Human Rights Committee, General Comment No. 18, *Non-discrimination*, 10 November 1989 (CCPR General Comment No.18)).

discrimination is reflected in the status of the prohibition against discrimination as a *jus cogens* norm. Thus, the IACtHR has stated:

"the principle of ... non-discrimination belongs to jus cogens, *because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of* jus cogens*."*[634]

363. More recently, the African Committee of Experts on the Rights and Welfare of the Child similarly referred to how "racial and ethnic discrimination are prohibited as binding *jus cogens* norm of international law".[635]

364. However, not every difference in treatment amounts to a violation of the right to non-discrimination. As previously stated by the African Commission:

"The test to establish whether there has been discrimination has been well settled. A violation of the principle of non-discrimination arises if: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; and c) if there is no proportionality between the aim sought and the means employed".[636]

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[634] I/A Court H.R., *Juridical Conditions and Rights of the Undocumented Migrants,* Advisory Opinion OC-18/03, September 17, 2003, (Ser. A) No. 18 (2003), para 101.

[635] *Institute for Human Rights and Development in Africa and Open Society Justice Initiative (on behalf of children of Nubian descent in Kenya) v Kenya* (2011) (No 002/Com/002/2009).

[636] *Kenneth Good v Republic of Botswana*, *supra* note 631

365. These requirements have been expressly set out by other international human rights supervisory bodies, including the IACtHR and the HRC.[637]

366. This accords with the approach of the ECtHRwhich has consistently held that the principles of non-discrimination and of equality of treatment are violated:

"If the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aims and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference in treatment in the exercise of a right laid down in the [European Convention on Human Rights] must not only pursue a legitimate aim: [the right to non-discrimination] is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."[638]

367. Additionally, the African Commission has previously held that justification for the violation of a Charter right "cannot be derived solely from popular will, as such cannot be used to limit the responsibilities of State Parties in terms of the Charter."[639] Equally, the fact that a difference in treatment is "in accordance with the provisions of the law" cannot be used of itself to justify that difference and thereby take away the right to non-discrimination.[640]

368. In respect of a difference in treatment based on race or ethnicity, the ECtHR has, building on a series of cases, held that:

"Ethnicity and race are related concepts. Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features such as skin colour or facial characteristics, ethnicity

[637] *Ibid*, para 219 (footnotes omitted).

[638] Case *Relating to certain aspects of the laws on the use of languages in education in Belgium*, ECtHR judgment of 23 July 1968, Application nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 , para 10. (Henceforth referred to as '*Belgian Linguistics Case*').

[639] *Legal Resources Foundation v Zambia, supra* note 624, at para 70.

[640] *Ibid,* para 72.

has its origin in the idea of societal groups marked in particular by common nationality, religious faith, shared language, or cultural and traditional origins and backgrounds. Discrimination on account of a person's ethnic origin is a form of racial discrimination (see the definition adopted by the International Convention on the Elimination of All Forms of Racial Discrimination in paragraph 19 above and that adopted by the European Commission against Racism and Intolerance in paragraph 23 above). Racial discrimination is a particularly egregious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of enrichment."[641]

"In this context, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible.[642] *The Court has also held that no difference in treatment which is based exclusively or to a decisive extent on a person's ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures."*[643]

369. As to who has the burden of proof of establishing any objective and reasonable justification, this falls on the Respondent State once the complainant has established a difference in treatment.[644] This is apparent from the reasoning of the African Commission in the case of *Kenneth Good v Botswana* when the only justification for treating the complainant differently appeared to be for

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[641] *Nachova and Others v. Bulgaria,* ECtHR Grand Chamber Judgment of 6 July 2005, Application nos. 43577/98 and 43579/98, para 145, and *Timishev v Russia,* ECtHR Judgment of 13 December 2005, Application nos. 55762/00 and 55974/00, para 56.

[642] *Case of D.H. and Others v The Czech Republic,* ECtHR Grand Chamber Judgment of 13 November 2007, Application no. 57325/00, para196.

[643] *Sejdic and Finci v Bosnia and Herzegovina,* ECtHR Grand Chamber Judgment of 22 December 2009, Application nos. 27996/06 and 34836/06, paras 43 and 44.

[644] See, for example, *Case of D.H. and Others v The Czech Republic, supra* note 642, para 177.

reasons of national security but the Commission found that "the State has not demonstrated how the action of the victim became a national security threat".[645]

370. Finally, with regard to the general principles relating to discrimination and equal treatment, reference is sometimes made to the concepts of direct discrimination and indirect discrimination. Direct discrimination is less favourable treatment on the basis of a prohibited ground such as race or ethnicity. Indirect discrimination, sometimes referred to as *de facto* discrimination, occurs where a practice, rule or requirement is neutral on its face (ie makes no reference to a prohibited ground) but impacts particular groups disproportionately. There is no reason to consider that the Charter in Article 2 does not seek to protect against both *de jure* and *de facto* discrimination and inequality. Thus, as referred to above, the African Commission has defined discrimination as any act which has either the purpose (direct discrimination) or effect (indirect discrimination) of impairing the enjoyment of all persons of all rights and freedoms. Equally in *Association Mauritanienne des Droits de l'Homme v Mauritania*, the African Commission has stated that:

"Article 2 of the Charter lays down a principle that is essential to the spirit of this Convention, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings. The same objective underpins the Declaration of the Rights of People Belonging to National, Ethnic, Religious or Linguistic Minorities adopted by the General Assembly of the United Nations in resolutions 47/135 of 18 December 1992… From the foregoing, it is apparent that international human rights law and the community of States accord a certain importance to the eradication of discrimination in all its guises.[646]

Discrimination and economic, social and cultural rights

371. The African Commission's recently adopted Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights provide for special protection for the rights of vulnerable and disadvantaged groups, such as the

[645] *Kenneth Good v Republic of Botswana*, *supra* note 624, at para 224.

[646] Communication no 210/98, at para 131 (emphasis added).

Ogiek, to ensure these rights are enjoyed fully and without discrimination. Specifically, they provide as follows:

"Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.

In ensuring effective equality in the enjoyment of economic, social and cultural rights, Member States must pay particular attention to members of vulnerable and disadvantaged groups. Such individuals are often disproportionately affected by a failure of the State to ensure economic, social and cultural rights and/or are direct victims of discriminatory laws, policies and customary practices.

To ensure realisation of equal access to economic, social and cultural rights States should ensure the provision of basic social services (such as water, electricity, education and health care) and equitable access to resources (such as land and credit) to members of vulnerable and disadvantaged groups."[647]

Objective justification for any difference in treatment

372. Article 2, as mentioned above, does not contain a derogation clause. Instead, it has been said that *"the only legitimate reasons for limitations to the rights and freedoms of the African Charter are found in Article 27(2), that is, that the rights of the Charter 'shall be exercised with due regard to the rights of others, collective security, morality and common interest.'"*[648] Furthermore, *"the reasons for possible limitations must be founded in a legitimate state interest and the evils of limitations of rights must be strictly proportionate with and absolutely*

[647] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, 48th Session, adopted November 2010, paras 31-33; available at http://www.escr-net.org/docs/i/1599552

[648] *Media Rights v Nigeria*, *supra* note 562, at para 68. See also *Interights and Others v Mauritania*, (2004) AHRLR 87 (ACHPR 2004), Communication 242/2001.

necessary for the advantages which are to be obtained."[649] Additionally, "*a limitation must not erode a right such that the right itself becomes illusory."*[650]

Application of the principles to the present case

373. It is respectfully submitted that the Court, in the development of its jurisprudence on Article 2, should act in line with the jurisprudence of other regional human rights bodies, both to the non-justification of racial, including ethnic, discrimination and to the burden of proof. Accordingly, to the extent that the Court accepts that discrimination on grounds of ethnic origin is not capable of objective justification, it follows that the differential treatment of the Ogiek and similarly other indigenous and minority groups within Kenya, in relation to the lack of respect for their property rights, religious and cultural rights, and rights to life, natural resources and development under the relevant laws (as set out in paragraphs 274-298 above), constitutes unlawful discrimination.[651]

374. Should the Court consider that despite its "perilous" nature, racial discrimination is capable of objective justification, then it falls to the Respondent Government to demonstrate that the discrimination suffered by the Ogiek pursues a legitimate state interest and is strictly proportionate with and absolutely necessary for the advantages which are to be obtained from that interest. It is respectfully submitted that this is an extremely heavy burden to discharge which, given the Government's pursuance of continuing a policy of assimilation, marginalisation and discrimination towards the Ogiek, it is not capable of discharging.

375. In the present case, it is clear that the Respondent Government has, since independence, been pursuing a policy of assimilation and marginalisation, presumably in an attempt to ensure national unity and, in the case of land and natural resource rights, in the name of conservation of the Mau Forest. While it is not disputed that such aims of national unity or conservation may be legitimate

[649] *Media Rights v Nigeria*, *supra* note 562, at para 69.

[650] *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, (1999) ACHPR Communications 140/94, 141/94 and 145/95, at para 42.

[651] See further, Film Evidence taken from Ogiek communities and transcript, *supra* note 22

and serve the common interest, the means employed, including the non-recognition of the tribal and ethnic identity of Ogiek individuals and their corresponding rights, is entirely disproportionate to such an aim and ultimately is counterproductive to its achievement. The importance of recognising minority and indigenous tribes and their contribution to society, and the negative effects of not doing so on long term stability, is amply demonstrated by the report of the Commission's Working Group of Experts on Indigenous Populations/Communities in which it was stated that:

"… it is indeed a fact that Africa is characterized by multiculturalism. Almost all African states host a rich variety of ethnic groups, some of which are dominant and some of which are in subordinate positions. All of these groups are indigenous to Africa. However, some are in a structurally subordinate position to the dominating groups and the State, leading to marginalisation and discrimination.

We find that it is important for a major human rights body like the African Commission on Human and Peoples' Rights to draw attention to the fact that, in the present day de-colonised and multicultural African states, there is a serious human rights issue concerning specific marginalised people who are being suppressed and discriminated against and whose cultures are under threat. Whatever the specific term used to analyse and describe their situation will be, it is highly important to recognise the issue and to urgently do something to safeguard fundamental collective rights.

The debate on the protection of the rights of indigenous peoples can give very constructive input to discussions within African human rights institutions on how to develop modalities of truly democratic multicultural African states where the voices and perceptions of all groups are respected. If allowed to flourish and develop on their own terms, indigenous peoples and communities in Africa have important contributions to make to the overall economic, political, social and cultural development of the states within which they live. They should be seen as an asset and if the political will exists, it would be very feasible to develop policies that give space and opportunities to all groups within a state.

The concrete elaboration of positive policies that respect the collective human rights of indigenous groups could very well give new inspiration to ongoing debates on prevention of conflicts on the African continent … Respect for different cultures, identities and modes of production and an inclusive in-cooperation of the rich variety of perspectives and needs of all groups in national policies will go a long way in preventing conflicts. All over the world, history had repeatedly shown that the silencing of ethnic identity does not lead to peace and true unity – only genuine respect for diversity can lead to this."[652]

376. The words of the Group of Experts echo those of the UN HRC in its General Comment no 23 on the rights of minorities in which it refers to ensuring the survival and continued development of the cultural, religious and social identity of minorities as "*enriching the fabric of society as a whole".*[653]

Conclusion

377. It is respectfully submitted that it follows from the above that the Ogiek have suffered routine discrimination at the hands of the Respondent Government. Furthermore, the Government is not able to discharge the burden upon it of showing that the reasons for such difference in treatment are strictly proportionate to or absolute necessary for the aims being pursued. This is because differential treatment on the basis of ethnic origin alone is never capable of objective justification or, alternatively, even if such treatment can in certain circumstances be justified, the treatment being challenged here undermines the very aims sought to be achieved. As a result, the laws which permit this discrimination are in violation of Article 2 of the Charter.

[652] *Supra* note 159, pp 101-3.

[653] United Nations Human Rights Committee, General Comment No. 23, Article 27, *The rights of minorities*, 8 April 1994 (CCPR/C/21/Rev.1/Add.5), para 9.

9. VIOLATION OF ARTICLE 4: THE RIGHT TO LIFE

378. Article 4 provides as follows:

> *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."*

379. It is submitted that the Ogiek's right to life has been violated as a result of the Respondent Government evicting them from the Mau Forest, the continued logging and clearance operations with the permission of the authorities, the parcelling and distribution of land in the Mau Forest to leading members of the Government and its political allies, and the failure to take any positive measures to protect the Ogiek way of life, thus threatening their very existence.[654]

380. In light of the central and singular importance of the Mau's resources for the sustainability of the Ogiek's hunter-gatherer way of life, it is submitted that the Ogiek's right to life under Article 4 has been and continues to be interfered with, by the Respondent Government arbitrarily depriving them of access to the necessary conditions for a life in dignity, in the name of sustainability and/or environmental necessity, as well as in order to parcel up and distribute forest land to third parties (including political allies)[655]. Any such interference should be strictly proportionate to the aim of such use of the Mau Forest, which it is not.

The scope of the right to life

381. The right to life is the first human right, the one on which the enjoyment of all others depends.[656] The African Commission has emphasised this in its jurisprudence, stating

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[654] See further paragraphs 132-262 above

[655]The Ndungu Report, supra note 248, at 152. Daily Nation, 'Moi Mama Ngina in Ndungu Land Report', (17 December 2004) <http://www.ogiek.org/news/news-post-04-12-7.htm> accessed 19 November 2013.

[656] F. Ouguergouz,"*The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for the Human Dignity and Sustainable Democracy in Africa"*, (The Hague: Kluwer

"The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow"[657]

382. Although the right to life does not fall within the group rights protected in Part II of the Charter, Part I includes rights and duties applying to individuals and groups alike.[658] So, any act which amounts to disrespect for the life and integrity of a person or group of persons, or an arbitrary denial of that right, will result in a violation of Article 4.[659]

383. The right to life under the African Charter sets itself apart from the right to life as protected by other international treaties and covenants, in that it does not specifically lay down any exception to the right.[660] However, in providing that "no one may be arbitrarily deprived of this right", it may be concluded that a person may be deprived of this right provided it is not done in an arbitrary fashion.[661] The scope of this provision therefore turns on the meaning of the word "arbitrarily".

384. The International Court of Justice has stated that *"Arbitrariness is not so much something opposed to a rule of law, as opposed to the rule of law.... It is a wilful disregard of law, an act which shocks, or at least surprises, a sense of juridical*

Law International, 2003), p. 91. (Henceforth referred to as: F. Ouguergouz,"*The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for the Human Dignity and Sustainable Democracy in Africa"*)

[657] *Forum of Conscience v Sierra Leone*, (2000) AHRLR 293 (ACHPR 2000) Communication 223/98,para 19.

[658] http://www.un.org/esa/socdev/enable/comp303.htm

[659] See further the *Ogoni* case, *supra* note 561, where a violation of Article 4 was found against an indigenous community.

[660] Article 6 (2) ICCPR provides for capital punishment for serious crimes; Article 2 ECHR provides limited exceptions under which the deprivation of life by state officials may be justified; Article 4 American Convention similarly provides for capital punishment for serious crimes.

[661]F. Ouguergouz, "*The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for the Human Dignity and Sustainable Democracy in Africa*", *supra* note 656, pp. 92-93.

propriety".[662] The concept of arbitrariness would therefore seem to be something which involves injustice or inequity, and something more than just being illegal. This is further supported by Article 29 (2) of the Universal Declaration of Human Rights, which only allows limitations on rights and freedoms if they are *"determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".*

385. The right to life is the supreme right from which no derogation is permitted even in times of public emergency.[663] This approach has been repeatedly confirmed by the Commission in its jurisprudence, and specifically in relation to the rights of indigenous peoples in the *Endorois* decision:

"The African Commission notes that the link to the right to life, in paragraph 219 above, is particularly notable, as it is a non-derogable right under international law."[664]

Rights and Obligations under Article 4

386. As the first human right, it follows that the right to life under the African Charter, expansively interpreted, can give an effective content to all guaranteed rights – economic, civil, political, social and cultural.[665] Therefore, it may be

[662] International Court of Justice, Case Concerning Elettronica Sicula S.p. A. (ELSI) (United States Of America v Italy)*),* ICJ reports 1989, para 128.

[663] United Nations Human Rights Committee, General Comment No. 6, Article 6, *The right to life*, 30 April 1982 (CCPR General Comment No. 6), para 1.

[664]*Endorois*, *supra* note 567, para 216; see also *Commission Nationale de Droits de l'Homme et des Libertés v Chad,* Communication 74/92, para 21.

[665] An interesting line of jurisprudence has emerged from the Indian Supreme Court in this respect: see for example, *Mohini Jain v State of Karnataka AIR* (1981) Sup. Ct. 1864 (App 6), as referenced in Nwobike, Justice C, *The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African*

considered both as a civil right and as an economic and social right.[666] As a civil right, it imposes an obligation on states to refrain from any infringement of this right or to prevent its possible infringement by a third party. As an economic and social right, it entails a positive obligation to ensure an adequate standard of living.

387. This approach has been confirmed by the African Commission in the *Endorois* decision which, although it did not consider a violation of Article 4 of the Charter, found the following:

"One of the obligations that the State must inescapably undertake as guarantor to protect and ensure the right to life is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared towards fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority[667]".

388. This approach was similarly adopted by the Commission in its decision in the *Ogoni* case[668], in which the Commission considered the right to life in a wider context. The case concerned the environmental pollution of the Ogoni territory in Nigeria. The Commission stated that Article 4 implied a right to food, which required the Nigerian Government to protect existing food sources from (amongst other things) environmental pollution:

"The communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (Article 4), the right to health

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Charter: Social and Economic Rights Action center (SERAC) and the Center for Economic and Social rights (CESR) v Nigeria, 1 Afr J Legal Stud 2 (2005) 129-146 at 135

[666]F. Ouguergouz,"*The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for the Human Dignity and Sustainable Democracy in Africa"*, *supra* note 656,p.91.

[667]*Endorois*, *supra* note 567, para 217.

[668]The *Ogoni* case*, supra* note 561

(Article 16) and the right to economic, social and cultural development (Article 22). By its violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.

The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens."

389. The finding of a violation based on environmental degradation and its threat to, and destruction of, Ogoni sources of livelihood was a positive step forward by the African Commission in the purposive interpretation of the right to life, marking a departure from other earlier decisions in which violations of the right to life were primarily based on summary executions, arrests and detention without trial, and the death penalty.

390. The approach has also been reflected in the African Charter on the Rights and Welfare of the Child, Article 5 of which protects the right of the child to survival and development. This means both the right not to be sentenced to death but also the right to be provided with adequate resources to survive.[669]

391. Indeed the UN HRC has also stated "*The right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures."*[670]

[669] http://www.achpr.org/instruments/child/, accessed 30.10.13.

[670] United Nations Human Rights Committee, General Comment No. 6, Article 6, *The right to life*, 30 April 1982 (CCPR General Comment No. 6), para 5.

The right to integrity of person & livelihood

392. As stated above, the right to life under Article 4 provides that "Every human being shall be entitled to respect for his life and the integrity of his person". Accordingly, it is widely accepted that a violation of the right to life can take place even where there has been no deprivation of life. The Commission has clearly established this in its jurisprudence:

"It would be a narrow interpretation of this right [to life] to think that it can only be violated when one is deprived of it. It cannot be said that the right to respect for one's life and the dignity[671] of his person, which this Article guarantees, would be protected in a case of constant fear and/or threats, as experienced by [the complainant]. [672]

393. In this context, it is worth further examining the concept of the right to integrity of person. The right can be broken down into two aspects: the right to physical integrity, and the right to moral integrity.[673] The former is generally interpreted as a right to the protection of the body from any violation not freely consented to, such as mutilation.[674] The right to moral integrity, meanwhile, is based on both an objective element – reputation – and also on a subjective element – honour.[675] The right can also be interpreted as a right to respect for what lies at

[671] Sic: this is clearly a misprint for 'integrity': see further Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights*, (Cambridge University Press, 2008), page 189; see further the Inter-American Court decisions of I/A Court H.R., *Sawhoyamaxa Indigenous Community v. Paraguay*. *supra* note 614, para 153 and I/A Court H.R., *Kichwa Peoples of Sarayaku Community v Ecuador*, *supra* note 559, para 234.

[672] *Kazeem Aminu v Nigeria*, (2000) ACHPR Communication 205/97, para 18.

[673] See further Article 7 (1) UNDRIP, which provides that indigenous people have the rights to life, physical and mental integrity, liberty and security of person".

[674] Ouguergouz, *supra* note 656, at page 102

[675] See debates on the elaboration of Article 12 of the Universal Declaration of Human Rights, as reported by A Verdoodt (Albert Verdoodt, *Naissance et signification de la Déclaration universelle des droits de l'homme* (Louvain: Warny, 1964)); Article 17 ICCPR also protects the individual against "unlawful attacks on his honour and person."

the root of moral being, for example, his culture: implying a link with Article 17 of the African Charter[676]. Such a purposive interpretation of Article 4, combining a reading of the Charter's provisions on the right to life and the right to culture, is entirely in line with the Commission's approach in similar cases, for example, the Ogoni case, in which it stated:

"The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter."[677]

394. This approach has been strictly followed by the IACtHR, which has found a violation of the right to life under the ACHR in a number of cases concerning denial of indigenous peoples' rights over their ancestral land. In *Yakye Axa Indigenous Community v Paraguay*, the Court found that

"Although restrictions may be permissible, states must be aware that in the case of indigenous property such limitations could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members'.[678]

395. Finding a violation of the right to life, the Court reasoned as follows:

"The right to life is crucial in the American Convention, for which reason realization of the other rights depends on protection of this one. When the right to life is not respected, all the other rights disappear, because the person entitled

[676] See further paras 538 to 594 below

[677] The *Ogoni* case, *supra* note 561, para 68.

[678] I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125.,para 147.

to them ceases to exist... Essentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated.[679]

One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority."[680]

The Community was held to have been deprived of the "*possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses. Furthermore, the State has not taken the necessary positive measures to ensure that the members of the Yakye Axa Community, during the period in which they have been without territory, have living conditions that are compatible with their dignity."*[681]

396. This approach was echoed in the case of *Sawhoyamaxa Indigenous Community v. Paraguay*[682], in which it stated *"States must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life; to establish an effective system of administration of justice able to investigate, punish and repair any deprivation of lives by state agents, or by individuals; and to protect the right of not being prevented from*

[679] *Ibid,* para 161.

[680] *Ibid*, para 162.

[681] *Ibid*, para 168.

[682] I/A Court H.R.,*Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 614

access to conditions that may guarantee a decent life, which entails the adoption of positive measures to prevent the breach of such right"[683] *. . .'*

397. Further, in *Xákmok Kásek Indigenous Community v Paraguay*, the Court found a violation of the right to life in relation to the living conditions of the Xákmok Kásek, including the lack of water, food and medical treatment, linking this situation to the community's lack of access to lands and inability to provide for and support themselves, according to their ancestral traditions and cultural patterns.[684]

398. This approach, incorporating aspects of indigenous community's livelihood within the right to life and human dignity, has been firmly endorsed by the African Commission in the *Endorois* decision, which referred to the decision in *Yakye Axa v Paraguay:*

"The Court found that the fallout from forcibly dispossessing indigenous peoples from their ancestral land could amount to an Article 4 violation (right to life) if the living conditions of the community are incompatible with the principles of human dignity"[685]

399. The CESCR has clearly recognised the link between forced evictions and the right to life, stating:

"The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the

[683] *Ibid*, para 153.

[684] I/A Court H.R., *Xákmok Kásek Indigenous Community v Paraguay* Merits, Reparations and Costs. Judgment Merits and reparations. Judgment of August 24, 2010. Series C No. 214, paras 202-217.

[685] The *Endorois* decision, *supra* note 567, at para 216

person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions."[686]

400. Further, in the *Ogoni* case, finding a violation of Article 4, the Commission held:

"The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole."[687]

Violation of Article 4

401. It is well established that, in common with other hunter-gatherer communities, the Ogiek relied upon their ancestral land in the Mau Forest to support their livelihoods, particular way of life and indeed their very existence.[688]

402. The Ogiek's ancestral land in the Mau Forest provided them with a constant supply of food, in the form of game and honey. [689] It also provided them with shelter[690], traditional medicines,[691] plants for traditional purposes[692], an area for

[686] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 7, Article 11.1, *The Right to Adequate Housing: Forced Eviction*, 20 May 1997 (CESCR General Comment No. 7), para 4.

[687] The *Ogoni case*, *supra* note 561, para 67.

[688] See Affidavit of Thomas Museiyie, *supra* note 80, paras 4-5; see also Film Evidence taken from Ogiek communities and transcript, *supra* note 22

[689] See Affidavit of Joseph Cheruiyot Sigowo, *supra* note 10, para 6 and the Affidavit of Kiplangat A. Samoe Chebose, *supra* note 18, paras 5-6. See also paras. 1-94 above.

[690] See Affidavit of Samson Kiptemboi Mutai, *supra* note 128, para 6 and the Affidavit of Jimmy Patiat Seina, *supra* note 10, para 8.

[691] See Affidavit of Elijah Kiptanui Tuei, *supra* note 16, paras 6 and 10 and the Affidavit of Thomas Museiyie, *supra* note 80, para 4.

[692] See Affidavit of Elijah Kiptanui Tuei *supra* note 16, paras 6 and 10.

cultural rituals and ceremonies, religious ceremonies,[693] and indeed for social organisation.[694] Indeed, the Respondent Government acknowledges this intimate relationship: "Any destruction to this [Mau Forest] ecosystem will impact on the right to life of... the Ogieks[695]".[696]

403. The African Commission's Working Group on Indigenous Populations/ Communities has recognised the central role that access to ancestral lands plays in the maintenance of a certain way of life. Firstly, in relation to the Ogiek, it has found

"While some Ogiek have taken up agriculture and some are livestock keepers, a large number of those who depend upon foraging and hunting have been left without any means of livelihood by the eviction. Some of the gazetted area is claimed to be protected for the customary territorial and foraging rights of the Ogiek, yet the Ogiek are kept away from the area. At the same time, no effort has gone into protecting the area against possible encroachment and logging. Instead, the government has allocated some of the forest to outsiders to be used for other purposes."[697]

404. Further, in relation to indigenous peoples more generally, the Working Group has stated that indigenous peoples' "very existence and way of life is under threat"[698] "whose cultures and ways of life are subject to discrimination and

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[693] See Affidavit of Joseph Cheriuyot Sigowo, *supra* note 10, para 7 and the Affidavit of Christopher Kipkones at para 9.

[694] See the Affidavit of Samson Kipkemboi Mutai *supra* note 128, para 33 which states, 'before the eviction, a clan would make important decisions as a group. We would come together when we needed to discuss an issue- for example, when someone from another clan proposed marriage to one of our daughters…Or we would come together to decide what to do if someone killed someone- we made this decision together.'

[695] Sic: should be Ogiek; Ogiot is the singular term, whilst Ogiek is the plural.

[696] See Written Submissions by the Republic of Kenya dated 15 March 2010, at para 8.1.3.

[697] *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, *supra* note 159, p. 26.

[698] *Ibid*, at p 86.

contempt and whose very existence is under threat of extinction."[699] It further found that

"The land alienation and dispossession and dismissal of their customary rights to land and other natural resources has led to an undermining of the knowledge systems through which indigenous peoples have sustained life for centuries and it has led to a negation of their livelihood systems and deprivation of their means. This is seriously threatening the continued existence of indigenous peoples and is rapidly turning them into the most destitute and poverty stricken."[700]

405. In *Saramaka People v Suriname*, the IACtHR recognised this relationship, stating:

"In order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter "development or investment plan") within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. <u>These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.</u>"[701]

[699] *Ibid*, at p 87.

[700] *Ibid*, at p 106.

[701] *Saramaka v Suriname, supra* note 560, para 129, (emphasis added).

406. As stated at paragraph 386 above, the Respondent Government is under a duty not just to refrain from any action which might infringe the right to life, but also to take positive, concrete measures geared towards the fulfilment of the right to a decent life.

407. It is submitted that the Respondent Government's removal of the Ogiek from their ancestral, cultural home, and subsequent limited access to these lands, threatens to destroy the way of life of the Ogiek community.[702] Their hunter-gatherer livelihood has been severely damaged by relegation to unsuitable lands, and their inability to access religious and cultural sites interferes with the practice and transmission of their culture.[703] In spite of its claims that it "has taken steps to ensure that the Ogieks, in particular, are well provided for"[704], it cannot possibly be concluded that the Government has taken any steps which could be seen as positive, concrete measures geared towards the fulfilment of the right to life and respect for integrity. Indeed, the TJRC Report stated, 'the Commission finds that the expulsion of Endorois, Ogiek (…) and other communities from their ancestral lands, and the allocation of forest lands to other communities, have led to the destruction of the forests upon which the traditional livelihood of these communities depends, and has rendered it virtually impossible for hunter-gatherers to practise their culture.'[705]

408. It is submitted that, to deprive the Ogiek of access to their ancestral lands, in the name of sustainability and/or environmental necessity, as well as in order to parcel up and distribute forest land to third parties (including political allies) cannot be seen as anything other than an arbitrary act, "an act which shocks, or at least surprises, a sense of juridical propriety". As such, it falls within the ambit of Article 4 of the Charter.

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[702] See Affidavit of Samson Kipkemboi Mutai *supra* note 128, paras 34, 35 and 37; see also paras 132-262 above

[703] See Affidavit of Linah Taploson, *supra* note 42, paras 11-12.

[704] See Written Submissions by the Republic of Kenya dated 15 March 2010, at para 8.1.2

[705] TJRC Report, *supra* note 121, Vol. IV, p.46, para. 216

No justification for interference

409. None of the human rights provided for by the African Charter carries an absolute guarantee. Article 4 of the Charter must be interpreted in the light of the general limitation clause set out in Article 27(2), known as the 'claw-back clause', which states that "the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

410. However, it is commonly accepted that this general limitation clause is worded in such a way as only to prevent the abuse by the individual of his rights and freedoms. Put simply, the qualifications it contains are intended to limit the exercise by the individual of his rights *rather than to precisely define the power of states to restrict such exercise*.[706]

411. Indeed, the African Commission has clearly adopted this approach in its jurisprudence, finding that

"The Commission is of the view that the 'claw-back' clauses must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter.... It is important for the Commission to caution against a too easy resort to the limitation clauses in the African Charter. The onus is on the state to prove that it is justified to resort to the limitation clause."[707]

412. The parcelling up of Ogiek ancestral land and its distribution to third parties and/or the evictions of the Ogiek from the Mau Forest in the name of conservation, cannot in any way be said to be acts which have "due regard to

[706] F. Ouguergouz,"*The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for the Human Dignity and Sustainable Democracy in Africa"*, *supra* note 656, p. 429 (emphasis added).

[707] *Amnesty International v. Zambia,* (1999) ACHPR, Communication 212/98, para 50.

the rights of others, collective security, morality and common interest". Therefore, the claw-back clause set out in Article 27(2) does not apply.

413. Further, the principle of proportionality, as stipulated by the jurisprudence of the African Commission[708] and the international law on human and people's rights, requires that a restriction on a right must be the least restrictive possible to meet the legitimate aim. A very severe restriction on the right to life and integrity of person, such as that suffered by the Ogiek, must therefore have strong justifications as to its necessity.

414. Denying the Ogiek access to their ancestral land in the Mau Forest is a restriction of their right to life which is wholly disproportionate to any other aim. The need for sustainable forest management is something for which, as set out in paragraphs 83-94 above, the Ogiek are uniquely adapted. In any case, the parcelling of land in the area to third parties suggests, at least, that the Ogiek would, on balance, be a less intrusive presence in the forest. Such a restriction is not necessitated by a significant public security interest or other justification. At the very least, the Respondent Government should be required to show that Ogiek land use practices could not be carried out in a manner consistent with the planned environmental protection and rehabilitation measures of the Mau Task Force. As has been repeatedly demonstrated at paragraphs 132-262 above, the Respondent Government has failed to adequately consult with the Ogiek in accordance with the requirements of international law, that is, to ensure the effective participation of the Ogiek, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Ogiek ancestral territory; to guarantee that the Ogiek will receive a reasonable benefit from any such plan within their territory, and thirdly, to ensure that no concession will be issued within Ogiek territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.[709]

[708] *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, *supra* note 650, para 42.

[709] *Saramaka People v Suriname*, *supra* note 560, Series C No. 172, para 129.

415. Further, the Respondent Government has not argued or established that taking measures to protect the Ogiek way of life in any way threatens law and order or interferes with the rights of others.

Conclusion

416. In light of the central and singular importance of the Mau's resources for the sustainability of the Ogiek's hunter-gatherer way of life, it is submitted that the Ogiek's right to life under Article 4 has been and continues to be interfered with by the Respondent Government arbitrarily depriving them of access to the necessary conditions for a life in dignity. Any such interference should be strictly proportionate to the aim of any alternate use of the Mau Forest: which it is not.

417. It is therefore submitted that the Respondent Government is in violation of Article 4 of the Charter.

10. VIOLATION OF ARTICLE 8 – THE RIGHT TO FREE PRACTICE OF RELIGION

418. Article 8 of the Charter states that:

"Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

419. It is submitted that the Ogiek's right to freely practice their religion has been violated as a direct result of their displacement from their ancestral land in the Mau Forest by the Kenyan Government, the continued logging and clearance operations with the permission of the Kenyan authorities, and the Kenyan authorities' continuing refusal to give the Ogiek a right of access to their ancestral land. The Ogiek have not been able to practise the prayers and ceremonies that are intimately connected to the Mau Forest, they have not been able to bury their dead in accordance with traditional spiritual rituals, and they have not had access to sacred sites for initiation and other ceremonies.[710]

The Right to Free Practice of Religion

420. The Ogiek's spiritual beliefs and ceremonial practices constitute a religion under international law. The term "religion" in international human rights instruments covers various religious and spiritual beliefs and should be broadly interpreted. The HRC has stated that the right to freedom of religion in the ICCPR:

"protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to

[710] See further paragraphs 6-82 above

religions and beliefs with institutional characteristics or practices analogous to those of traditional religions".[711]

421. Freedom of conscience and religion includes *inter alia* the right to worship, engage in ritual, observe days of rest, and wear religious garb.[712] The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religious Belief notes that the right to freedom of conscience allows for individuals or groups "*to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes*", as well as "*to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief*".[713]

422. Similarly, the HRC has noted that the freedom to worship and engage in ceremonial acts is at the centre of the freedom of religion. The HRC stated:

"The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols and the observance of holidays and days of rest".[714]

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[711] United Nations Human Rights Committee, General Comment No. 22, Article 18, *The right to freedom of thought, conscience and religion*, 30 July 1993 (CCPR/C/21/Rev.1/Add.4), para 2.

[712] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (Thirty-sixth session, 1981), U.N. GA Res. 36/55, (1981).

[713] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (Thirty-sixth session, 1981), U.N. GA Res. 36/55, (1981).

[714] United Nations Human Rights Committee, General Comment No. 22, Article 18, *The right to freedom of thought, conscience and religion*, 30 July 1993 (CCPR/C/21/Rev.1/Add.4), para 4.

423. The African Commission has wholly embraced the broad discretion required by international law when defining and protecting religion[715]. In the case of *Free Legal Assistance Group and Others v. Zaire,* the Commission held that the practices of the Jehovah's Witnesses were protected under Article 8.[716] Further, in the *Endorois* decision, the Commission noted the HRC's approach referred to in paragraphs 420 and 422 above and, drawing upon the case of *Free Legal Assistance Group and Others v. Zaire*, expressed the view that the right to free practice of religion should "*mean the right to worship, engage in rituals, observe days of rest, and wear religious garb*".[717] It also held that Article 8 *"allows for individuals or groups to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes, as well as to celebrate ceremonies in accordance with the precepts of one's religion or belief."*[718]

424. It is well recognised that the religion of indigenous groups, such as the Ogiek, is directly linked to their culture and their land. Indeed, in the *Endorois* decision, the African Commission stated "*Religion is often linked to land, cultural beliefs and practices, and... freedom to worship and engage in such ceremonial acts is at the centre of the freedom of religion*."[719]

425. As a result, the religion of indigenous peoples therefore requires special protection. The Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights ("IACHR") in 1997, recognises the specific needs of indigenous communities and the right to practice their spiritual beliefs as an individual and collective human right. Specifically, Article II of the Proposed Declaration reads:

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[715] See further paras 299-309 above explaining why international and comparative human rights law should be drawn upon

[716] *Free Legal Assistance Group v. Zaire, (1995)* ACHPR, Communications. 25/89, 47/90, 56/91, 100/93, para 45.

[717] *Endorois*, *supra* note 567, para 165.

[718] *Ibid*

[719] *Ibid,* para 166.

"Indigenous people have the collective rights that are indispensable to the enjoyment of the individual human rights of their members. Accordingly the states recognize inter alia the right of the indigenous peoples to collective action, to their cultures, to profess and practice their spiritual beliefs and to use their languages".[720]

426. The Proposed Declaration, in Article XIV, establishes a wide definition of the right to practise religion, stating that indigenous peoples have the right to use their sacred and ceremonial areas and the right of expression in accordance with their values, usages, customs, ancestral traditions, beliefs and religions. Article X obliges the state to encourage universal respect for the integrity of indigenous spiritual symbols, practices, sacred ceremonies, expressions and protocols.

427. It is submitted the Ogiek's beliefs and spiritual practices are protected by Article 8 of the African Charter and constitute a religion under international law. As stated at paragraphs 50-53 above, the Ogiek practise a monotheistic religion closely tied to their environment. They have a distinct belief in god, called "Asista" or "Tororet",[721] and would pray to Asista at the start of the day, as well as when they went hunting or honey gathering to ensure the hunt or harvest was good. The Ogiek's religious practices and ceremonies therefore depended directly on their ability to access the Mau Forest. For example, the *simotwet* tree, a tree found on Ogiek ancestral lands in the Mau Forest, held particular significance to the Ogiek, as they believed it offered a special connection to God. To honour the tree, the Ogiek refrained from eating its fruit. They came to the tree to hold important meetings or pray. When praying to the tree, the Ogiek spit into a ball of grass and placed the grass beneath the *simotwet.* [722] The tree also formed part of initiation ceremonies.

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[720] Article 2, *Proposed American Declaration on the Rights of Indigenous Peoples*, Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th regular session.

[721] See Affidavit of Daniel Kobei, *supra* note 53

[722] See Affidavit of Samson Kipkemboi Mutai *supra* note 128, para 8; Affidavit of Daniel Kobei, *supra* note 53 at paras 6-9; and see also paragraph 92 above

428. The Ogiek regard the Mau Forest as sacred grounds, and used the forest for key cultural and religious ceremonies, such as weddings[723] funerals, circumcisions,[724] and traditional initiations. When Ogiek died, a religious ceremony was carefully observed to honour the dead and preserve the safety of the living. The body would be taken and placed under a tree far from the hut in which he died, and covered with a skin of an animal.[725] Ogiek smeared a special gel, made of animal fat, to purify the body and allow the deceased's spirit to pass to the next world. The practise of this spiritual tradition depended on the Ogiek having access to the Mau Forest to bury their dead under a tree and conduct the ceremony, and to hunt animals for the skin and fat used as part of the spiritual ceremony.

429. From the above, it is abundantly clear that the Ogiek are an indigenous group whose religion is intimately tied with the land, and therefore require special protections. The Mau Forest is of central religious significance to the Ogiek. The religious sites of the Ogiek people are situated in and around the Forest; here the Ogiek pray, and religious ceremonies are regularly connected with the Forest. Ancestors are buried in the Forest. The Mau Forest is therefore essential to the religious practices and beliefs of the Ogiek.

430. Based on these international norms and jurisprudence of the African Commission and other international bodies, it is submitted that the practices and beliefs of the Ogiek constitute a religion for the purposes of both international law and Article 8 of the African Charter.

[723] See Affidavit of Jane Bwaley, *supra* note 95 at paras 7-10 and the Affidavit of Linah Taploson *supra* note 42, paras 6-11.

[724] See Affidavit of Jimmy Patiat Seina *supra* note 10, para 6 and the Affidavit of Linah Taploson *supra* note 42, para 5 and Affidavit of Daniel Kobei *supra* note 53, at para 24

[725] See further paragraph 52 above

Violation of Article 8

431. It is submitted that the Respondent Government has interfered with the Ogiek's right to free practice of religion. By evicting the Ogiek from their land, and refusing access to the Mau Forest and the religious sites within it, the Kenyan authorities have interfered with the Ogiek's ability to practise and worship as their faith dictates.[726] It is further submitted that religious sites within the Forest have not been properly demarcated and protected, in violation of Article 8.

432. Since their eviction from their ancestral homes within the Mau Forest, the Ogiek have been prevented from freely practising their religion. Access as of right for religious rituals – such as circumcisions, burials and initiation ceremonies – has been denied for various members of the community.[727]

433. The right to worship and to practise particular rituals is an integral part of religious freedom. In *Boodoo v. Trinidad & Tobago,* a case concerning an applicant prevented from wearing a beard, from having access to prayer beads, and from worshipping at religious services, the HRC was clear that interference with ritual and ceremonial acts constituted a violation of the author's religious freedoms. The HRC stated:

"that the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts and that the concept of

[726] See Affidavit of Seli Chemeli Koech, *supra* note 49, at para 28: 'We're not allowed to bury them in the forest, so we had to rush and bury them illegally in the forest, at night, so we didn't get caught. My son and my daughter were buried here at night. My son was buried in Nandi hills. The daughter of my son was buried in Chereber, because someone helped me pay—but I didn't even know where we were going.' See also para 29 of the same Affidavit.

[727] See Affidavit of Seli Chemeli Koech *supra* note 49, para 28-29.

worship extends to ritual and ceremonial acts giving expression to belief, as well as various practices integral to such acts".[728][729]

434. The African Commission has followed this approach in its jurisprudence. In *Amnesty International v. Sudan,* the Commission recognised the centrality of practise to religious freedom.[730] Here, the Commission found that the State party violated the authors' right to practise religion because non-Muslims did not have the right to preach or build their churches and were subject to harassment, arbitrary arrest, and expulsion.

435. Relying on this case, the Commission went further in the *Endorois* decision, finding a violation of Article 8 of the Charter in relation to the Endorois' eviction from their lands, since this rendered it "*virtually impossible for the Community to maintain religious practices central to their culture and religion*" (emphasis added).[731]

436. In addition, the UNDRIP gives indigenous peoples the right "to maintain, protect and have access in privacy to their religious and cultural sites."[732] Only through unfettered access to the Mau Forest will the Ogiek be able to protect, maintain, and use their sacred sites in accordance with their religious beliefs.

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[728] *Mr. Clement Boodoo v. Trinidad and Tobago*, (2002) Human Rights Committee Communication No. 721/1996,(CCPR/C/74/D/721/1996).

[730] *Amnesty International and Others v. Sudan,* (1999) ACHPR, Communications 48/90, 50/91, 52/91, 89/93.

[731] *Endorois, supra* note 567, para 173.

[732] UNDRIP, Article 12.

Expulsion from Sacred Lands

437. The Ogiek's inability to practise their religion is a direct result of their expulsion from their traditional land in the Mau Forest. The Ogiek's forced eviction from their ancestral lands by the Respondent Government has removed them from the sacred grounds essential to the practise of their religion, and rendered it virtually impossible for the Ogiek to maintain religious practices central to their culture and religion.[733]

438. The IACHR has determined that expulsion from lands central to the practice of religion constitutes a violation of religious freedoms. In the case of *Loren Laroye Riebe Star,* the Commission held that the expulsion of priests from the Chiapas area was a violation of the right to associate freely for religious purposes.[734] The Commission came to a similar conclusion in a case concerning a Catholic nun who fled Guatemala after State actions prevented her from freely exercising her religion.[735] Here, the Commission decided that her right to freely practise her religion had been violated, because she was denied access to the lands most significant to her.[736]

439. Similarly, in the Mayagna (Sumo) *Awas Tingni* case*,* the IACtHR directly identified the religious element of land for indigenous peoples. The Court held that:

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[733] See Affidavit of Jane Bwaley *supra* note 95, para12: 'part of our community has become Christian.' See also the Affidavit of Linah Taploson *supra* note 42, para 12: 'when are daughters leave us and intermarry, we see that they come back with bad habits. Our daughters are often mistreated when they marry outsiders. They don't have freedom and are overworked. So they return to us, but when they come back they have changed.' See also Film Evidence taken from Ogiek communities and transcript, *supra* note 22

[734] I/A Commission H.R., *Loren Laroye Riebe Star, Jorge Alberto Baron Guttlein and Rodolfo Izal Elorz/Mexico,* Report No. 49/99, Case 11.610, (1999).

[735] I/A Commission H.R., *Dianna Ortiz v. Guatemala,* Report 31/96, Case 10.526, (1997).

[736] *Ibid*

"the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of… their spiritual life…. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy".[737]

440. The HRC has indirectly addressed expulsion from sacred grounds as violation of a group's right to religious freedom.[738] In a case concerning the construction of a hotel in Tahiti on the site of a pre-European occupation burial ground, the authors of the submission did not raise an Article 18 (freedom of thought, conscience, and religion) claim due to admissibility complications. However, dissenting judges recognised that the permanent denial of access to ancestral burial grounds may involve "denial of the right of religious or ethnic minorities, in Community with other members of their group, to enjoy their own culture or to practise their own religion".[739]

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[737] I/A Court H.R., *The Mayagna (Sumo) Awas Tingni Community v Nicaragua*. Judgment of August 31, 2001. Series C No. 79, para 149; hereinafter "the *Awas Tingni* case". This approach has been repeatedly adopted by the Inter-American Commission and Court and in subsequent jurisprudence: see *Maya indigenous community of the Toledo District v. Belize* Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004), para 155; I/A Court H.R., *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, paras 101 and 103; I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay, supra* note 678, para 131, I/A Court H.R., *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 614; *Saramaka People v Suriname*, *supra* note 560, para 90; I/A Court H.R., *Xákmok Kásek Indigenous Community v Paraguay*. Merits, *supra* note 684, para 86; I/A Court H.R., *Kichwa Peoples of Sarayaku Community v Ecuador*, Merits and reparations. Judgment of June 27, 2012. Series C No. 245, para 149.

[738] *Francis Hopu and Tepoaitu Bessert v. France*, (1997) Human Rights Committee, Communication No. 549/1993(CCPR/C/60/D/549/1993/Rev.1).

[739] *Ibid: s*ee dissent by David Kretzmer and Thomas Buergenthal with Nisuke Ando and Lord Coville, para 3.

441. The African Commission has clearly adopted a similar approach. As stated at paragraph 435 above, in the *Endorois* decision, the Commission held that there had been a violation of Article 8 of the Charter in relation to the Endorois' eviction from their ancestral lands, since this had rendered it "virtually impossible for the Community to maintain religious practices central to their culture and religion".[740]

442. The centrality of land to the practice of certain religions, as clearly recognised by the IACHR, IACtHR and the African Commission, is even more important in the instant case. The Mau Forest region is the sole site of religious significance to the Ogiek who have lived there since time immemorial, and cannot be replaced by worship and practise at an alternate site. Only the Mau Forest region has the ancestral and religious meaning necessary for the Ogiek's free practice of religion.

Failure to Demarcate and Protect Religious Sites

443. The destruction of the Mau Forest, and subsequent conservation efforts, have both failed to fully demarcate the sacred sites within the Reserve and to maintain and protect sites that are known to be sacred to the Ogiek. Without proper care, sites that are of immense religious and cultural significance have been damaged, degraded, or destroyed due to both commercial logging operations and the removal of the Ogiek from their land in favour of non-Ogiek and/or the implementation of the Mau Forest Task Force Report.[741]

444. The UNDRIP emphasises that "States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected."[742]

[740] *Endorois*, *supra* note 567, para 173.

[741] See further paras 132-262 above

[742] UNDRIP, Article 12.

The Respondent Government has thus far failed to take effective measures to ensure the full preservation of Ogiek religious sites.

445. The Kenyan authorities have interfered with the Ogiek's right to freely practise their religion by evicting them from their lands, and then refusing to grant free access to their sacred sites. This separation from their land prevents the Ogiek from carrying out sacred practices central to their religion. The Respondent Government's failure to demarcate and protect religious sites within the Mau Forest constitutes a severe and permanent interference with the Ogiek's right to practise their religion.[743]

No Justification for Interference

446. Article 8 provides that states may interfere with religious practices "subject to law and order". It is submitted that the religious practices of the Ogiek are not a threat to law and order and therefore there is no justification for the interference.

447. The limitations placed on the state's duties to protect rights should be viewed in light of the underlying sentiments of the African Charter. "*International human rights standards must always prevail over contradictory national law... [or else this] would defeat the purpose of the rights and freedoms enshrined in the Charter".*[744] The African Commission has further stated that it is "*of the view that the 'claw-back' clauses must not be interpreted against the principles of the Charter… Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter*".[745]

[743] See Affidavit of Seli Chemeli Koech, *supra* note 49, paras. 28-29.

[744] *Media Rights Agenda and Constitutional Project v Nigeria*, *supra* note 562, para 66.

[745] *Amnesty International v. Zambia*, *supra* note 707, para 50.

448. The Commission's jurisprudence reflects this desire to hold states to strict limits in their ability to restrict religious freedoms. In the *Endorois* decision, the Commission clearly stated:

"*In some situations, it may be necessary to place some form of limited restrictions on a right protected by the African Charter. But such a restriction must be established by law and must not be applied in a manner that would completely vitiate the right.... such interference [must be]... not only proportionate to the specific needs on which they are predicated, but... also reasonable"*.[746]

449. In reaching this decision, the Commission drew upon the approach of the HRC, which has held:

"Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights… Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated".[747]

450. Further, the principle of proportionality, as stipulated by the jurisprudence of the African Commission[748] and the international law on human and people's rights, requires that a restriction on a right must be the least restrictive possible to meet the legitimate aim. A very severe restriction on the right to practice religion, such as that suffered by the Ogiek, must therefore have strong justifications as to its necessity.

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[746] *Endorois*, *supra* note 567, para 172.

[747] United Nations Human Rights Committee, General Comment No. 22, Article 18, *The right to freedom of thought, conscience and religion*, 30 July 1993 (CCPR/C/21/Rev.1/Add.4), para 8.

[748] *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, *supra* note 650, para 42.

451. The African Commission invoked the principle of proportionality in *Amnesty International v. Sudan.* Here, the Commission decided that a general prohibition on Christian association was "disproportionate to the measures required by the Government to maintain public order, security, and safety". Restrictions placed on the freedom to practise one's religion should be as minimal as possible; in the instant case, complete and total expulsion from the land for religious ceremonies is not minimal.[749]

452. In *Garreth Anver Prince v South Africa*, the Commission held that the restrictions in South African legislation on the use and possession of cannabis were reasonable as they serve a general purpose.[750] However, the Commission clarified that the limitation should serve a 'rational and legitimate purpose'[751] and the 'evils of limitations of rights must be strictly proportionate with an absolutely necessary for the advantages which are to be obtained'.[752] A limitation may never have as a consequence that the right itself becomes illusory and should not be discriminatory.[753] It should also be clearly provided by law.[754]

453. Similarly, the Commission held in the *Endorois* decision that,

"Denying the Endorois access to [their ancestral land] at ... Lake [Bogoria], is a restriction on their freedom to practice their religion, a restriction not necessitated

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[749] *Amnesty International and Others v. Sudan*, *supra* note 730, paras 80 and 82.

[750] *Garreth Anver Prince v South Africa*, (2004) AHRLR 105 (ACHPR 2004) Communication 255/02, para 43.

[751] *Ibid,* para 40.

[752] *Ibid,* para 44.

[753] *Ibid*

[754] *Kenneth Good v Republic of Botswana*, *supra* note 624, at para 187. In this context, the African Commission held that restrictions on the use and possession of cannabis by South Africa were reasonable and therefore the Rastafari's right to culture has not been violated, since the "participation in one's culture should not be at the expense of the overall good of the society": see *Garreth Anver Prince v South Africa*, *supra* note 750, para 48.

by any significant public security interest or other justification. The African Commission is also of the opinion that removing the Endorois from their ancestral land was a lawful action in pursuit of economic development or ecological protection. The African Commission is of the view that allowing the Endorois to use the land to practice their religion would not detract from the goal of conservation or developing the land for economic reasons".[755]

454. It is submitted that denying Ogiek access to their ancestral lands in the Mau Forest is wholly disproportionate to any other aim. The prohibition on the Ogiek's access to the Mau Forest for peaceful religious ceremonies is not necessitated by a significant public security interest or other justification. The Respondent Government has not argued or established that the practise of the religion of the Ogiek people in any way threatens law and order or interferes with the rights of others.

455. Moreover, the eviction of the Ogiek from the Mau Forest was not a legitimate step in pursuit of economic development or environmental protection.[756] Allowing the Ogiek to use the land to practise their religion would not detract from such a goal. The prohibition on the Ogiek's access to the Forest does not adversely affect the environmental conservation or economic development objectives of the Mau Task Force, for example. As stated at paragraphs 6-94 above, the Ogiek have an intimate relationship with the Mau Forest and their dependence on it for food, shelter, survival and identity means they both respect and conserve it.[757] Forest conservation is integral to the Ogiek way of life. Indeed, the African Commission has previously rejected limiting the Charter based on alleged "special circumstances".[758]

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[755] *Endorois*, *supra* note 567, para 173.

[756] It should also be noted that these are not valid reasons for restricting rights under Article 8 of the African Charter.

[757] See Affidavit of Samson Kipkemboi Mutai *supra* note 128, paras 10, 38-41 and the Affidavit of Jimmy Patiat Seina *supra* note 10, para 6.

[758] *Constitutional Rights Project v. Nigeria*, (1998) ACHPR, Communication 102/93, para 58

456. The African Commission decided in the communication *Free Legal Assistance Group and Others v. Zaire* that where there is an interference with a right it is for the Government to justify the interference. Any justification offered must, moreover, be tested on the grounds of proportionality.[759] The Commission emphasised this further in the *Endorois* case: "*It is for the Respondent State to prove that such interference is not only proportionate to the specific need on which they are predicated but is also reasonable*."[760]

457. Furthermore, limitations cannot destroy the essence of a right, or render it illusory.[761] The religion of the Ogiek is centred in the Mau Forest. Without access to their traditional lands, the Ogiek's right to religion is denied.

Conclusion

458. Article 8 of the Charter guarantees the right to the free practice of religion. This right can only be limited "subject to law and order". The restrictions placed by the Respondent Government on the Ogiek's access to their sacred sites, which severely limits their ability to practise their religion, cannot be justified on grounds of law and order. The exercise of their religion is entirely peaceful and can be maintained without disruption to the Mau Forest.

459. Accordingly, the Ogiek have suffered a violation of Article 8 of the Charter.

[759] *Free Legal Assistance Group v. Zaire*, *supra* note 716

[760] *Endorois*, *supra* note 567, para 172.

[761] *Constitutional Rights Project v. Nigeria*, (1999) ACHPR, Communication 153/96, para 42.

11. VIOLATION OF ARTICLE 14 – THE RIGHT TO PROPERTY

460. Article 14 of the African Charter provides that:

> *"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."*

461. The Ogiek community has a right to property over the area of the lands that they have traditionally used and possessed to pursue their cultural, spiritual, economic and social activities. These property rights, while not recognised under Kenyan domestic law, derive from the African Charter, which recognises the right of an indigenous people to property rights over their ancestral lands.[762] The Ogiek's rights have been violated in that they have been evicted from, and dispossessed of, their ancestral communal lands in the Mau Forest Complex. The impact on the community has been wholly disproportionate to any public need or general community interest. Additionally, while some parcels of land have been transferred to third parties, it would not be contrary to Article 14 for the Court to order restitution of those lands.

Ogiek property

462. As stated at paragraphs 1-94 above, the Mau Forest is the traditional land of the Ogiek people. The Ogiek have lived in the Mau Forest since time immemorial, enjoying unchallenged rights to its resources, and relying on it for food, shelter, identity and survival. In doing so, the Ogiek exercised an indigenous form of tenure, holding the land through a collective form of ownership. The Ogiek lived in close relationship with the land; the land formed a foundation for their culture, family and clan organisation, spiritual life, and economic survival.

[762] See *Endorois*, *supra* note 567, paras 174-238.

463. The Mau Forest was used by the Ogiek as a plentiful, constant and stationary supply of food, in the form of game, wild vegetable and fruits, and honey. It also served as a source of plants for traditional medicines. It provided shelter, with the Ogiek building temporary shelters made of a frame of bamboo poles bent over to form a dome and covered with animal skins.[763] Such behaviour indicated African traditional land ownership, which was rarely written down as a codification of rights or title, but was nevertheless understood though mutual recognition and respect between landholders.[764]

Scope of Property Rights under Article 14

464. "Property" has an autonomous meaning under international human rights law,[765] which supersedes the national legal definitions. The African Commission, in *Endorois*, accepted this proposition in recounting the case history of both the European and Inter-American Courts of Human Rights.[766] Under those systems, the court will examine the specific facts of individual situations to determine what should be classified as property, especially for displaced persons, instead of limiting themselves to formal requirements in national law:

"The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions."[767]

[763] See further paragraph 24 above

[764] See, for example, paragraph 55 above

[765] From which the Court can draw inspiration and take into consideration under Articles 60 and 61 of the African Charter.

[766] See *Endorois*, *supra* note 567, paras 185-195.

[767] *Awas Tingni, supra* note 737, para 146.

465. In accordance with the approach set out at paragraphs 299-309 above, t is therefore for the Court to determine a definition of property rights that accords with African and international tradition.

466. The African Commission has recognised in its jurisprudence that land can constitute property for the purposes of Article 14 of the Charter.[768] It has also found that the right to property includes the right to have access to one's property and not to have one's property invaded or encroached on.[769]

467. The Commission has also recognised that "*owners have the right to undisturbed possession, use and control of their property however they deem fit".*[770]

468. Further, in the European Court of Human Rights decision in *Doğan and Others v Turkey*, which concerned applicants who had been unable to demonstrate registered title of lands from which they had been forcibly evicted, the Court observed that:

"[T]he notion 'possessions' (in French: biens) in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision."[771]

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[768] *Malawi African Association and Others v Mauritania*, (2000) ACHPR, Communications 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, para 128; see also *Endorois*, *supra* note 567, para 187.

[769] The *Ogoni* case, *supra* note 561, para 54; also see *Endorois*, *supra* note 567, para 190.

[770] *Huri-Laws v Nigeria*, (2000) ACHPR, Communication 225/98, para 52.

[771] *Doğan and Others v Turkey*, ECtHR Judgment of 29 June 2004, Application nos 8803-8811/02, 8813/02 and 8815-8819/02, para 138. Article 1 of Protocol I reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

469. The Court went on to accept that the property rights of the applicants included the economic resources and rights over their common land, stating that:

"The Court notes that it is not required to decide whether or not in the absence of title deeds the applicants have rights of property under domestic law. The question which arises under this head is whether the overall economic activities carried out by the applicants constituted 'possessions' coming within the scope of the protection afforded by Article 1 of Protocol No. 1. In this regard, the Court notes that it is undisputed that the applicants all lived in Boydaş village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivate the land belonging to the latter. The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling. Accordingly, in the Court's opinion, all these economic resources and the revenue that the applicants derived from them may qualify as 'possessions' for the purposes of Article 1."[772]

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[772] *Doğan and Others v Turkey*, ECtHR Judgment of 29 June 2004, Application nos 8803-8811/02, 8813/02 and 8815-8819/02, para 139.

Communal ownership and indigenous communities

470. The Ogiek, as an indigenous community, request the Court to recognise their rights to communal property in their ancestral lands. This falls within the scope of Article 14.

471. Both international and domestic courts have recognised that indigenous groups have a specific form of land tenure that creates a particular set of difficulties. Common difficulties faced by indigenous groups have included the lack of "formal" title in their historic territories, the failure of domestic legal systems to acknowledge collective property rights, and the claim of formal title to indigenous land by colonial and post-colonial government authorities. In combination, this has led to many cases of displacement from a peoples' historic territory.[773]

472. The African Commission has recognised the problems faced by traditional communities in the case of dispossession of their land in the Report of the Working Group on Indigenous Populations/Communities.[774] The Working Group pointed out that for hunter-gatherer communities:

"their customary laws and regulations are not recognized or respected and as national legislation in many cases does not provide for collective titling of land. Collective tenure is fundamental to most indigenous pastoralist and hunter-gatherer communities and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure."[775]

[773] WGIP Report 2005, *supra* note 159 at pp. 21-22.

[774] *Ibid*

[775] *Ibid*, p. 21.

473. A first step in the protection of traditional African communities is the acknowledgment that the rights, interests and benefits of such communities in their traditional lands constitute "property" under the Charter. In this connection, it is worth recounting the *Endorois* decision, in which the African Commission concluded that the community had collective rights in their ancestral lands around Lake Bogoria:

"[T]he State... has a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law."[776]

474. The leading international human rights case-law on the issue of collective property rights, from the Inter-American system, unanimously supports the protection of property rights "*in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property*".[777] It stated that *possession* of the land should suffice for indigenous communities lacking real title to obtain official recognition of that property.[778] The Court set out its concept of indigenous property rights, thus:

"*Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its Community."*[779]

475. The point was later reiterated by the IACtHR in its decision in the case of *Yakye Axa*, in which it found:

[776] *Endorois*, *supra* note 567, para 196.

[777] *Awas Tingni, supra* note 737, para 148.

[778] *Ibid*, para 151.

[779] *Ibid,* para 149.

"The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity."[780]

Additionally, in the *Moiwana* decision, the IACtHR observed that:

"The Moiwana community members, a N'djuka tribal people, possess an "all-encompassing relationship" to their traditional lands, and their concept of ownership regarding that territory is not centered on the individual, but rather on the community as a whole."[781]

476. This is affirmed by the UNDRIP, which in Article 26 provides that:

"1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the

[780] I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay*, *supra* note 678, para 135.

[781] *Moiwana Community v. Suriname*, *supra* note 737, para 133.

customs, traditions and land tenure systems of the indigenous peoples concerned."

477. Widespread condemnation of the acquisition of indigenous title by colonial and post-colonial authorities[782] is paired with the recognition, at municipal level, by domestic courts that the historic indigenous association with particular lands should be considered a "property right" that continues long after seizure of the lands. Such decisions have been made by the United Kingdom Privy Council as far back as 1921,[783] the Canadian Supreme Court,[784] and the High Court of Australia.[785] Further, in the *Richtersveld* case, the South African Constitutional Court held that the rights of a particular community survived the annexation of the land by the British Crown and could be held against the current occupiers of their land.[786] More recent cases that support the notion of continuing and

[782] See, e.g., Erica-Irene A. Daes, *Special Rapporteur, Indigenous peoples and their Relationship to Land: Final working paper by the Special Rapporteur*, Commission on Human Rights, (E/CN.4/Sub.2/2001/12) (2001), paras 31-32: the Special Rapporteur observes that the international Community has come to see that the concept that the "discovering" colonial power may take free title to indigenous lands is illegitimate.

[783] *Amodu Tijani v Southern Nigeria* [1921] 2 AC 399 (United Kingdom Privy Council).

[784] *Calder et al v Attorney-General of British Columbia* (1973) 34 DLR (3d) 145 (Supreme Court of Canada); *R v Marshall; R v Bernard* [2005] SCR 220 (Supreme Court of Canada); *R v Van der Peet* [1996] 2 SCR 507 (Supreme Court of Canada).

[785] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992) (High Court of Australia). This decision has been cited by other courts around the world, including, amongst others, in Fiji (*Kanakana v Attorney* General [2012] FJCA 24 (Court of Appeal of Fiji)), New Zealand (*Takamore v Clarke* [2011] NZCA 587 (Court of Appeal of New Zealand)), Samoa (*Alii and Fapule of Siumu District v Attorney General* [2010] WSSC 9 (Supreme Court of Samoa)) and Kiribati (*Greig v Attorney General* [2010] KIHC 11 (High Court of Kiribati)).

[786] *Alexkor Ltd and Another v Richtersveld Community and Others*, 2004 (5) SA 460 (CC) (14 October 2003) (Constitutional Court of South Africa).

collective indigenous property rights have come out of the domestic courts of Botswana[787] and Belize.[788]

478. The Ogiek are recognised to have occupied the Mau Forest "since time immemorial". Recognition, in these terms has come from the African Commission's Working Group on Indigenous Populations/Communities,[789] the UN Special Rapporteur on indigenous peoples,[790] the Kenyan Government[791] and the Mau Forest Task Force Report.[792] Over this extended period of time, the community has accrued rights over the land and its resources which derive not from deeds of title but from historic possession and user.

479. The protections afforded by Article 14 of the African Charter include indigenous property rights, especially as they relate to ancestral territories. The

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[787] *Matsipane Mosetlhanyane and Gakenyatsiwe Matsipane v Attorney General of Botswana*, Civil Appeal No CACLB-074-10 (27 January 2011) (Court of Appeal of Botswana).

[788] *Aurelio Cal and the Maya Village of Santa Cruz v Attorney General of Belize; and Manuel Coy and Maya Village of Conejo v Attorney General of Belize*, (Consolidated) Claim Nos 171 & 172 of 2007 (18 October 2007) (Supreme Court of Belize); *The Maya Leaders Alliance and the Toledo Alcaldes Association et al. v Attorney General of Belize et al.*, Claim No 336 of 2008 (28 June 2010) (Supreme Court of Belize).

[789] See *Report of the African Commission's Working Group on Indigenous Populations/Communities, Research and Information Visit to Kenya*, *supra* note 8, p.42.

[790] Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, *supra* note 256, para 37. A similar point is recorded in the *Report by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Mission to Kenya (9-22 February 2004*)Commission on Human Rights, 61st Session 17 December 2004, (E/CN.4/2005/48/Add.2), paras 59-62.

[791] See Respondent's Submissions on Admissibility, addressed to the African Commission; United Nations Human Rights Council, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, supra* note 8, para 268-269.

[792] Mau Forest Task Force Report, *supra* note 250, footnote 2 on page 36.

Ogiek's right to the lands in the Mau Forest are therefore protected by Article 14. The property rights protected include, crucially, a collective right to the property.

Property rights and indigenous communities

480. Following the African Commission's decision in *Endorois*, the concept of a 'property right' has been given greater clarity:

"[M]embers of indigenous and tribal communities require special measures that guarantee the full exercise of their rights, particularly with regard to their enjoyment of 'property rights' in order to safeguard their physical and cultural survival."[793]

481. The *Endorois* decision goes on to highlight that

"If international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries."[794]

482. Lastly, to affirm the point, the Commission cited *Saramaka* in the Inter-American Court, which

[793] *Endorois*, *supra* note 567, para 197.

[794] *Ibid,* para 204.

"makes it clear that mere access or de facto *ownership of land is not compatible with principles of international law. Only* de jure *ownership can guarantee indigenous peoples' effective protection."*[795]

483. Consequently, only full ownership or title is sufficient to discharge the obligation imposed on the state by Article 14 to protect the collective property rights of an indigenous community.

484. The UN Special Rapporteur on Indigenous Peoples has confirmed this position, stating in its 2010 report to the Human Rights Council that "traditional indigenous tenure constitutes property that State parties to the Charter are bound under article 14 not only to respect but also to affirmatively protect".[796]

485. Any right of ownership of the land also extends to some of the natural resources found on, under or above that land. This is supported by Article 21 of the African Charter, as elucidated in the *Ogoni* case[797] and in *Endorois*.[798] The African Commission, in *Endorois*, relied heavily on the *Saramaka* decision in which the Inter-American Court stated:

"the right to use and enjoy their territory would be meaningless in the context of indigenous and tribal communities if said right were not connected to the natural resources that lie on and within the land. That is, the demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life. This connectedness between the territory and the natural resources necessary for their physical and

[795] *Endorois*, *supra* note 567, para 205. See also *Saramaka People v Suriname, supra* note 560

[796] *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, supra* note 8, para 255.

[797] The *Ogoni* case, *supra* note 561, paras 56-58.

[798] *Endorois*, *supra* note 567, paras 252-268.

cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property. From this analysis, it follows that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life."[799]

486. The Inter-American system does not have a distinct right to natural resources. Nevertheless, a property right over traditionally-utilised natural resources could be read into the general right to property under Article 21 of the American Convention. The same can be said of the African Charter, whether under Article 14 or expressly under Article 21: as confirmed in the *Endorois* case.[800] As a consequence, the Ogiek community have a right, under either Article 14 or 21 of the Charter, to the natural resources on or within their traditional lands. This right will extend to those materials which are relied upon, and used, for the preservation and continuation of Ogiek culture and traditions. These materials include the bees which naturally inhabited the forest, who were used to make Ogiek traditional honey, a source of food for the Ogiek and their way of life;[801] herbs and plants used to make traditional medicines and also for use in traditional ceremonies;[802] and indigenous trees and bushes, which were crucial to the survival of the Ogiek, providing nectar for honey production, hiding places for animals, and locations to hang beehives.[803] These were clearly natural resources which the Ogiek benefited from before the eviction from their traditional lands. In addition, the Ogiek have rights to the potential wealth on

[799] *Saramaka People v Suriname*, *supra* note 560, para 122.

[800] See *Endorois*, supra note 567, at para 267

[801] For example, the significance of beehives (and by extension bees) can be seen during Ogiek marriage ceremonies: 'the man will offer his betrothed's family a number of beehives.' [Extract from the Affidavit of Linah Taploson *supra* note 42, para 8.] Also, see the Affidavit of Jimmy Patiat Seina *supra* note 10, para 6 which says, 'We didn't want to cut the live trees because that is where the bees get nectar.'

[802] See Affidavit of Thomas Museiyie, *supra* note 80, para 4.

[803] See Affidavit of Samson Kipkemboi Mutai *supra* note 128, paras 6, 8 and 9.

their land, including logging concessions, tea plantations and other possible resources.

Encroachment and dispossession

487. As a result of the actions of the Kenyan authorities, the Ogiek's property has been encroached upon, in particular by the expropriation and, in turn, the effective denial of ownership of their land.

488. In law, the Ogiek were never given full title to the land that they had in practice held before the British colonial administration. Even where land is partly occupied by Ogiek, possession of the land is sought in the name of conservation, but in 'reality the Government has already allocated part of this land to outsiders who are politically influential and connected to be used for other purposes.'[804]

489. The Commission's approach to encroachment can be best summarised as follows:

"In the view of the African Commission, the following conclusions could be drawn: (1) traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title; (2) traditional possession entitles indigenous people to demand official recognition and registration of property title; (3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in

[804] Naomi Kipuri, *Indigenous Peoples' Rights to Lands, Territories and Resources Related to Discrimination in Employment and Occupation: Case study on practices of pastoralism and hunting-gathering in Kenya*, Report prepared for the International Labor Organization (ILO), p. 14.

good faith; and (4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite condition for the existence of indigenous land restitution rights."[805]

490. The encroachments on the Ogiek people's property are particularly severe as they go to the core of the community's identity as a people. The predominant encroachments are:

a. the failure to provide adequate recognition and protection in domestic law of the Ogiek's rights over the land, in particular the failure of Kenyan law to acknowledge collective ownership of land;

b. the eviction of the Ogiek people from their land, both in the physical removal of Ogiek families living on the land and the denial of the land to the rest of the community, and the resulting loss of their non-movable possessions on the land, including dwellings, religious and cultural sites and beehives;

c. the lack of prompt and full compensation to the Ogiek for the loss of their ability to use and benefit from their property over the years;

d. the significant loss by the Ogiek of beehives, as a source of honey, as a result of the eviction;

e. the denial of benefit, use of and interests in their traditional lands since eviction, including the denial of any financial benefit from the lands' resources, such as that generated by logging concessions and tea plantations;

f. the awarding of title to land to private individuals; and

g. the awarding of logging concessions on the land.

[805] *Endorois*, *supra* note 567, at para 209.

Not in accordance with appropriate laws

491. The circumstances in which the right to property may be restricted as such are dictated by Article 14 of the African Charter. It reads:

"The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

492. The test laid out in Article 14 of the Charter is *conjunctive*. That is, in order for an encroachment not to be in violation of Article 14 it must be proven that the encroachment was in the interest of the public need/general interest of the community *and* was carried out in accordance with appropriate laws.[806] The question of "accordance with the provisions of appropriate laws" will be first analysed[807] before the issue of the "public need", and the Inter-American case-law, is considered.

493. The requirement that any encroachment on property rights be in accordance with the "appropriate laws" incorporates both domestic and relevant international laws.[808] The Ogiek argue that their rights under international law have not been observed in the failure to recognise their legal rights as an indigenous people and in the forced and, at times, violent manner of their eviction.

[806] *Endorois*, *supra* note 567, para 211.

[807] As has been the practice of the ECtHR in cases concerning qualified rights.

[808] *Endorois*, *supra* note 567, para 219.

Legal rights as an indigenous people

494. International law, as outlined below,[809] requires that indigenous communities be afforded positive measures of protection to preserve their culture and society. One common manifestation of such a positive measure is the issue of full ownership or title rights over land, which is usually the only measure sufficient to ensure the rights of the community in question.[810]

495. The Kenyan authorities, including the courts, have failed to apply the international law on the protection of indigenous land rights. As set out above, this includes the need to recognise the collective nature of the land right, to recognise the historic association, and to prioritise the cultural, spiritual and other links of the people to a particular territory. Instead the Kenyan law gives only a very limited acknowledgement to African customary law.

496. In this case, the Ogiek were evicted precisely because they were not perceived to have any right, collective or otherwise, in the land on which they lived. At the time of the evictions, the crucial issue of recognition of the collective ownership of land, or indeed of any ownership of the land in question, was not acknowledged either under Kenyan law or by the Kenyan authorities.[811]

497. In particular, the 2005 Forests Act, while containing a number of provisions relating to the formation of 'community forest associations' by 'forest communities' and the possibility of licensing for exploitation of the forest, does not contain any provisions allowing for collective land rights over the forest.[812] Additionally, the Forests Act allows for any concessions granted to forest communities to be withdrawn for a broad range of reasons (and the initial grant

[809] Paras 559 to 576

[810] *Endorois*, *supra* note 567, para 205.

[811] See further paragraphs 274-298 above

[812] It is also worth noting that the Act contains no reference to 'indigenous peoples'.

is wholly discretionary),[813] forest communities cannot sell non-timber resources taken from the forest, as the Ogiek traditionally have done with honey and honey-products,[814] and it is not possible under the Act for communities to settle in the forest.[815] As for hunting, it is restricted by sections 22 and 23 of the Wildlife (Conservation and Management) Act 1989 (Cap. 376) to appropriately licensed professional hunters. The draft Wildlife Management and Conservation Bill 2013 proposes to entirely outlaw subsistence hunting.[816]

498. A similar situation prevailed in the *Saramaka* case. The Surinamese Government claimed that the 1992 Forest Management Act gave legal effect to the right of the members of the Saramaka people to the use and enjoyment of property in conformity with their communal property system. In a similar fashion to Kenya, under the 1992 Act the Government could grant permits for 'community forests'.[817]

499. The Inter-American Court did not agree with Suriname that the 1992 Act did adequately protect the Saramaka people's rights:

"Although questions arise as to whether the State has made any effort to inform the members of indigenous and tribal peoples about the possibility of obtaining these so-called "community forests," the real problem is that such community forests are not issued as a matter of right, but at the sole discretion of the Minister in charge of forest management and subject to any conditions the Minister may impose. The Court observes that it does not have evidence that demonstrates the grant of "community forests" permits to any member of the

[813] See sections 32, 35, 38, 45 and 48 of the Forests Act 2005.

[814] See section 21.

[815] See section 52.

[816] See section 84 of the draft Wildlife Management and Conservation Bill 2013. Available at: http://www.environment.go.ke/wp-content/uploads/2013/08/WILDLIFE-CONSERVATION-AND-MANAGEMENT-BILL-2013-FINAL-19TH-JULY.pdf

[817] *Saramaka People v Suriname*, *supra* note 560, para 112.

Saramaka community. Notwithstanding this absence, the Court considers that the "community forests" permits are essentially revocable forestry concessions that convey limited and restricted use rights, and are therefore an inadequate recognition of the Saramakas' property rights.[818]

[...]

"In sum, the State's legal framework merely grants the members of the Saramaka people a privilege to use land, which does not guarantee the right to effectively control their territory without outside interference. The Court has previously held that, rather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment."[819]

500. Further, in *Kemai and Others v Attorney General and Others,*[820] the Nairobi High Court found that the Ogiek had no property rights over the Mau Forest Complex at Tinet, and that a licence to exploit the forest resources would be entirely sufficient for the protection of their traditional livelihood. This domestic decision demonstrates a failure of understanding, by the domestic judiciary, as to the basis of and rationale behind indigenous property rights.

501. The Ogiek have nonetheless sought to preserve their position in national law via a number of legal cases, which have either been unsuccessful or remain pending before the national courts. These were set out in detail in the admissibility submissions, but include the obtaining of injunctions against the Respondent Government to protect the Ogiek's property rights, which were not

[818] *Ibid,* para 113.

[819] *Ibid*, para 115.

[820] *Kemai and Others v Attorney General and Others*, (23 March 2000) Civil Case No 238 of 1999; see Annex 27 to Complainants' Admissibility Submissions, already filed with this Court

respected by the Government authorities;[821] and the failure to conduct appropriate environmental impact assessments, which would have taken into account the Ogiek's ancestral property rights.

502. Any national legal claim by the Ogiek would ultimately rise or fall according to the extent to which Kenya's legal system recognises and protects collective and ancestral land rights. As explained in paras 274-298 above, Kenya's previous Constitution does little to protect the concept of group or collective rights in the sense asserted by the Complainants.

503. Indeed the Mau Forest Task Force Report following the forest excisions which took place in 2001, found that the "allocation of land was carried out in breach of the Laws of Kenya governing land, including the Government Land Act, Forest Act, Physical Planning Act, Agricultural Control Act, Survey Act and the Environmental Management and Coordination Act.[822]

504. It is worth noting as further evidence of the Respondent Government's failure to respect collective and ancestral land rights, nearly 4 years after the adoption of the African Commission's *Endorois* decision - which, *inter alia*, recognised the Endorois' property rights over their ancestral land - the Respondent Government has taken no steps to implement that decision, and indeed has taken some steps which flagrantly violate it.[823]

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[821] See for example, HCCA case No 635 of 1997 at Annexes 15 -19 and 21 to Complainants' Admissibility Submissions, already filed with this Court

[822] Mau Forest Task Force Report, *supra* note 250, at page 45.

[823] Including, the designation of Lake Bogoria as a UNESCO World Heritage Site without the Endorois's consent or consultation: see ACHPR Resolution 197/2011, *Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage Site*, available at http://www.achpr.org/sessions/50th/resolutions/197/; see also ACHPR Resolution 257/2013, *Resolution Calling on the Republic of Kenya to Implement the Endorois Decision*, available at: http://www.achpr.org/sessions/54th/resolutions/257/

Forced eviction

505. The African Commission in *Endorois* noted General Comment No. 4 of the CESCR, which incorporates a legal test for forced removal from lands that are traditionally claimed by a group of people as their property. The Committee stated that:

> *"Instances of forced eviction 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*."[824]

506. The Commission went on to state that forced evictions by their very nature cannot be deemed to satisfy the test set out in Article 14 of 'being in accordance with the law'.[825] In accordance with the law requires both national and international law,[826] and requires consultation and compensation.[827] "*In terms of consultation the threshold is especially stringent in favour of indigenous peoples, as it also requires that consent be accorded*."[828]

507. This view has been reaffirmed by the United Nations Commission on Human Rights, which stated that forced evictions are gross violations of human rights, and in particular the right to adequate housing.[829] Also noted by the African

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[824] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 4, *The Right to Adequate Housing*, (Sixth session, 1991) (E/1992/23), para 18.

[825] *Endorois*, *supra* note 567, para 218.

[826] *Ibid,* para 219.

[827] *Ibid,* para 255.

[828] *Ibid,* para 226.

[829] See United Nations Commission on Human Rights, Resolution 1993/77, (1993) (E/C.4/RES/1993/77); United Nations Commission on Human Rights, Resolution 2004/28, (2004) (E/C.4/RES/2004/28) .

Commission in the *Endorois* decision, was General Comment No. 7, requiring States Parties, prior to carrying out any evictions, to explore all feasible alternatives in consultation with affected persons, with a view to avoiding, or at least minimizing, the need to use force.[830] The Commission in *Endorois* also cited the ECtHR case of *Akdivar and Others v Turkey*, in which the Grand Chamber held that forced evictions constituted a violation of Article 1 of Protocol I to the European Convention.[831]

508. Further, the UNDRIP asserts, in Article 10, that:

"Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

509. The African Commission's recently adopted Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights provide that the right to property includes the following obligations on State parties to:

"Ensure peaceful enjoyment of property and protection from forced eviction. This obligation implies that the State shall protect the enjoyment in all forms, from interference by third parties as well as its own agents....

[830] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 7, *Forced evictions and the Right to Adequate Housing*, (Sixteenth session, 1997) (E/1998/22), para 14.

[831] *Akdivar and Others v Turkey*, ECtHR Grand Chamber, Application no. 21893/93, 16 September 1996.

Ensure that public need or in the general interest of the community serves legitimate public interest objectives such as economic reform or measures designed to achieve greater social justice....

To ensure that... indigenous populations / communities who are victims of historical land injustices, have independent access to and use of land and the right to claim their ancestral rights and to prevent unfair exploitation of natural resources by both state and non state national and international actors"[832]

510. As explained in details in paragraphs 132 - 262 above, the Ogiek have been subject to forcible eviction on numerous occasions.[833] During some evictions, their homes and property were destroyed in the process.[834] These evictions, then, were carried out in a manner that was manifestly incompatible with the international laws on forced eviction and dispossession.[835] As a consequence, the evictions of the Ogiek people render the Kenyan Government in violation of Article 14.

Public need or the general interest of the community

511. In *Yakye Axa*, the IACtHR stated that "both the private property of individuals and communal property of the members of the indigenous communities are

[832] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, 48th Session, adopted November 2010, para 55; available at http://www.escr-net.org/docs/i/1599552

[833] See also the Affidavit of Christopher Kipkones, *supra* note 118, paras 16-19, the Affidavit of James Rana, *supra* note 169, paras 8-10, and the Affidavit of Francis Maritim, *supra* note 368, paras 8-10.

[834] United Nations Human Settlements Programme (UN HABITAT), *Forced Evictions-Towards Solutions?* Second Report of the Advisory Group on Forced Evictions to the Executive Director of the UN HABITAT, 2007, pp. 27-28.

[835] United Nations Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee: Kenya*, 29 April 2005 (CCPR/CO/83/KEN), para 22.

protected by... the American Convention", and that "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established."[836]

512. The Court determined that when indigenous communal property and individual private property are in contradiction, the ACHR:

"*provide[s] guidelines to establish admissible restrictions to the enjoyment and exercise of those rights, that is: a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society.*"[837]

513. Similarly, the precise terms of Article 14 of the African Charter permit encroachments upon the right to property only "in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

514. Limitations on rights, such as that allowed under Article 14, must be reviewed through the lens of the proportionality principle. The Commission has established that "[t]he justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow."[838]

515. The principle of proportionality emphasised by the African Commission is also well-established in the jurisprudence of other international courts. In a seminal case, the ECtHR observed that any condition or restriction imposed upon a right

[836] I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay*, *supra* note 678, para 143.

[837] *Ibid*, para 144.

[838] *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, *supra* note 650, paras 211, 213 and 214.

must be "proportionate to the legitimate aim pursued".[839] Proportionality is now considered a general principle of the ECtHR.[840]

516. The IACtHR has likewise held that limitations on rights must be "proportionate and reasonable",[841] a concept that has since been elaborated on by the Inter-American Court, which noted that any restriction must be "closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right."[842]

517. Any limitations on rights should therefore be proportionate to a legitimate need and should be the least restrictive measures possible.[843] Further, as the Commission noted in *Endorois*:

"The 'public interest' test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property. In this sense, the test is much more stringent when applied to ancestral land rights of indigenous peoples."[844]

[839] *Handyside v United* Kingdom, no 5493/72, 7 December 1976, para 49.

[840] See, e.g., *Belgian Linguistics Case, supra* note 638; *Open Door & Dublin Well Women v Ireland*, ECtHR Judgment of 29 October 1992, Application nos 14234, 14235/88; *Kokkinakis v Greece*, ECtHR Judgment of 19 April 1993, Application no. 14307/88; *Supreme Holy Council of the Muslim Community v Bulgaria*, ECtHR Judgment of 16 December 2004, Application no. 39023/97.

[841] *X & Y v Argentina*, Case 10.506, Report No. 38/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 50 (1997) para 60.

[842] I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay*, *supra* note 678, para 145.

[843] *Endorois*, *supra* note 567, para 214.

[844] *Ibid,* para 212 (emphasis added).

The Commission went on to quote the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights, who considered that:

"Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people."[845]

518. To this, the IACtHR in *Yakye Axa* has added that *"[t]he necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest" and whether they are "justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right*."[846]

519. The Court in *Yakye Axa* was clear that the approach adopted would reduce to a case-by-case analysis of "*the restrictions that would result from recognizing one right over the other*." However, the Court was clear that:

"the States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage."[847]

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[845] Erica-Irene Daes, '*Minorities, Peoples and Self-Determination'* in N Ghanea & A Xanthaki (eds), *Indigenous Peoples' Right to Land and Natural Resources* (Martinus Nijhoff, 2005)

[846] I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay*, *supra* note 678, para 145 (emphasis added).

[847] *Ibid*, para 146.

520. The Court continued:

> *"Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous community and their members*."[848]

521. Later in the judgment, it added that:

> *"[t]o guarantee the right of indigenous peoples to communal property, it is necessary to take into account that the land is closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values."*[849]

522. This theme was later reiterated in the Concurring Opinion of Judge Cançado Trindade (now a Judge of the International Court of Justice) to the Interpretation of the *Yakye Axa* judgment. He observed that:

> *"The definite transfer of the communal lands has in the instant case consequences which are quite more far-reaching than one can prima facie anticipate, since, in the last resort, it is a question of survival of the cultural identity of the members of such Community. Only through such measure will their fundamental right to life* lato sensu*, including their cultural identity, be properly protected."*[850]

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[848] *Ibid*, para 147.

[849] *Ibid*, para 154.

[850] I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay*. Interpretation of the Judgment of Merits, Reparations and Costs. Judgment of February 1, 2006. Series C No. 141., Concurring Opinion of Judge Cançado Trindade, para 8.

523. This built on what the Court said in the Interpretation decision, that the State must take "*into account how particularly important [the lands] are for the Community*",[851] echoing what the African Commission concluded in *Endorois*.[852]

524. In *Yakye Axa*, the Court said little about the mechanism that Paraguay should adopt in order to facilitate this task. However, the Partly Concurring and Partly Dissenting Opinion of Judge Ramon Fogel to the *Yakye Axa* judgment, suggests that leaving the question of the expropriation of the land of private third parties to the legislature is, in general terms, an unsatisfactory and ineffective remedy. He stressed that "*[i]n its compliance with this obligation, the Paraguayan State must take into account Article 14(3) of [ILO Convention No.] 169..., which establishes the need to establish appropriate procedures in the framework of the national legal system to address the land claims of the peoples involved."*[853]

525. In *Saramaka v Suriname*, the IACtHR, set out a three-part test to determine if restrictions to property rights could be considered in accordance with international law:

"In order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter "development or investment plan") within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State

[851] *Ibid*, para 26.

[852] *Endorois*, *supra* note 567, para 212.

[853] I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay*. Interpretation of the Judgment of Merits, Reparations and Costs, *supra* note 849, Partly Concurring and Partly Dissenting Opinion of Judge Ramon Fogel, para 26.

must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people."[854]

526. Various judicial bodies have considered the balancing exercise between public and private land interests and communal indigenous land rights. Significantly, the Inter-American Court in *Sawhoyamaxa* made clear that "*the fact that the claimed lands are privately held by third parties is not in itself an 'objective and reasoned' ground for dismissing prima facie the claims by the indigenous people. Otherwise, restitution rights become meaningless*".[855]

527. Further, in *Endorois*, the African Commission demonstrated a concise balancing of the interests at stake in that case:

"The reasons of the Government in the instant Communication are questionable for several reasons including: (a) the contested land is the site of a conservation area, and the Endorois – as the ancestral guardians of that land – are best equipped to maintain its delicate ecosystems; (b) the Endorois are prepared to continue the conservation work begun by the Government; (c) no other community have settled on the land in question, and even if that is the case, the Respondent State is obliged to rectify that situation, (d) the land has not been spoliated and is thus inhabitable; (e) continued dispossession and alienation from their ancestral land continues to threaten the cultural survival of the Endorois' way of life, a consequence which clearly tips the proportionality argument on the side of indigenous peoples under international law."[856]

[854] I/A Court H.R., *Saramaka People v Suriname*, *supra* note 560, para 129.

[855] I/A Court H.R.,*Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 614, para 138

[856] *Endorois*, *supra* note 567, para 235

528. In the present case, in the name of sustainability and/or environmental necessity, as well as in order to parcel up and distribute forest land to third parties (including political allies),[857] the Respondent Government has removed the Ogiek from their land and destroyed their possessions, including dwellings. First, it is wholly impermissible for the Government to evict the traditional occupants of land in order to replace them with an alternative occupant with no prior connection to the land in question. This form of redistribution of the land of an occupant indigenous community cannot serve a public need and cannot be in pursuit of a legitimate aim.

529. Second, on the assumption that sustainable forest management was a legitimate aim and served a public need, it could have been accomplished by alternative means that were proportionate to that need. The upheaval and displacement of an entire community, and absolute denial of their property rights over their ancestral lands, is an obviously disproportionate response to any public need served by the need to conserve the land.

530. The Ogiek have lived in the Mau Forest sustainably for centuries and have, over the years, taken care of the forest in order to ensure that it continues to provide them with a reliable source of food and shelter, as set out above. The forest resources are important in Ogiek culture, thus rendering their conservation vital.[858]

531. As the Ogiek are willing, and are capable, of continuing to live in and manage the forest sustainably,[859] the Kenyan authorities could have pursued this aim in a way that respected their property rights. In particular, through a process of free and informed consultation, the Government could have sought to build traditional

[857] See the Ndungu Report, *supra* note 248 at 152; see Daily Nation, 'Moi Mama Ngina in Ndungu Land Report', (17 December 2004) <http://www.ogiek.org/news/news-post-04-12-7.htm> accessed 19 November 2013.

[858] See the Affidavit of Samson Kipkemboi Mutai *supra* note 128, paras. 6-10 and 38-41.

[859] See Affidavit of Jimmy Patiat Seina *supra* note 10, paras. 50-53.

forest management knowledge into the conventional structures of forest management.[860]

532. Further, the African Commission has stated, with respect to proportionality and restrictions on rights: "*Most important, a limitation may not erode a right such that right itself becomes illusory*".[861] In *Endorois* it stressed that "*[a]t the point where such a right becomes illusory, the limitation cannot be considered proportionate – the limitation becomes a violation of the right."*[862] Moreover, in *Endorois*, the Commission was of the view that the eviction of the people from their land denied them "*the very essence of the right itself*"[863] and so could not be justified.

533. The Respondent Government, in ejecting the Ogiek community, have denied them all legal rights in their ancestral lands, rendering their property rights essentially illusory. In other words, the Government has violated the essence of the right, and cannot justify such an interference with reference to "the general interest of the community" or a "public need".

534. This position is confirmed by the UN Special Rapporteur on the Rights of Indigenous Peoples, who has stated

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[860] See, e.g., the Canadian approach towards indigenous land rights and national parks: on Ivvavik National Park of Canada, http://www.pc.gc.ca/eng/pn-np/yt/ivvavik/plan.aspx, and on Torngat Mountains National Park of Canada, http://www.pc.gc.ca/eng/pn-np/nl/torngats/plan.aspx#a3. See, as well, an Australian example, the Lama Lama Indigenous Management Agreement, http://www.atns.net.au/agreement.asp?EntityID=4716 and M Wenham, 'Indigenous people mark the return of Cape York land' *Courier Mail* (11 July 2008), http://www.couriermail.com.au/news/queensland/elders-land-dream-comes-true/story-e6freoof-1111116879553.

[861] *Constitutional Rights Project v. Nigeria*, *supra* note 223 para 42.

[862] *Endorois*, *supra* note 567, para 215.

[863] *Ibid,* para 215.

"There remain serious questions about a sufficient environmental or other justification to resettle the Ogiek people and severely limit the property rights they may be shown to have in the area. Such a justification would require, at a minimum, a showing that Ogiek land use practices could not be carried out in a manner consistent with the planned environmental protection and rehabilitation measures. In general, because the relocation of indigenous peoples who have strong cultural and material connections to the lands from which they are removed is understood to implicate threats to a range of human rights, the establishment of environmental conservation areas should not result in the relocation of indigenous peoples. Ways should be explored, in consultation with the indigenous peoples Ogiek, to develop conservation regimes without their removal."[864]

535. Accordingly, the Ogiek, given the significance of their land in the Mau Forest for their continued physical and cultural survival and their continuing commitment to their land and their customary practices set out above, enjoy full restitution rights over the lands that were taken from them. Indeed, the former UN Special Rapporteur on Indigenous Peoples stated 'further excisions of gazetted forest areas and evictions of hunter-gatherers should be stopped. Titles derived from illegal excision or allocation of forest lands should be revoked, and new titles should only be granted to original inhabitants.'[865] This conclusion is supported by the fact that, on the bases mentioned in the *Endorois* decision at paragraph 527 above, the need for sustainable forest management is something for which the

[864]United Nations Human Rights Council, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya*, *Addendum, Cases examined by the Special Rapporteur*, 15 September 2010 (A/HRC/15/37/Add.1), para 260.

[865] UN General Assembly Human Rights Council, 4th Session, Report of the Special Rappoteur on the situation of human rights and fundamental freedoms of indigenous peoples, Rodolfo Stavenhagen, Mission to Kenya (A/HRC/4/32/Add.3), 26 February 2007, para 102.

Ogiek are uniquely adapted.[866] In any case, the parcelling of land in the area to third parties suggests, at least, that the Ogiek would, on balance, be a less intrusive presence in the forest.

536. Alternatively, should the Court not accept that the balancing of the different interests at issue lies firmly in favour of the Ogiek, and should the Court find that the Ogiek are not entitled to full restitution of their lands, the Kenyan authorities should enter into free and informed consultation with the Ogiek people. Those consultations should proceed to decide which of the private landowners could be expropriated for the benefit of the Ogiek and/or which alternative land, located within the forest area, could be delimited, transferred and/or reforested for their benefit. Such consultations must also cover the question of compensation. The form and method of these consultations would be left to the Government to determine but must be guided by the principles enunciated by the African Court and Commission that require free, informed and effective participation of affected groups. The Government have a duty to conduct such consultations in good faith and with a view to reaching agreement on terms favourable to the Ogiek, as required by successive Inter-American Court decisions.

Conclusion

537. The encroachment by the Respondent Government on Ogiek property, as well as the inability of Kenyan law and the refusal of the Kenyan courts to countenance collective ownership rights, does not comply with the appropriate international laws on indigenous peoples' rights. As a consequence of this, the Ogiek's right to property has been violated.

[866] See Affidavit of Jimmy Patiat Seina *supra* note 10, paras 50- 56 and the Affidavit of Rose Chengetich Maritim, *supra* note 203, para 11.

12. VIOLATION OF ARTICLE 17: THE RIGHT TO CULTURE

538. Articles 17(2) and (3) provide as follows:

"(2) Every individual may freely take part in the cultural life of his community.

(3)The promotion and protection and morals and traditional values recognized by the community shall be the duty of the State."

539. It is submitted that the Ogiek's cultural rights have been violated as a result of the Kenyan authorities' evicting them from the Mau Forest, the continued logging and clearance operations with the permission of the authorities, and the parcelling and distribution of land in the Mau Forest to leading members of the Government, friends and allies. By restricting the Ogiek access to the Mau Forest, it has denied them access to an integrated system of beliefs, values, norms, traditions and artefacts closely linked to access to the forest.

Defining the right to culture

540. "Culture" has a number of meanings, all of which the African Commission has recognised.[867] The first understanding of culture is "culture as capital": the accumulated material heritage of mankind or particular groups, exemplified by monument and artefacts. The second is "culture as creativity": the process (and products) of artistic and scientific creation.[868]

[867] See paragraphs 299-309 which set out the approach it is submitted the Court should take with reference to international, comparative law.

[868] See *Guidelines for National Periodic Reports, in Second Annual Activity Report of the African Commission on Human and Peoples' Rights* (1988-1989), ACHPR/ RPT/2nd, Annex XII, Available at: http://www1.chr.up.ac.za/images/files/documents/ahrdd/theme02/african_commission_resolution_13.pdf accessed 10 October 2013

541. Culture, in this sense, therefore equates to the sum total of the material and spiritual activities and products of a given social group that distinguishes it from other similar groups.[869]

542. This meaning is clearly reflected in the Preamble of the African Cultural Charter (1976),[870] which states that:

"[A]ny human society is necessarily governed by rules and principles based on traditions, languages, ways of life and thought, in other words on a set of cultural values which reflect its distinctive character and personality".[871]

543. The African Commission has recognised that the right to culture requires the state to be both tolerant of diversity and also to introduce measures for the protection of identity groups which differ from the majority / dominant group.[872] In its recently adopted Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, it clearly states that the right to take part in cultural life is integral to the way of life of individuals and communities, including promotion and preservation of their culture, heritage and institutions.[873] Further, it refers not only to the enjoyment of cultural activities and access to materials but to participation, policy-making and artistic freedom.[874]

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[869] Rodolfo Stavenhagen, *Cultural Rights: A Social Science, Perspective*, in Economic, Social and Cultural Rights, A Textbook, (Asbjorn Eide et al. eds., 2nd ed. 2001), pp. 86-88.

[870] Adopted on 5 July 1976, available at: http://au.int/en/sites/default/files/CULTURAL_CHARTER_AFRICA.pdf, accessed 3 October 2013.

[871] African Cultural Charter (1976), para 6 of the Preamble.

[872] See *Guidelines for National Periodic Reports, in Second Annual Activity Report of the African Commission on Human and Peoples' Rights 1988-1989*, (ACHPR/ RPT/2nd, Annex XII), as quoted in Rachel Murray and Steven Wheatley, "*Groups and the African Charter on Human and Peoples' Rights*", Human Rights Quarterly, 25 (2003), p 224.

[873]African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights, supra* note 832, at para 73;

[874] *Ibid*

544. Drawing upon this approach, in a decision adopted in 2000, the African Commission took the view that "*The African Charter should be interpreted in a culturally sensitive way, taking into account the differing legal traditions of Africa",*[875] *and referred to language as an "integral part of the structure of culture... Its usage enriches the individual and enables him to take an active part in the community and its activities. To deprive a man of such participation amounts to depriving him of his identity*".[876]

545. This stance is echoed by Article 3 of the African Cultural Charter, which states that cultural diversity is "*a source of mutual enrichment for various communities*"; whilst paragraph 8 of the Preamble provides that "*any people has the inalienable right to organize its cultural life in full harmony with its political, economic, social, philosophical and spiritual ideas*".[877]

546. In addition, the Charter for an African Cultural Renaissance, adopted by the AU Assembly in January 2006 and soon to replace the African Cultural Charter,[878] provides:

"That culture should be regarded as the set of distinctive linguistic, spiritual, material, intellectual and emotional features of the society or a social group, and

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[875] *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, *supra* note 650, para 26.

[876] *Malawi African Association and Others v. Mauritania*, *supra* note 768, para 137.

[877] African Cultural Charter (1976), para 8 of the Preamble

[878] Available at : http://au.int/en/sites/default/files/CHARTER_FOR_AFRICAN_CULTURAL_RENAISSANCE.pdf. This Charter shall come into force immediately upon receipt by the Commission of the African Union of the instruments of ratification and adhesion from two-thirds of the total membership of the African Union. As of 10 October 2013, 26 have signed so far: . http://www.africa-union.org/root/au/Documents/Treaties/list/Cutural%20Renaissance%20Charter.pdf

that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs".[879]

547. Paragraph 6 of the Preamble goes on to recognise *"That any people have the inalienable right to organize their cultural life in full harmony with their political, economic, social, philosophical and spiritual ideas."*

548. Further, "*African States recognize that cultural diversity is a factor for mutual enrichment of peoples and nations. Consequently, they commit themselves to defend minorities, their cultures, their rights and their fundamental freedoms"*.[880]

549. Indeed the African Union has shown general support for this approach: Article 17 of the Protocol on the Rights of Women in Africa, regarding the right to positive cultural context, states "*Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies".*

The scope of the right to culture

550. Article 17 deals with the rights of individuals to take part in the cultural life of their communities.[881] The protection of Article 17 can be invoked by any group that identifies with a particular culture within a state.[882]

551. The importance of land to indigenous cultures and ways of life has been widely acknowledged. Indeed, the African Commission's Working Group on Indigenous Peoples/ Communities has classified the dispossession of land and

[879] Paragraph 4 of the Preamble.

[880] Charter for an African Cultural Renaissance (2006), Article 5.

[881] Chidi Anselm Odinkalu, "*Analysis of Paralysis, or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights*", Human Rights Quarterly*,* 23 (2001), p 341.

[882] Guidelines for National Periodic Reports, in Second Annual Activity Report of the African Commission on Human and Peoples' Rights 1988-1989, ACHPR/ RPT/2nd, Annex XII, para 111.14

natural resources as "*a major human rights problem for indigenous peoples....[which] destroy[s] their lives and cultures*";[883] further stating that dispossession "*threatens both the economic, social and cultural survival of indigenous... hunter-gatherer communities*".[884]

552. The UN HRC has also noted, "*culture manifests itself in many forms, including a particular way of life associated with the use of land resources*".[885]

553. The CESCR specifically recognises the connection between indigenous peoples, land and culture, stating:

"The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.

Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic

[883] WGIP Report 2005, *supra* note 159, p. 20.

[884] *Ibid*

[885] United Nations Human Rights Committee, General Comment No. 23, Article 27, *The rights of minorities*, 8 April 1994 (CCPR/C/21/Rev.1/Add.5), para 7.

resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts. States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights."[886]

554. In the African context, the High Court of Botswana recognised the clear relationship between indigenous peoples' land and their culture in the case of *Sesana and Others v Attorney General,*[887] stating

"*The current wisdom, which should inform all policy and direction in dealing with indigenous peoples is the recognition of their special relationship to their land. Jose R Martinez Cobo, states: 'It is essential to know and understand the deeply spiritual relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture. For such peoples the land is not merely a possession and a means of production. The entire relationship between the spiritual life of indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely'."*

555. The African Commission has recently made its position in relation to Article 17 (2) and (3) most clear in the *Endorois* decision:

"It … understands culture to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. It

[886] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 21, Article 15.1 (a), *The right to of everyone to take part in cultural life*, 21 December 2009 (E/C.12/GC/21), paras 36 and 37.

[887] (2006) AHRLR 183 (BwHC 2006) at para 117 (b).

has also understood culture to encompass a group's religion, language, and other defining characteristics."[888]

556. As stated at paragraphs 1-94 above, the Ogiek are a distinct minority ethnic group, sharing many cultural features and maintaining these core cultural values and economic patterns.[889] Recognition of the hunter-gatherer lifestyle as a culture and indeed way of life is clearly established in the Report of the Working Group on Indigenous Peoples/ Communities.[890] These traditional ways of life must therefore be recognised as a culture in and of itself.

557. Indeed, the Respondent Government has outlined its views on the importance of respecting and protecting the right to culture in its last state report to the African Commission,[891] referring to various steps which it has taken to "promote cultural identity as well as mutual appreciation and co-existence among different ethnic groups", to "preserve the culture of peoples of Kenya" and to "protect cultural property even where the property is in private hands".

558. It is submitted therefore that the Ogiek are entitled to claim the protections of Articles 17(2) and (3).

Rights and Obligations under Article 17

559. The right to enjoy one's culture, practise one's religion, or use one's language cannot be enjoyed if the group no longer exists. The protection of minorities' existence includes their physical existence, their continued existence on the territories on which they live, and their access to the material resources required to maintain their existence on those territories. Protection of their existence goes

[888] *Endorois*, *supra* note 567, para 241.

[889] See Affidavit of Kiplangat A. Samoe Chebose *supra* note 18, para 18: 'although we are now living amidst the Kipsigis, we remain distinct.'

[890] WGIP Report 2005, *supra* note 159; see for example, pages 15-16, where the Ogiek are clearly referenced.

[891] Republic of Kenya Report on the African Charter on Human and Peoples' Rights, June 2006 at paras 120-123; see http://www.achpr.org/files/sessions/41st/state-reports/1st-1992-2006/staterep1_kenya_2006_eng.pdf, accessed 5 November 2013

beyond the duty not to destroy or deliberately weaken minority groups: "*It also requires respect for and protection of their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples, synagogues and the like*"[892].

560. Article 17 recognises the dual nature of culture in its individual and collective forms, by protecting both the individual's participation in the cultural life of his community, and also obliging the state to promote and protect traditional values recognised by a community.[893]

561. Article 17(3) sets out a distinctive African rendering of cultural rights that amplifies the state's responsibility for cultural rights protection.[894]

562. This was recently recognised by the African Commission in the *Endorois* decision, which imposed an affirmative duty upon the state in relation to the right to culture: "*The African Commission is of the view that protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their religious and cultural heritage essential to their group identity, including buildings and sites …"*[895].

563. This state responsibility is in line with the overall duty to respect, protect, and fulfil the realisation of economic, social and cultural rights, as understood in international human rights law. These are summarised in the African Commission's Principles and on the Implementation of Economic, Social and Cultural Rights:

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[892] Asbjorn Eide, cited in Rachel Murray and Steven Wheatley, "*Groups and the African Charter on Human and Peoples' Rights*", Human Rights Quarterly, 25 (2003), p 222.

[893] See further, F. Ouguergouz,"*The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for the Human Dignity and Sustainable Democracy in Africa"*, *supra* note 656, p. 189.

[894] Shyllon, "The right to a cultural past: African viewpoints" in V Prott, *Cultural Rights and Wrongs*, (UNESCO Paris, 1998)

[895] *Endorois*, *supra* note 567, at para 241.

"All human rights, including economic, social and cultural rights, impose a combination of negative and positive duties on States. A useful framework for understanding the nature of the duties imposed by economic, social and cultural rights is the duty "to respect, protect, promote and fulfil" these rights. No hierarchy is accorded to any of these duties and all should be protected through administrative and judicial remedies."[896]

564. The **obligation to respect** requires that States parties refrain from interfering directly or indirectly with the enjoyment of economic, social and cultural rights. This entails respecting the freedom of individuals and peoples to use all of the resources at their disposal to meet their economic, social and cultural needs and obligations, and to take positive measures to ensure that all branches of Government do not violate those rights.[897]

565. The **obligation to protect** requires the State to take positive measures to ensure that non-state actors such as multi-national corporations, local companies, private persons, and armed groups do not violate economic, social and cultural rights. This includes regulating and monitoring the commercial and other activities of non-state actors that affect people's access to and equal enjoyment of economic, social and cultural rights and ensuring the effective implementation of relevant legislation and programmes and to provide remedies for such violations.[898]

566. The **duty to promote** economic, social and cultural rights requires States to adopt measures to enhance people's awareness of their rights, and to provide accessible information relating to the programmes and institutions adopted to realise them. It also includes an obligation to promote the values and objectives

[896] African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights, supra* note 832, para 4

[897] *Ibid*, paras 5 and 6 (emphasis added).

[898] *Ibid,* para 7; (emphasis added).

of economic, social and cultural rights in administrative and judicial decision-making.[899]

567. The **duty to fulfil** economic, social and cultural rights requires States parties to take positive steps to advance the realisation of the rights. The State should continually aim at improving both the range of individuals, communities, groups and peoples who have access to the relevant rights as well as the quality of enjoyment. This includes the adoption of measures that enable and assist individuals and communities to gain access to these rights on their own. The rights of vulnerable and disadvantaged groups should be prioritised in all programmes of social and economic development, and particular attention must be paid to vulnerable and disadvantaged groups in programmes aimed at ensuring access to appropriate services and resources.[900]

568. The Commission has further specified that the right of the individual to take part in cultural life includes the following state obligations to:

i) Ensure participation at all levels in the determination of cultural policies and in cultural and artistic activities;

ii) Implement measures for safeguarding, protecting and building awareness of tangible and intangible cultural heritage, including traditional knowledge systems;

iii) Ensure recognition of and respect for the diverse cultures existing in Africa;

iv) Implement policies generally aimed at the conservation, development and diffusion of culture and the promotion of cultural identity. These policies should be implemented through:

a) Making funds available for the promotion of cultural development and popular participation in cultural life, including public support for private initiative;

[899] *Ibid*, paras 8 and 9 (emphasis added).

[900] *Ibid*, paras 10-12 (emphasis added).

b) Creation of institutional infrastructure established for the implementation of policies to promote popular participation in culture, such as cultural centres, museums, libraries, theatres and cinemas;

c) Measures and programmes aimed at promoting awareness and enjoyment of the cultural heritage of national ethnic groups, minorities and indigenous populations/communities;

d) Protection of the freedom of artistic creation and performance and professional education in the field of culture and art.

(iv) Ensure that minority and indigenous languages are protected and promoted. States should recognize that language is an integral part of the structure of culture and that the usage of language enriches the individual and enables him/her to take an active part in the community and in its activities.[901]

569. The African Commission's Working Group on Indigenous Peoples/ Communities has similarly emphasised the importance of creating spaces for dominant and indigenous cultures to co-exist. The WGIP notes with concern that:

"indigenous communities have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and to large scale development initiatives that tend to destroy their lives and cultures rather than improve their situation".[902]

570. In line with this position, the World Parks Congress has stated that in the context of conservationist programmes, extreme caution must be taken not to infringe upon the rights of indigenous peoples. In the Congress's support of the 2003 Dana Declaration on Mobile Peoples and Conservation, which coincided with the World Conference Against Racism, it firmly stated that:

[901] *Ibid* para 76 (emphasis added).

[902] WGIP Report 2005, *supra* note 159, p. 20.

"Conservation of biodiversity and natural resources within areas inhabited or used by mobile peoples requires the application of adaptive management approaches. Such approaches should build on traditional / existing cultural models and incorporate mobile peoples' worldviews, aspirations and customary law. They should work towards the physical and cultural survival of mobile peoples and the long-term conservation of biodiversity".[903]

571. The UN HRC has also held that development projects expropriating ancestral lands threaten cultural survival. In *Lubicon Lake Band v. Canada*, industrialisation, as well as gas and oil exploration, resulted in the environmental degradation of traditional lands and threatened the band's ability to rely on the land for their economic well-being.

572. The Committee found a violation of the community's right to culture as provided by ICCPR Article 27, and emphasised the need to protect indigenous cultures in the face of development. It held that "*historical inequities […] and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue".* [904] The Committee thus equated traditional way of life with culture.

573. Additional jurisprudence from the HRC, developing clear criteria for determining whether development projects are compatible with the ICCPR's protection of culture, includes the case of *Länsman v Finland*.[905] In this case, the Committee examined whether logging concessions infringed upon indigenous

[903] Principle 4, Adaptive Management, *Dana Declaration on Mobile Peoples and Conservation*. Adopted during September 2003 World Park Congress sessions.

[904] *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, (1990) Human Rights Committee, Communication No. 167/1984,(CCPR/C/38/D/167/1984), para 33.

[906] *Länsman v. Finland* (1994) Human Rights Committee, Communication No. 511/1992, (U.N. Doc. CCPR/C/52/D/511/1992)., para 9.4. The paragraph finishes: "However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27."

peoples' traditional practice of reindeer husbandry, which – in the same way that honey collection and hunting are part of the Ogiek way of life - is at the centre of the Sami cultural and economic way of life. The HRC clearly stated that development imperatives could not deny the right to enjoy culture:

"A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27. Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture. Thus, measures whose impact amount to a denial of the right will not be compatible with the obligations under article 27".[906]

574. The CESCR has recently noted that states have an obligation "*To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk*."[907]

575. The *Länsman v. Finland* case also notes that the state has a duty to protect and fulfil cultural rights in approving development projects. In its decision, the Human Rights Committee stated that:

[906] *Länsman v. Finland* (1994) Human Rights Committee, Communication No. 511/1992, (U.N. Doc. CCPR/C/52/D/511/1992)., para 9.4. The paragraph finishes: "However, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under article 27."

[907] United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 21, Article 15.1 (a), *The right to of everyone to take part in cultural life*, 21 December 2009 (E/C.12/GC/21), para 55e

"[E]conomic activities must, in order to comply with article 27, be carried out in a way that the authors continue to benefit from reindeer husbandry. Furthermore, ***if*** *mining activities (…) were to be approved on a large scale and significantly expanded by those companies to which exploitation permits have been issued, then this may constitute a violation of the authors' rights under article 27, in particular of their right to enjoy their own culture. The State party is under a duty to bear this in mind when either extending existing contracts or granting new ones.*[908]

576. The African Commission has firmly adopted this approach in its most conclusive decision on Article 17 (2) and (3). In the Endorois decision, the Commission clearly stated its opinion that:

"the Respondent State has a higher duty in terms of taking positive steps to protect groups and communities like the Endorois, but also to promote cultural rights including the creation of opportunities, policies, institutions or other mechanisms that allow for different cultures and ways of life to exist, develop in view of the challenges facing indigenous communities."[909]

Violation of Article 17

577. The Ogiek have suffered violations of their cultural rights in two ways. Firstly, the Ogiek have faced systematic restrictions on access to religious and cultural sites, such as burial sites and areas for initiation ceremonies, which are of central significance for cultural rites and celebrations.[910] The community's attempts to access their historic lands for these purposes have been described as "trespassing" and met with intimidation and detention.[911]

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[908] *Ibid*

[909] *Endorois*, *supra* note 567, para 248.

[910] See Film Evidence taken from Ogiek communities and transcript, *supra* note 22

[911] See Affidavit of Christopher Kipkones, *supra* note 118 at para 32 and the Affidavit of Cllr. John Siteinei, *supra* note 69 at para 10.

578. Secondly, and separately, the Ogiek's cultural rights have been violated by the serious restrictions imposed by the Kenyan authorities on their hunter-gatherer way of life. The curtailment of the sustainability of this way of life has directly resulted from their repeated eviction from the Mau Forest, and the failure to provide necessary infrastructure to compensate for lost traditional medicinal and food sources, as well as shelter.[912]

579. The loss of these resources has been further exacerbated by the Kenyan authorities' demarcation and transfer of land within the Mau Forest to third parties, for commercial logging operations and farming, for use by non-Ogiek for small scale agricultural purposes and, more recently, with the ostensible aim of preventing the environmental destruction of the forest.[913] This has resulted in considerable destruction of the Mau Forest, the Ogiek's traditional and cultural home.

580. With logging concessions now taking place throughout the Mau Forest, further threat is posed to the cultural and spiritual integrity of the Ogiek's ancestral land. It is of particular concern that provisional measures issued by the African Commission in this regard in November 2009, and then later mirrored by the African Court in March 2013, and issued out of concern that the Respondent Government's actions towards the Ogiek placed them at risk of irreparable damage, continue to be ignored by the Kenyan authorities.

581. Finally, the Government authorities' failure to allow or enable the Ogiek to co-exist in a sustainable manner within the Mau Forest, in line with the requirements set out in the above standards and jurisprudence, has further contributed to the serious threat to their hunter-gatherer way of life.[914] Further, the Kenyan Truth, Justice and Reconciliation Commission in its Report found that the routine

[912] See Affidavit of Kiplangat A. Samoe Chebose *supra* note 18, paras 16-17.

[913] See further paragraphs 132-262 above

[914] See Affidavit of Judy Jemutai Kipkenda, *supra* note 196, para 5 which outlines the effects of assimilation on the Ogiek, due to the evictions from the forest.

marginalisation of minority and indigenous peoples' identity impacted on several of their rights including, the right to culture.[915]

582. The African Commission's finding in the *Endorois* decision amply illustrates the clear connection between restrictions on the exercise of indigenous peoples' cultural rights and their particular way of life and Article 17 of the Charter:

"The Respondent state has not taken into consideration the fact that by restricting access to Lake Bogoria, it has denied the community access to an integrated system of beliefs, values, norms, mores, traditions and artefacts closely linked to access to the Lake."[916]

Proportionality

583. Unlike the traditional civil and political rights that the African Charter mostly circumscribes with clawbacks[917], the economic, social and cultural rights guaranteed by the Charter - including the right to culture under Article 17 - are free of both clawbacks and limitations.[918] The African Commission has held this to mean, therefore, that "limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances."[919]

584. Nevertheless, in respect of any limitation, the restriction must be proportionate to a legitimate aim, as stipulated by the jurisprudence of the African

[915] TJRC Report, *supra* note 121, Vol. I, p. xviii. The Commission further noted at Vol. IV, p. 45, para 210, that 'the state failed to recognise the existence, unique culture and contributions of many minority and indigenous communities in Kenya.'

[916] *Endorois*, *supra* note 567, para 250.

[917] Under Article 27(2) of the Charter.

[918] Chidi Anselm Odinkalu, "*Analysis of Paralysis, or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples' Rights*", (2001), Human Rights Quarterly, 23 p 341- 348.

[919] *Media Rights Agenda and Others v. Nigeria*, *supra* note 562 at para 64.

Commission[920] and the international law on human and people's rights. The principle of proportionality, requires that limitations be the least restrictive possible to meet the legitimate aim.

585. The African Commission's approach to Article 27(2) is a useful reference to define the acceptable parameters of a limitation imposed by the state. The limitation should serve a 'rational and legitimate purpose'[921] and the 'evils of limitations of rights must be strictly proportionate with an absolutely necessary for the advantages which are to be obtained'.[922] Similarly a limitation may never have as a consequence that the right itself becomes illusory and should not be discriminatory[923]. They should also be clearly provided by law.[924]

586. This approach was adopted by the African Commission in its analysis of Article 17 of the African Charter in the *Endorois* decision:

"The African Commission is aware that unlike Articles 8 and 14, Article 17 has no claw-back clause. The absence of a claw-back clause is an indication that the drafters of the Charter envisaged few, if any, circumstances in which it would be appropriate to limit a people's right to culture. It further notes that even if the Respondent State were to put some limitation on the exercise of such a right, the restriction must be proportionate to a legitimate aim that does not interfere adversely on the exercise of a community's cultural rights."[925]

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[920] *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, *supra* note 650, para 42.

[921] *Garreth Anver Prince v South Africa*, *supra* note 750, para 40.

[922] *Ibid*, para 44.

[923] *Ibid*

[924] *Kenneth Good v Republic of Botswana*, *supra* note 624, at para 187. In this context, the African Commission held that restrictions on the use and possession of cannabis by South Africa were reasonable and therefore the Rastafari's right to culture has not been violated, since the "participation in one's culture should not be at the expense of the overall good of the society": see *Garreth Anver Prince v South Africa*, *supra* note 750, para 48.

[925] *Endorois*, *supra* note 567, para 249.

587. In finding a violation of Article 17 (2) and (3) in the *Endorois* case, the Commission concluded that:

"By forcing the community to live on semi-arid lands without access to medicinal salt licks and other vital resources for the health of their livestock, the Respondent State have created a major threat to the Endorois pastoralist way of life. It is of the view that the very essence of the Endorois' right to culture has been denied, rendering the right, to all intents and purposes, illusory. Accordingly, the Respondent State is found to have violated Article 17(2) and (3) of the Charter."

588. Further, in the case of *Lovelace v. Canada*, the UN Human Rights Committee held that, although it was important to protect the integrity of indigenous communities from non-Native settlers, refusing to reinstate the right for a Native woman, previously married to a non-Native, to live on her reserve could not be deemed a proportionate measure, as this reserve was the only place in existence where she could enjoy her culture.[926] It is submitted that the Mau Forest holds the same central importance for the Ogiek.

589. Thus, even if the use of the Mau Forest as a source of capital - via logging and farming - or the attempts to protect its destruction - via the Mau Task Force - constitute a legitimate aim, the Respondent Government's failure to secure access by right for the Ogiek to celebrate cultural rituals, cannot be deemed proportionate to that aim.

590. Further, as stated above at paragraphs [...], the Ogiek's intimate relationship with the Mau Forest and their dependence on it for food, shelter, identity and very survival has ensured that this relationship has been rooted in respect for the forest and the need to conserve it. Forest conservation is integral to the Ogiek way of life.[927]

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[926] *Sandra Lovelace v. Canada*, (1985) Human Rights Committee, Communication No. 24/1977, (U.N. Doc. CCPR/C/OP/1), para 15.

[927] See Affidavit of Samson Kipkemboi Mutai *supra* note 128, paras 38-41.

591. The limitations placed on the Ogiek - removal from and restricted access to their cultural home - threaten to destroy the cultural life of the community.[928] Their hunter-gatherer way of life has been severely damaged by relegation to unsuitable lands, and their inability to access religious and cultural sites interferes with the practice and transmission of their culture.[929] Therefore, as in case of the Endorois, the very essence of the Ogiek's right to culture has been denied, rendering this right, to all intents and purposes, illusory.

592. Furthermore, the restrictions on the Ogiek's right to culture are not the least restrictive possible. The Ogiek are willing to co-exist with any attempts to prevent the environmental degradation of the Mau Forest and believe that they can work alongside the Kenyan authorities in pursuit of the same conservation goals.[930]

Conclusion

593. In light of the central and singular importance of both the Mau Forest in a wide range of cultural ceremonies and rites, and also of the Mau's resources for the sustainability of the Ogiek's hunter-gatherer way of life, it is submitted that the Ogiek's right to culture under Articles 17(2) and (3) have been and continue to be interfered with. Any such interference should be strictly proportionate to the aim of such alternate use of the Mau Forest: which it is not.

594. It is therefore submitted that the Respondent Government is in violation of Articles 17(2) and 17 (3) of the Charter.

[928] See Affidavit of Jane Bwaley, *supra* note 95 at paras 7-12.

[929] See Affidavit of Judy Jemutai Kipkenda, *supra* note 196 at para.5.

[930] See Affidavit of Jimmy Patiat Seina *supra* note 10, paras. 51 - 53.

13. VIOLATION OF ARTICLE 21: THE RIGHT TO FREE DISPOSITION OF NATURAL RESOURCES

595. Article 21 provides:

> *"1.All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.*
> *2. In the case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."*

596. It is submitted that the Ogiek have been unable to access the vital resources in the Mau Forest since their eviction from their ancestral home. The forests used to provide them with a relatively plentiful, constant and stationary food supply of game and honey.[931] Logging concessions have been granted on Ogiek ancestral land without giving them a share in these resources. They have had to pay money to access their lands. As a direct result, the Ogiek have suffered a violation of Article 21.

The Scope of the Right to Natural Resources

597. The right of all people to the free disposition of wealth and natural resources is an absolute right. As the Charter makes clear, "*in no case shall a people be deprived of it*".[932]

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[931] See Affidavit of Kiplangat A Samoe Chebose *supra* note 18, para 5 which says, 'In my youth there was plenty of food. Our traditional stores called kesungut were full of food and honey because of bumper harvests.' See also paragraphs 1-262 above.

[932] Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples' Rights*, (Cambridge University Press, 2008), p. 263; see also F. Ouguergouz, "*The African Charter on Human and Peoples' Rights*", *supra* note 656, p. 272 which states that the right can be regarded as a rule of *jus cogens*.

598. Article 21 largely derives from the legacy of colonialism, and serves 'to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society'.[933]

599. The African Charter creates two distinct rights: the right to property (Article 14) and the right to free disposal of wealth and natural resources (under Article 21). In the context of traditional lands the two rights are very closely linked and violated in similar ways. Article 21 is however, wider in its scope than Article 14, and requires respect for a people's right to use natural resources, even where a people do not have title to the land.

600. The African Commission has clearly established within its jurisprudence that the right to natural resources contained within their traditional lands vests also in the indigenous people who ancestrally own that land.[934] This was established in the *Ogoni* case, in which the Commission further stated that governments have a duty to protect their citizens from unregulated or harmful exploitation of natural resources "not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties".[935] The Commission went on to provide that "this duty calls for positive action on [the] part of governments in fulfilling their obligations under human rights instruments."[936]

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[933] The *Ogoni* case, *supra* note 561, at para 56. See also Declaration of the World Against Racism, Racial discrimination, Xenophobia and Related Intolerance, adopted at the 20th Plenary Meeting on 8 September 2001 in Durban, South Africa, which recognises that 'Africans and peoples of African descent, and peoples of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences' and 'regrets that the effects and persistence of these structures and practices have been among the factors contributing to lasting social and economic inequalities in many parts of the world today"; para 14.

[934] See paragraphs 299-309 which set out the approach it is submitted the Court should take with reference to international, comparative law.

[935] The *Ogoni* case, *supra* note 561, para 57.

[936] *Ibid*

601. The right of indigenous peoples to freely dispose of their natural resources has also been firmly established within the Inter-American system. Although the American Convention does not have an equivalent of the African Charter's Article 21, it reads the right to natural resources into the right to property, and in turn applies similar limitation rights on the issue of natural resources as it does on limitations of the right to property. The 'test' in both cases makes for a much higher threshold when potential spoliation or development of the land is affecting indigenous peoples' rights.[937]

602. In *Saramaka People v Suriname,*[938] the IACtHR had to deal with competing claims by the members of the Saramaka people and by the state of a right to the natural resources in dispute. The Court held that the cultural and economic survival of indigenous peoples and their members depends on their access and use of the natural resources in their territory that are related to their culture and found therein, and that Article 21 of the ACHR protects their right to such natural resources. It further stated that indigenous peoples' land rights would be rendered meaningless "if not connected to the natural resources that lie on and within the land".[939]

603. Additionally, the Court prescribed three safeguards to ensure that any development on indigenous peoples' land does not endanger the very survival of that group and its members. Accordingly, a state has a duty to consult with the indigenous peoples in conformity with their traditions and customs regarding any proposed use of the natural resources; a duty to allow members of the community to participate in the benefits derived from any concession; and a duty to perform or supervise an assessment on the environmental and social impact prior to the commencement of the project.[940]

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[937] See *Endorois*, *supra* note 567, para 256.

[938] *Saramaka People v Suriname*. *supra* note 560

[939] *Ibid*, para 122.

[940] *Saramaka People v Suriname*, *supra* note 560, para 155.

604. In subsequent jurisprudence, the IACtHR went on to find that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 of the ACHR are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life.[941]

605. In summary, this approach suggests that the rights of indigenous peoples over their own natural resources has two aspects: the right to use and enjoy the natural resources that lie within their traditional territories, and the right to give or withhold their consent to any exploitation, exploration and extraction of natural resources in such territories.[942]

606. The HRC has made a direct connection between Article 1(2) ICCPR and indigenous peoples' right to lands.[943] It has highlighted in States reports the obligation contained in Article 1 ICCPR for states to ensure the right for indigenous peoples to control their land and natural resources.[944] In the case of Norway, for example, the Committee invited the Government to report "on the

[941] I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay*, *supra* note 678; *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 614

[942] Jérémie Gilbert, "The Right to Freely Dispose of Natural Resources: Utopia or Forgotten Right?" *Netherlands Quarterly of Human Rights, Vol 31/2,* 314-341, 2013 at page 329

[943] See *Mahuika et al v New Zealand*, (2000) Human Rights Committee, Communication no 547/1993 ((A/56/40)

[944] See for example United Nations Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee: Canada*, 7 April 1999 (CCPR/C/79Add.105), para 8; and United Nations Committee on Economic, Social and Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, 10 December 1998 (E/C.12/1/Add.31), para 18

Saami peoples' right to self-determination under Article 1 of the Covenant, including paragraph 2 of that Article".[945]

607. Further, the World Bank's Operational Directive 4.10 states that "Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction."[946]

608. The African Commission has recognised that the right to freely dispose of natural resources is of critical importance to indigenous peoples and their way of life. The report of the Commission's Working Group on Indigenous Populations/ Communities states:

"Dispossession of land and natural resources is a major human rights problem for indigenous peoples … The establishment of protected areas and national parks has impoverished indigenous pastoralist and hunter-gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and, in many cases, even displaced them … This [the loss of fundamental natural resources] is a serious violation of the African Charter (article 21(1) and 21 (2)), which states clearly that all peoples have the right to natural resources, wealth and property".[947]

609. In the *Endorois* case, the African Commission relied on the tests established in *Saramaka* to determine if ruby mining activities on the Endorois' lands needed to be restricted to preserve the survival of the community. Although the Commission was aware that the Endorois did not have an attachment to rubies, it relied upon the *Ogoni* case, which has established that the right to natural

[945]United Nations Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, *Concluding Observations of the Human Rights Committee: Norway*, 1 November 1999 (CCPR/C/79/Add.112), para 17.

[946] World Bank Operational Directive 4.10.

[947] WGIP Report 2005, *supra* note 159, p. 20.

resources contained within their traditional lands is vested in the indigenous people, and that a people inhabiting a specific region within a state can claim the protection of Article 21. It also referred to need to satisfy the two-pronged test set out on Article 14 of the Charter: "*in the interest of public need or in the general interest of the community*" and "*in accordance with appropriate laws*", finding that the Government had not satisfied that test.

Violation of Article 21

610. The Ogiek enjoy the protection of Article 21 with respect to the Mau Forest and the wealth and natural resources arising from it. This includes the bees which naturally inhabited the forest, who were used to make Ogiek traditional honey, a source of food for the Ogiek and their way of life;[948] herbs and plants used to make traditional medicines and also for use in traditional ceremonies;[949] and indigenous trees and bushes, which were crucial to the survival of the Ogiek, providing nectar for honey production, hiding places for animals, and locations to hang beehives.[950] These were clearly natural resources which the Ogiek benefited from before the eviction from their traditional lands.[951]

611. In addition, Article 21 also protects the Ogiek's rights to the potential wealth on their land, including logging concessions, tea plantations and other possible resources.

612. The use of natural resources by the Respondent Government, non-Ogiek and private companies, for logging concessions and tea plantations cannot be said to be in the interests of public need or in the general interest of the community,

[948] For example, the significance of beehives (and by extension bees) can be seen during Ogiek marriage ceremonies: 'the man will offer his betrothed's family a number of beehives.' [Extract from the Affidavit of Linah Taploson *supra* note 42, para 8.] Also, see the Affidavit of Jimmy Patiat Seina *supra* note 10, para 6 which says, 'We didn't want to cut the live trees because that is where the bees get nectar.'

[949] See Affidavit of Thomas Museiyie, *supra* note 80, para 4.

[950] See Affidavit of Samson Kipkemboi Mutai *supra* note 128, paras 6, 8 and 9.

[951] See further paragraphs 1-94 and 102 -131 above

given the deleterious effect such activities are having on both the Ogiek's resources and therefore their livelihood[952] and the climate.[953] Indeed, the Respondent Government acknowledges the intimate relationship which the Ogiek have with their ancestral land: "Any destruction to this [Mau Forest] ecosystem will impact on the right to life of... the Ogieks[954]".[955]

613. Further, the use of these resources cannot be said to be in accordance with appropriate laws, such as the test set out in *Saramaka* at paragraphs 405 and 525 above, which prescribes state duties to ensure effective participation of the community, benefit-sharing, and the carrying out of prior environmental and social impact assessments. The Ogiek have not been consulted[956] as to the Government's and Government authorised private use of the natural resources on their ancestral land, and as such, Article 21 has been violated. Indeed, in 2004 the Report of the Working Group on Minorities noted claims that the trees on Ogiek land 'were being harvested without their consent, that their land had been distributed to majority communities, and that other land had been designated a game reserve.'[957]

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[952] A report by the World Rainforest Movement, "*Underlying Causes of Deforestation and Forest Degradation in Kenya"* found that crops grown on Ogiek lands... include tea and pyrethrum.... pyrethrum and pesticides applied on the farms kill bees and have rendered bee keeping unviable. Bee keeping is affected by the growing of pyrethrum and the use of pesticides on the farm, it is therefore not a suitable alternative to harvesting of honey in the forest. See http://www.wrm.org.uy/oldsite/deforestation/Africa/Kenya.html, accessed 7.11.13; see also the Affidavit of Daniel Kobei, *supra* note 53, para 23

[953] See Affidavit of Samson Kipkmboi Mutai *supra* note 128, paras. 38-41.

[954] Sic: should be Ogiek; Ogiot is the singular term, whilst Ogiek is the plural

[955] See Written Submissions by the Republic of Kenya dated 15 March 2010, at para 8.1.3

[956] The Kenyan Truth, Justice and Reconciliation Commission in its Report also highlighted the fact that (…) communities closest to natural resources were not viewed as beneficiaries of development outcomes.' TJRC Report, *supra* note 121, Vol. IIC, p. 260, para. 174.

[957] United Nations Economic and Social Council, Commission of Human Rights Sub-commission on the Promotion and Protection of Human Rights, 56th Session, *Report of the Working Group on Minorities*, Tenth Session (E/CN.4/Sub.2/2004/29), 8 June 2004, para 11.

Article 21(2)

614. Article 21(2) provides that

"In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation".

615. As stated above, the African Commission has already firmly established that depriving indigenous peoples of their lands and natural resources, through *inter alia*, the creation of protected areas and national parks and displacement of the peoples amounts to a violation of Article 21(2). Spoliation, in this sense, must have the meaning of "the taking of a benefit properly belonging to another".[958]

616. The Ogiek have never received adequate compensation for the use of the natural resources on their lands.[959]

Conclusion

617. It is submitted that the Ogiek have the right to freely dispose of their wealth and natural resources, pursuant to Article 21(1). Since their eviction from the Mau Forest, they have been denied use of the natural resources on their ancestral land, whilst the Respondent Government have plundered them, without seeking the consent or effective participation of the Ogiek, or sharing the benefits. As such, the Ogiek have suffered a violation of Article 21(1).

618. Accordingly, pursuant to the provisions of Article 21(2), the Ogiek are entitled to lawful recovery of their property as well as to adequate compensation for the losses they have suffered.

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[958] Bryan A. Garner, Braum A. Garner (Editor),*Black's Law Dictionary (2004).(*West Academic: Eighth Edn, 2004).

[959] See Affidavit of Samson Kipkemboi Mutai *supra* note 128, para 38 which states, 'part of the money from this harvesting should be given to help the Ogiek community. Just as in Maasai Mara, the Maasai have received a share of the tourist revenue, we would want the same for the money from the trees that have been logged.'

14. VIOLATION OF ARTICLE 22 – THE RIGHT TO DEVELOPMENT

619. Article 22 of the African Charter provides that:

> *"1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.*
>
> *2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development."*

620. The Ogiek's right to development has been violated as a result of numerous and cumulative actions and omissions on the part of the Kenyan Government. More particularly, the right has been breached in that the Government has wholly failed to consult with or seek consent from the Ogiek community about their shared cultural, economic and social life within the Mau Forest.

Right to development

621. The African Charter legally binds states parties to respect the rights of peoples to development. Although the African Charter is the only treaty to do this, the Charter, and by extension the Court and Commission,[960] draws inspiration for the right to development from the 1986 UN General Assembly Declaration on the Right to Development[961] (DRD), the work of the UN Independent Expert on Development, the UN Intergovernmental Working Group

[960] See paragraphs 299-309 which set out the approach it is submitted the Court should take with reference to international, comparative law.

[961] Annex to the United Nations General Assembly Resolution 41/128 (4 December 1986) (A/RES/41/128). Later reaffirmed in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, (A/CONF.157/23), para 10: "The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. As stated in the Declaration on the Right to Development, the human person is the central subject of development."

on the Right to Development, alongside the UN High-Level Task Force on the Implementation of the Right to Development. Additionally the ongoing work of the United Nations Development Programme (UNDP) and, in particular, the annual *Human Development Reports* provide further interpretive material as can the Constitutions and case-law of the numerous African countries that have incorporated the right to development into their municipal law.[962]

622. The African Commission held in the *Ogoni case* that:

"*The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective*."[963]

This includes the right to development.

623. The Commission has, on four prior occasions, found violations of Article 22 of the Charter.[964] Of those, the most significant, and recent, is the *Endorois* decision,[965] in which the Commission held that Kenya had violated the Endorois' right to development in failing to adequately involve them in the development process and in failing to ensure the continued improvement of the well-being of the community.

624. The Commission in *Endorois*, drawing on a substantial body of international material, highlighted two important facets of the right to development: that it is

[962] Both Ghana and Uganda have included the concept as a directive principle of national policy. The Constitutions of Benin, the Central African Republic, the Democratic Republic of Congo, Ethiopia, Malawi and Senegal also contain a justiciable right to development.

[963] The *Ogoni* case, *supra* note 561, para 71

[964] The *Endorois* decision, *supra* note 567; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) ACHPR Communications 279/03-296/05; *Kevin Mgwanga Gunme, et al. v Cameroon*, *supra* note 628; *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, (2003) ACHPR Communication 227/99.

[965] *Endorois*, *supra* note 567

"both *constitutive* and *instrumental*, or useful as both a means and an end."[966] There is, accordingly, both under the jurisprudence of the Commission and within the scheme envisaged by the DRD:

(1)The right to participate in the development process; *and*

(2)The right to a substantive improvement in well-being.

625. Article 2(1) of the DRD states the principle that "[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development". Further, the right to development, under the DRD and the African Charter, is a right of *peoples*. This is clarified in the DRD when it is made clear that the right is an

"inalienable human right by virtue of which *every human person* and *all peoples* are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development."[967]

626. The scope of the right, then, is not restricted to indigenous peoples but is extended to "all peoples". Additionally, under international law, the DRD suggests that the right is owed to individuals ("every human person") as well as collectives. Accordingly, under the African Charter, while, in order to claim the benefit of this right, it is sufficient that a group is a recognised indigenous community, it is by no means necessary.

627. Article 2(3) of the DRD notes that the right to development includes the "*active, free and meaningful participation in development*." Peoples shall experience "*constant improvement of the well being of the entire population and of all individuals*." Thus, as recognised in the *Endorois* decision, it has both procedural and substantive elements. Fulfilling only one of these two prongs will

[966] *Endorois*, *supra* note 567, para 277.

[967] Article 1(1) DRD (emphasis added).

not satisfy the right to development; whilst violating either will constitute a violation.

628. The state, acting at the national level, bears the primary duty for ensuring the realisation of the right to development.[968] As the African Charter makes clear, the state must act individually or collectively.[969]

629. Recognising the right to development requires fulfilling five main criteria. Development must be equitable, non-discriminatory, participatory, accountable, and transparent. Equity and choice are especially important, "over-arching theme[s]" in the right to development.[970] The income or other benefits derived from development must be equally distributed.[971] Similarly, the UN Task Force on the Implementation of the Right to Development stated that "*development had to be grounded in sound economic policies that fostered growth with equity*."[972]

630. Moreover, the African Commission has emphasised that the fundamental goal of development is freedom of choice and that it "must be present as a part of the right to development".[973] This closely echoes the prevailing international and UN-led approach towards development, championed, for example, by the UNDP and the World Bank in their yearly *Human* and *World Development Reports*.[974]

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[968] See Article 3 DRD.

[969] See Article 22(2) ACHPR.

[970] *Endorois*, *supra* note 567, para 277.

[971] Arjun Sengupta, "*Development Cooperation and the Right to Development*," Francois-Xavier Bagnoud Centre Working Paper No. 12, (2003), available at www.hsph.harvard.edu/fxbcenter/working_papers.htm.

[972] *Review of the Progress in the Promotion and Impact of the Right to Development: Considerations of the Report of the High Level Task Force on the Impact of the Right to Development*, (2001) Commission on Human Rights, (E/CN.4/2005/WG.18/2) para 10.

[973] *Endorois*, *supra* note 567, paras 278 and 283. See also, Arjun Sengupta, "*The Right to Development as a Human Right*," Francois-Xavier Bagnoud Centre Working Paper No. 8, (2000), p. 8, available at http://www.hsph.harvard.edu/fxbcenter/working_papers.htm 2000.

[974] See United Nations Development Programme, *Human Development Report 1990: Concept and Measurement of Human Development* (New York: Oxford University Press,

Development as freedom, choice and increasing capabilities

631. Nobel laureate, Amartya Sen, has conceptualised economic, social and cultural development as an increase in overall well-being.[975] Sen articulated a framework of capabilities and functionings where a people's overall well-being is measured not by what they do, but by what they are able to do.[976] This conception of development keeps at its core the ideas of choice and of freedom. A state of perfect development, for Sen, is where a person has the ability "to choose a life one has reason to value."[977] To this extent, the realisation of the right to development both requires, and will result in, increased capabilities and, therefore, an increased range of choice for the beneficiary.[978]

632. The right to development is a corollary of the right to self-determination.[979] The African Charter highlights, in particular, the importance of using development to enhance "freedom and identity", thus inserting Sen's conception of development as freedom into the text of the Charter itself.

633. The previous UN Independent Expert on the Right to Development, Arjun Sengupta, has used the example of housing to illustrate the importance of choice and self-determination. Development is not simply the state providing housing for particular individuals or peoples; development is instead about providing peoples with the ability to choose where to live: "*The state or any other authority cannot*

1990) and *Human Development Report 2000: Human Rights and Human Development* (New York: Oxford University Press, 2000)

[975] Amartya Sen, *Development as Freedom* (Oxford University Press, 1999).

[976] *Ibid.* This is also supported by the work of Martha Nussbaum, *Women and Human Development: the Capabilities Approach* (Cambridge University Press, 2000).

[977] *Ibid*, p.74.

[978] This, furthermore, is picked up by the UNDP in their 2000 *Human Development Report*, *supra* note 973

[979] Article 22(2) African Charter

arbitrarily decide where an individual should live just because the supplies of such housing are made available".[980]

634. Increasing capabilities, then, is an integral part of development. Development is a "*right to a process that expands the capabilities or freedom of individuals to improve their well-being and to realize what they value*."[981]

635. Capabilities can be measured in more concrete terms, such as the right to food, health or education. Therefore, the concept of capabilities encompasses the ability to secure these needs in ways desirable to the beneficiaries of development. In this respect, the DRD states that the right to development incorporates "*equality of opportunity for all in their access to basic resources, education, health services, good housing, employment, and fair distribution of income*."[982]

A right to economic, social and cultural development: increasing capabilities

636. The African Charter guarantees all peoples the right to social, economic and cultural development. All three strands are equally important. Further, under this element of the right, social, economic and cultural development is perceived as both an outcome and a means of enhancing capabilities.

637. The previous UN Independent Expert on the Right to Development has stated that the right to development necessitates the fulfilment of civil, political, economic, social and cultural rights and freedoms. Sengupta notes that "all these rights are interrelated and independent".[983]

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[980] Sengupta, *supra* note 971, 8

[981] *Third Report of the Independent Expert on the right to development*, 2 January 2001(E/CN.4/2001/WG.18/2).

[982] Article 8 DRD.

[983] *Third Report of the Independent Expert on the right to development*, 2 January 2001(E/CN.4/2001/WG.18/2), p.3.

638. The DRD reiterates that:

"*all human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights*."[984]

639. This idea, of an integrated approach to human rights and development, leads to the proposition of what has become known as 'human development': of a form of development that respects human rights.[985]

640. The previous UN Independent Expert has also highlighted the interdependent nature of the right to development and other rights:

"*The right to development, while sensitive to human development and inclusive of the rights-based approach, takes the development formula one step further by treating all rights as an integrated whole and the right to development as a comprehensive process for their treatment*."[986]

641. Consequently, for the reasons set above, the Ogiek have suffered violations of their rights to livelihood, religion, culture, property and natural resources, each of which impacts upon their capacity for meaningful development. It is submitted that the Respondent Government has violated their right to development as well.

642. Further, given that development is understood as an improvement in well-being (measured in terms of capabilities), the right to development ensures the provision of resources essential for survival and well-being. Traditional

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[984] Article 6(2) DRD.

[985] See for example, the UN Human Development Reports, available at: http://hdr.undp.org/en/reports/global/hdr2000/

[986] M Salomon and A Sengupta, *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples* (Minority Rights Group International, 2003), p.5.

indigenous land use systems have been recognised as crucial to well-being. The IACHR noted in 1997, for example, that:

"For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers both to its capacity for providing the resources which sustain life, and to the geographical space necessary for the cultural and social reproduction of the group."[987]

643. Thus, as control over ancestral land is central to well-being, control over land is central to realising the right to development. For the reasons set out above at paragraphs 102-273 above, the Ogiek do not have control over their traditional lands, which has had a dramatic effect on their overall well-being and their capability to develop and to enjoy their social, economic and cultural life. As a consequence, their right to development has been violated.

A right to participate in development: allowing choice

644. The right to participate in development is the very core of the right to development.[988] The right is one of peoples to shape an economic, social and cultural life that they have reason to value. Crucially, the right does not exist simply to secure for all peoples a basic level of subsistence and fulfilment of basic needs. Instead, choice is at the heart of the right to development.

645. It is worth noting that the benefit of the right to development is not restricted to indigenous peoples, as set out at paragraph 626 above. This is made clear in the Charter's reference to "[a]ll peoples" in Article 22, as well as the other international legal materials.

[987] Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96 doc.10, rev.1 (1997), at 115.

[988] See Article 1(1) DRD

646. Further, the choice envisaged by the right to development goes significantly further than the jurisprudence of the Inter-American Court in respect of land rights, which also applies to development projects in traditional lands.[989] The right to development, under Article 22 of the African Charter, includes within its scope all "economic, social and cultural development" and therefore exists in both a positive as well as the recognised negative sense.

647. Consequently, the right to development is a right held by all peoples to participate in, and to shape, a comprehensive process of economic, social and cultural development in all areas of life.[990] The form that such participation must take in any set of circumstances is left unclear by Article 22 and, in particular, it is not clear what level or mechanism of participation is required in respect of non-indigenous African groups. In the *Endorois* decision, the African Commission made clear that indigenous communities have rights of prior consultation and consent in respect of their traditional lands.[991] The position is given greater clarity by the case-law on indigenous participation rights, as well as the 2007 UN Declaration on the Rights of Indigenous Peoples.[992]

648. Further, the burden to create conditions favourable to a people's development falls squarely on the shoulders of the Government. This was clearly established in the African Commission's jurisprudence in the *Endorois* decision, which states:

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[989] See, for instance, *Saramaka People v Suriname, supra* note 560, para 134: "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions."

[990] See Preamble to the DRD, para 2: "Recognizing that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom".

[991] See *Endorois*, *supra* note 567, paras 289-297.

[992] This was "officially sanctioned by the African Commission through its 2007 Advisory Opinion": *Ibid*, para 204.

"The African Commission is of the view that the Respondent State bears the burden for creating conditions favourable to a people's development. It is certainly not the responsibility of the Endorois themselves to find alternate places to graze their cattle or partake in religious ceremonies. The Respondent State, instead, is obligated to ensure that the Endorois are not left out of the development process or benefits."[993]

Effective participation and meaningful consultation

649. The right to development requires that individuals and communities participate in the planning and parameters of proposals and policies that will affect them. *Effective* participation means that communities have the ability to meaningfully affect the outcome of a project through informed consultations.

650. The African governments established this principle in the 1990 African Charter on Popular Participation in Development and Transformation. The 1990 Charter defines "popular participation" as "*the empowerment of the people to effectively involve themselves in creating the structures and designing the policies and programmes that serve the interests of all as well as to effectively contribute to the development process and share equitably in its benefits*".[994]

651. The HRC addressed the effectiveness of consultation procedures in *Mahuika v New Zealand*. There the Committee found that the broad consultation process undertaken by New Zealand had effectively provided for the participation of the Maori people in determining fishing rights. The authorities of New Zealand had negotiated with Maori representatives, and then allowed the resulting Memorandum of Understanding to be debated extensively by Maoris throughout the country. The signatories of the Deed of Settlement included the official

[993] *Endorois*, *supra* note 567, para 298.

[994] African Charter on Popular Participation in Development and Transformation, (1990) (A/45/427), para 11.

negotiators, as well as an additional 106 Maori signatories.[995] The Committee specifically noted that the consultation procedure addressed the cultural and religious significance of fishing to the Maori people, and that the Maori representatives were able to affect the design of the final Settlement.[996]

652. Additionally, international development organisations have begun adopting participation and consultation standards with respect to indigenous peoples. A UNDP Policy paper notes that participation is "*essential in securing all other rights in development processes*".[997] The World Bank has updated its Operational Policy on Indigenous People, now requiring that all borrowers from the Bank "*engage in a process of free, prior and informed consultation... [that] results in broad Community support"* by the indigenous peoples affected.[998] Bank Procedure 4.10 defines *"free, prior and informed consultation*" as:

"consultation that occurs freely and voluntarily, without any external manipulation, interference, or coercion, for which the parties consulted have

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[995] *Apirana Mahuika et al v New Zealand*,(2000) Human Rights Committee Communication No 547/1993, (CCPR/C/70/D/547/1993), paras 5.7-5.9.

[996] *Ibid,* paras 9.6 and 9.8. The Inter-American Court for Human Rights addressed the issue of participation with regard to the Awas Tingni people of Nicaragua. The Court held that the state must "carry out the delimitation, demarcation, and titling of the corresponding lands of the members of the Awas Tingni Community... with full participation by the community and taking into account its customary law, values, customs and mores": *Awas Tingni, supra* note 737, para 164.

[997] UNDP, *Integrating Human Rights with Development: A UNDP Policy Document* (1998), Sec. 2, available at: http://magnet.undp.org/Docs/policy5.html. The standards have been more fully delineated in UNDP, *UNDP and Indigenous Peoples: A Practice Note on Engagement*, available at: http://www.undp.org/cso/policies/doc/IPPolicyEnglish.

[998] World Bank, *Operational Policy 4.10 – Indigenous Peoples* (July 2005), para 1, available at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553653~menuPK:4564185~pagePK:64709096~piPK:64709108~theSitePK:502184,00.html.

prior access to information on the intent and scope of the proposed project in a culturally appropriate manner, form, and language".[999]

Operational Policy 4.10 also instituted a new process of requiring borrower states to formulate Indigenous Peoples Plans or Planning Frameworks.[1000]

653. Further, the ILO has delineated consultation standards with respect to indigenous peoples in Convention No. 169. The relevant text of the Convention states:

"*The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures*".[1001]

654. This all broadly accords with the approach adopted by the African Commission in the *Endorois* decision. In that case, the Commission ruled that the failure to consult the Endorois about the creation of a game reserve in the Lake Bogoria region resulted in a violation of their right to development.[1002] Further, in November 2011, the African Commission passed Resolution 197, finding that the inscription of Lake Bogoria in the World Heritage List by UNESCO, at the instigation of Kenya, was also a violation of Article 22, since the Endorois community was not consulted in advance.[1003]

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[999] World Bank, *Bank Procedure 4.10 – Indigenous Peoples* (July 2005), para 2(a), available at http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTOPMANUAL/0,,contentMDK:20553664~menuPK:64701637~pagePK:64709096~piPK:64709108~theSitePK:502184~isCURL:Y,00.html.

[1000] *Operational Policy 4.10*, *supra* note 584, para 6

[1001] ILO Convention No 169, Article 6(2).

[1002] *Endorois*, *supra* note 567, paras 297-298.

[1003] African Commission on Human and Peoples' Rights, 197: Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage site, 50th Ordinary Session, 24 October – 5 November 2011.

Free, prior and informed consent

655. In the context of large development projects, such as the creation of sustainability zones, the State has a duty to obtain the free, prior and informed consent of communities affected by them. The most developed explanation of what free, prior and informed consent means has come out of the Committee on the Elimination of Racial Discrimination (CERD). CERD adopted General Recommendation XXIII Concerning Indigenous Peoples, which emphasised that no decisions directly relating to the rights or interests of indigenous people should be taken without their "informed consent".[1004] The Committee has reiterated this duty in its Concluding Observations to States parties.[1005]

656. The Committee on Economic, Social and Cultural Rights has reminded States parties to "*consult and seek the consent of the indigenous peoples concerned prior to the implementation of… any public policy affecting them*".[1006] Therefore, at a minimum, the State should negotiate with the intention of seeking consent.

[1004] United Nations Committee on the Elimination of Racial Discrimination, General Recommendation No. 23, *Indigenous Peoples*, 18 August 1997 (Gen. Rec. No.23), para 4(d).

[1005] See United Nations Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Costa Rica*, 4-22 March 2002 (CERD/C/60/CO/3), para 13; United Nations Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*: United States, (2001) (A/56/18), paras 380-407; United Nations Committee on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention, *Concluding Observations of the Committee on the Elimination of Racial Discrimination*: *Australia*, (2000) (CERD/C/304/Add.101), para 9.

[1006]United Nations Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia*, (2001) (E/C.12/Add.1/74), para 33.

657. More significantly, Rodolfo Stavenhagen, then UN Special Rapporteur on Indigenous Peoples, observed that:

"*Wherever [large-scale development projects] occur in areas occupied by indigenous peoples it is likely that their communities will undergo profound social and economic changes that are frequently not well understood, much less foreseen, by the authorities in charge of promoting them… The principal human rights effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence."*[1007]

Consequently, the Special Rapporteur concluded that "*[f]ree, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects*."[1008]

658. James Anaya, the present UN Special Rapporteur on Indigenous Peoples, has concluded in similar fashion:

"*A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent. The Declaration [on Indigenous Peoples Rights] recognizes two situations in which the State is under an obligation to obtain the consent of the indigenous peoples concerned… These situations include when the project will result in the relocation of a group from its*

[1007] *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, supra* note 256, p.2.

[1008] *Ibid,* para 66.

traditional lands, and in cases involving the storage or disposal of toxic waste within indigenous lands… [Mr Anaya went on to adopt the *Saramaka* decision, cited below, of the Inter-American Court of Human Rights.]"[1009]

659. The requirement of prior, informed consent has also been delineated in the case law of the Inter-American Commission on Human Rights. In *Mary and Carrie Dann v USA*, the Commission noted that convening meetings with the Community 14 years after title extinguishment proceedings began constituted neither prior nor effective participation.[1010] To have a process of consent that is fully informed "*requires at a minimum that all of the members of the Community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives*".[1011]

660. Further, the IACtHR in the *Saramaka* decision, concerning development projects touching on indigenous property rights, found:

"*regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramaka, but also to obtain their free, prior, and informed consent, according to their customs and traditions*."[1012]

661. A more recent UN HRC decision in *Poma Poma v Peru* is also instructive. In that case the author and her children, who were descendants of the Aymara people, owned an alpaca farm on which they raised alpacas, llamas and other smaller animals in accordance with traditional customs. That activity was their

[1009] United Nations Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya*, Twelfth Session, 15 July 2009 (A/HRC/12/34), para 47.

[1010] *Mary and Carrie Dann v USA* (2002) Case 11.140, Report No.75/02, Inter-Am. C.H.R., Doc. 5 rev. 1 at 860, para 136.

[1011] *Ibid,* para 140 (emphasis added).

[1012] *Saramaka People v Suriname*, *supra* note 560, para 134.

only means of subsistence and had been part of the Aymara way of life for thousands of years. The farm was situated on the Andean altiplano at 4,000 metres above sea level, where there are only grasslands for grazing and underground springs that bring water to the highland wetlands. The farm covered over 350 hectares of pasture land, part of which is a wetland area that runs along the former course of the river Uchusuma, which supported more than eight families. Over many years the Government diverted the river and authorised the drilling of wells. This caused the gradual drying out of the wetlands, in turn causing huge losses in livestock.[1013]

662. In *Poma Poma*, the Committee, assessing the case against the right to enjoy one's culture in community with others, found that

"*The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them*."[1014]

"*The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community*."[1015]

663. The *Endorois* decision helps to clarify when consultation, consent or both will be required in any set of circumstances. The African Commission was of the view that in respect of

"*any development or investment projects that would have a major impact within the… territory, the State has a duty not only to consult with the community, but*

[1013] *Poma Poma v.Peru*, Comm. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (HRC 2009).

[1014] *Ibid,* para 7.2.

[1015] *Ibid,* para 7.6.

also to obtain their free, prior and informed consent, according to their customs and traditions."[1016]

664. For the present purposes, then, the point at which the consent of the affected community is required is where the project would have a "major impact". While the decision provides no guidance on how to assess the scale of "major", it follows from the tenor of the surrounding international case-law and comment that significant factors will be the impact on the cultural and physical life of the indigenous community in question. This was at the heart of *Poma Poma* and *Saramaka*, as well as *Endorois*.

Advancing development interests

665. The UN Special Rapporteur on Indigenous Peoples covered Articles 23 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples in his 2010 Report to the General Assembly, the former of which provides that "*indigenous peoples have the right to determine and develop priorities and strategies for the development and use of their land or territories and other resources*". He further considered that:

"*the Declaration's guarantees under article 32 are aimed not only at avoiding the harm to indigenous peoples that might result when development projects are carried out without their consent, but also at advancing indigenous peoples' own development interests along with those of the larger society, with the objective that indigenous peoples genuinely influence decision-making regarding the development of the countries in which they live*."[1017]

[1016] *Endorois*, *supra* note 567, para 29.

[1017] United Nations General Assembly, *Situation of human rights and fundamental freedoms of indigenous people, Note by the Secretary-General*, (*Interim Report of James Anaya, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*), Sixth-Fifth Session, 9 August 2010 (A/65/264), para 28.

666. The right to development, on this impression, is also a *positive* right, a proposition that accords with the plain language of the DRD which places the "human person [as] the central *subject* of development".[1018]

667. On the face of the DRD and the Declaration on the Rights of Indigenous Peoples, it is not clear what form this type of positive participation ought to take. However, that said, Article 18 of the Indigenous Peoples Declaration suggests that:

"Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions." (emphasis added)

668. In addition, Article 19, dealing with consultation and cooperation suggests that:

"*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them*." (emphasis added)

669. Article 23, dealing specifically with the right to development is clear that:

"*Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."* (emphasis added)

[1018] See Article 2(1) DRD (emphasis added)

670. The upshot is that under these Declarations, in contrast to the position of other non-indigenous groups, there is at least some clarity in respect of what a positive right to participate in, and to shape, development means.

Violation of the Ogiek's Right to Development

671. The principal violation in the instant case is located in a failure to consult and to obtain consent from the Ogiek.[1019] In particular, the failure to consult with the Ogiek before the institution of environmental sustainability mechanisms in the Mau Forest and before the evictions were ordered demonstrates a failure to support the Ogiek's right to development. [1020]

672. Focusing on sustainability, Ioannis Vrailas, Deputy Head of the Delegation of the European Union to the United Nations, stated, at the UN Permanent Forum on Indigenous Issues in May 2012, that *"[m]any indigenous peoples are disproportionally affected by biodiversity loss and climate change, as many communities depend on some of the most fragile and vulnerable ecosystems*." He further expressed "*deep concern regarding the threats of climate change to the very survival of many indigenous peoples and its negative impacts on traditional lifestyles and cultures*."[1021]

[1019] See the Affidavit of Christopher Kipkones *supra* note 118, para 17; the Affidavit of Francis Maritim *supra* note 368, para 8; and the Affidavit of Daniel Leshao, *supra* note 57, at para 15; see also Film Evidence taken from Ogiek communities and transcript, *supra* note 22

[1020] Furthermore, the Ogiek are not able to financially benefit from the activities taking place in these areas. See United Nations General Assembly, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Sixty-Second Session, 21 August 2007 (A/62/286), para 17.

[1021] European Union Statement by H.E. Mr Ioannis Vrailas, Deputy Head of the Delegation of the European Union to the United Nations, at the United Nations Economic and Social Council Permanent Forum on Indigenous Issues, *Item 3: Open dialogue (Governments, indigenous peoples' organizations, United Nations agencies)*, 8 May 2012, available at: http://www.eu-un.europa.eu/articles/en/article_12153_en.htm.

673. Accordingly, rather than finding their rights and interests indiscriminately subordinated to the perceived 'public good' of environmental sustainability, the Ogiek's right to participate in development could have allowed them the opportunity to utilise their traditional knowledge in pursuit of sustainability, while continuing to reside in their traditional lands. James Anaya, Special Rapporteur, has recorded that enhancing indigenous self-determination in the development process includes "*enhancing indigenous education and skills capacity in relevant areas."*[1022] He recognised that "*[i]ndigenous peoples are rich in valuable knowledge, but are often lacking in the skills and levels of education necessary to themselves engage and participate in the various components of development programmes*".[1023] To this extent, the Kenyan authorities should have opened for consultation with the Ogiek the question of engaging them as partners in proposed sustainability projects.

674. In this respect, the UN Special Rapporteur has stated in relation to the treatment of the Ogiek by the Respondent Government, recognized that States bear the burden of creating conditions favourable to people's development[1024], and went on to state that

"*The Government does not appear to be developing a plan for the Mau Forest Complex that enables the Ogiek to become active participants and direct beneficiaries of natural conservation and economic development, including the tourist potential of the Mau Forest Complex."*[1025]

675. Furthermore, given the gravity of the designation of the Mau Forest Complex as a sustainability zone and considering the subsequent evictions, the

[1022] United Nations Permanent Forum on Indigenous Issues, *Statement by Professor James Anaya, Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people*, Ninth Session, 22 April 2010 (New York), p. 6.

[1023] *Ibid*

[1024] *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, supra* note 8*,* para 265.

[1025] *Ibid,* para 266.

Respondent Government was under a duty to obtain the prior, informed consent of all of the Ogiek before taking any decision about their evictions or indeed the development of the Mau Forest, for example, through the granting of logging concessions. There were no consultations or discussions between Ogiek representatives and the Government before such actions were taken, and neither was the consent of the any of the Ogiek sought.

Conclusion

676. In sum, the critical failure by the Respondent Government to consult with or seek consent from the Ogiek community about their shared cultural, economic and social life represents a violation of Article 22.

15. REMEDIES AND REPARATION

677. The Ogiek, both individually and as a collective people, have suffered major violations of their rights under Articles 1, 2, 4, 8, 14, 17, 21 and 22 of the African Charter. The African Commission accordingly seeks a declaration that the Republic of Kenya is in violation of all of these articles.

678. In addition, it is submitted that the Ogiek are entitled to full reparations for the violations suffered, as set out further below.

The Right to Reparation

679. In what has become a guiding statement of principle, the ICJ has articulated that reparation must, as far as possible, wipe out all the consequences of the illegal act, and re-establish the situation which would, in all probability, have existed if the act had not been committed.[1026]

680. The UN Basic Principles and Guidelines stipulate that any award of reparation should be *'[a]dequate, effective and prompt and intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered.'*[1027]

681. The African Charter does not contain a specific article on the obligation of States to afford reparation in the event of a breach of the rights enshrined in the African Charter. However such a right has been implied by the African

[1026] Permanent Court of International Justice, Fourteenth (Ordinary) Session, *The Factory at Chorzow* (Claim for Indemnity) (The Merits), *Germany v Poland*, Judgment No.13, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13, para. 73.

[1027] United Nations General Assembly Resolution 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law***,** adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005**,** principle IX.

Commission and other sub-regional mechanisms in their interpretation of the African Charter.[1028] Further, the African Court has an express mandate allowing it to award reparation, as follows:

"If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."[1029]

682. It is a common misconception that reparation is synonymous with compensation. As human rights mechanisms request or recommend States to take certain steps to redress the violations found, it is therefore important that their reparation awards go beyond compensation awards, and include other forms of reparation, including, as appropriate, restitution, rehabilitation, satisfaction and guarantees of non-repetition.[1030]

683. The types of reparation appropriate to remedy the harm suffered will differ depending on the individual circumstances.[1031] An examination of the Ogiek

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[1028] Article 1 of the African Charter obliges State parties to '*recognise the rights, duties and freedoms enshrined in the Charter and… to adopt legislative or other measures to give effect to them*.' Further, Article 7 (1) (a) of the African Charter provides that every individual shall have the right to have his cause heard, including '*a right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by convictions, laws, regulations and customs in force.'*

[1029] See the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, Article 27(1); hereinafter, "The Protocol Establishing the Court"

[1030] See United Nations General Assembly Resolution 60/147, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law***,** adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005**,** para 18.

[1031] The African Commission has made it clear that a government inherits the previous government's international obligations, including the responsibility for the previous government's mismanagement. In this way, even if the present government that did not commit the human rights abuses complained of, it is responsible for the reparation of those

situation and those remedies which would be most suitable to their situation now follows.[1032]

Restitution

684. Restitution seeks to restore the victim to the situation that that would have existed had the crime not happened. This may include restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.[1033]

685. Article 21(2) of the African Charter provides:

"In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."

686. The restoration of property unlawfully expropriated is also a common form of reparation in the jurisprudence of the African Commission. In the *Endorois* decision, for example, Kenya was urged to 'recognise the rights of ownership to the Endorois and restitute Endorois ancestral land'.[1034]

687. Similarly, in cases of violations of indigenous communities' rights to property, natural resources, equality, and right to life before the Inter-American Commission and Court, the Respondent government has frequently been

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abuses; see for example, *OMCT & Association Internationale des Juristes Democrates v Rwanda* (1996) ACHPR, Communication 27/89

[1032] See for example, Affidavits of Jimmy Patiat Seina *supra* note 10, A Tulwet Lemisi *supra* note 9 and Daniel Kobei, *supra* note 53, for statements on the types of reparations which would be acceptable to the Ogiek

[1033] See UN Basic Principles and Guidelines, *supra* note 1030, para 19

[1034] See for example, *Endorois*, *supra* note 567, which urged Kenya to 'recognise the rights of ownership to the Endorois and restitute Endorois ancestral land: dispositif, point (a) .

required to identify and restitute the community's ancestral and communally owned land.[1035]

688. Specifically, in the case of the Maya community of Toledo, the Belize Government was ordered to both

"1. Adopt in its domestic law, and through fully informed consultations with the Maya people, the legislative, administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which the Maya people have a communal property right, in accordance with their customary land use practices, and without detriment to other indigenous communities.

2. Carry out the measures to delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the Maya people without detriment to other indigenous communities and, until those measures have been carried out, abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people."[1036]

689. Accordingly, in light of the spoliation of Ogiek land and the corresponding violations of Article 21 set out in paragraphs 595-618 above, it is submitted that the Ogiek are entitled to both the recovery of their ancestral land, through a delimiting, demarcation and titling process conducted by the relevant Government authorities, including but not limited to the Ministry of Lands, National Land Commission and Office of the Attorney General, and also adequate compensation (the latter issue is addressed in paragraphs 690-696

[1035] See for example, *Maya indigenous community of the Toledo District v Belize*, at note 737 *supra*, para 197; *Moiwana Community v Suriname* at note 737 *supra*, para 23; *Yakye Axa Indigenous Community v Paraguay*, at note 678 *supra*, para 242; *Sawhoyamaxa Indigenous Community v Paraguay*, at note 614 *supra*, para 248; *Saramaka People v Suriname*, at note 560 *supra*; *Xakmok Kasek Indigenous Community v Paraguay,* at note 684 *supra*, para 337.

[1036] *Maya indigenous community of the Toledo District v Belize*, at note 737 *supra*, para 197;

below). Given the importance of ancestral land to Ogiek religion and culture, only the restitution of their land will allow them to fully enjoy their rights.

Compensation

690. According to the UN Basic Principles and Guidelines, compensation should be awarded for '*any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case… such as: (i) physical or mental harm; (ii) lost opportunities such as employment, education or social benefits; (iii) material damages including loss of earning potential; (iv) moral damage; and (v) any costs incurred for legal assistance, medical services, and psychological and social services.'*[1037]

691. Whilst a range of international and regional human rights treaties and declarative instruments contain an explicit right to compensation for human rights violations, only the Inter-American Court and the European Court have specified the amount of compensation.[1038] The ICJ and the ECOWAS Community Court of Justice, though not human rights courts, have also made specific monetary awards for material and moral damages.

692. Although the amount of compensation may differ from country to country and from mechanism to mechanism, the UN Human Rights Committee has stated in several cases that States are under an obligation to provide appropriate compensation, which excludes purely 'symbolic' amounts of compensation.[1039]

[1037] See UN Basic Principles and Guidelines, *supra* note 1030; see also United Nations Committee Against Torture, *General Comment No. 3*, 13 December 2012 (CAT/C/GC/3), regarding the UN Convention Against Torture which reiterates that compensation should be awarded for pecuniary and non-pecuniary damages.

[1038] Note that the European Court's primary remedy in the case of a violation is a declaration that there has been such a violation. Awards under Article 41 of the Convention are therefore usually low.

[1039] See for instance Human Rights Committee, *Bozize v Central African Republic*, (1994) Communication No. 449/1990, (CCPR/C/50/D/428/1990); *Mojica v Dominican Republic*,

693. In the *Endorois* decision, the African Commission ordered the Government of Kenya to "pay adequate compensation to the community for all the loss suffered",[1040] in relation to the expropriation of Endorois ancestral lands, their forced evictions, and the Government's refusal to allow the community to use these lands in any meaningful way. It also required that the Government of Kenya "pay royalties to the Endorois from existing economic activities[1041] and ensure they benefit from employment opportunities within the [Lake Bogoria] Game Reserve".[1042]

694. However, the African Commission did not specify how much compensation should be awarded to the Endorois, and in fact – similar to the practice of the Inter-American Commission and the UN Human Rights Committee, does not usually specify loss in monetary terms. Instead, in some cases, it has recommended that "*the amount of the compensation be determined according to Congolese legislation.'*[1043] It is submitted that the Court should require the principles of equity and a flexible standard of proof to be applied in the determination of appropriate compensation.[1044]

(1994) Communication No.449/1991 (CCPR/C/51/D/449/1991); *Griffin v Spain*, (1995) Communication No. 493/1992 (CCPR/C/53/D/493/1992).

[1040] *Endorois*, *supra* note 567, dispositif, point (c)

[1041] Ruby mining and other activities

[1042] *Endorois*, *supra* note 567, dispositif, point (d)

[1043] *Antoine Bissangou v Republic of Congo*, (2006), ACHPR, Communication 253/2002, para.80.

[1044] Where insufficient evidence exists as to the (value of the) lost property, the practice of human rights mechanisms, particularly the European and Inter-American courts, as well as inter-State courts such as the ICJ, suggests that awards are nevertheless made on the basis of equity, provided that there is a causal nexus between the damage and the violation. See for instance, ECtHR, *Ipek v Turkey*, Judgment of 17 February 2004, para. 227; IACtHR, *Chaparro Álvarez and Lapo Íñiguez v. Ecuador,* Judgment of 21 November 2007, paras.232, 240, 242; ICJ, Ahmadou Sadio Diallo (*Republic of Guinea v Democratic Republic of the Congo*), Judgment (Compensation), 19 June 2012, para.24.

695. In the ICJ case of *DRC v Uganda,* the Court ordered that it would allow the State Parties to evaluate the level of compensation and, failing agreement, that the Court would determine this value at a subsequent phase of the proceedings.[1045] Therefore, the Court clearly allowed the parties room for good faith bilateral negotiations including the possibility of appointing an independent assessor to assess compensation levels.

696. In much of the relevant jurisprudence decided by the Inter-American Court, the Court has specified the amount of the compensation for both pecuniary and non-pecuniary damages, and additionally provided for a specific award to be held as a 'community development fund' for the benefit of the community, directed to health, housing, educational, agricultural and other purposes.[1046]

Satisfaction and guarantees of non-repetition

697. Pursuant to the UN Basic Principles and Guidelines, satisfaction and guarantees of non-repetition include such individual and collective elements as revelation of the truth, public acknowledgment of the facts and acceptance of responsibility, prosecution of the perpetrators, search for the disappeared and identification of remains, the restoration of the dignity of victims through commemoration and other means, activities aimed at remembrance and education and at preventing the recurrence of similar crimes.[1047]

698. The African Commission has issued a range of remedies to achieve such aims, including rehabilitation of the economic and social infrastructure,[1048] and

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[1045] *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005, p. 168, para 260.

[1046] See for example, *Maya Indigenous Community of the Toledo District v Belize*, *supra* at note 737, para 197; *Moiwana Community v Suriname supra* at note 737, para 23; *Yakye Axa Indigenous Community v Paraguay*, *supra* at note 678, para 242; *Sawhoyamaxa Indigenous Community v Paraguay*, *supra* at note 614, para 248; *Saramaka v Suriname*, *supra* at note 560; *Xakmok Kasek Indigenous Community v Paraguay, supra* at note 684, para 337.

[1047] See UN Basic Principles and Guidelines, *supra* note 1030, paras. 22 and 23

[1048] *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) Communications 279/03-296/05, para 228(e).

establishing a National Reconciliation Forum to address long-term sources of conflict.[1049] The Inter-American Commission and Court has similarly ordered states to carry out a public ceremony recognising its public international responsibility and to issue an apology,[1050] to conduct a public act of acknowledgment of its responsibility within one year of the date of the judgment,[1051] and to publicise the official summary of the judgment through a broadcaster with wide coverage in the community's region.[1052]

699. It is submitted that all of these steps would go some considerable way towards providing reparation for the Ogiek community for the violations suffered at the hands of the Respondent Government.

Conclusion

700. Accordingly it is submitted that the Court should make the following orders against the Respondent Government, by way of a separate judgment of the Court pursuant to Rule 63 of the Court rules, to provide reparation to the Ogiek[1053]:

(i) **Restitution:**[1054] of Ogiek ancestral land, via (a) the adoption in its domestic law, and through fully informed consultations with the Ogiek, the legislative, administrative, and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which the Ogiek have a communal property right, in accordance with their customary land use practices, and without detriment to other indigenous communities; and (b) the conducting of measures to delimit, demarcate

[1049] *Ibid*, para 228(f)

[1050] *Moiwana v Suriname*, *supra* at note 737, at para 23

[1051] *Yakye Axa Indigenous Community v Paraguay*, at note 678 *supra*, para 242

[1052] *Xakmok Kasek Indigenous Community v Paraguay,* at note 684 *supra*, para 337.

[1053] This list is non-exhaustive and the Court is respectfully invited to supplement these methods of reparation with additional requirements

[1054] This reparation is intended to address violations of Articles 14 and 21 in particular

and title or otherwise clarify and protect the corresponding lands of the Ogiek without detriment to other indigenous communities and, until those measures have been carried out, for the Respondent Government to abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Ogiek, and (c) such land to be returned to the Ogiek on with common title within each location, for it to use at it sees fit;

(ii) **Compensation:**[1055] for all the damage the Ogiek have suffered, to include (a) the appointment of an independent assessor to decide upon the appropriate level of compensation, and to determine the manner in which and to whom such compensation should be paid; such appointment to be agreed upon by the parties; (b) payment of pecuniary damages to reflect the loss of their property, development and natural resources; (c) payment of non-pecuniary damages, to include the loss of their freedom to practise their religion and culture, and the threat to their livelihood; (d) the establishment of a community development fund for the benefit of the Ogiek, directed to health, housing, educational, agricultural and any other relevant purposes; (e) the payment of royalties from existing economic activities in the Mau Forest and to ensure the Ogiek benefit from any employment opportunities within the Mau;

(iii) **Development:**[1056] To adopt legislative, administrative and other measures to recognise and ensure the right of the Ogiek to be effectively consulted, in accordance with their traditions and customs and/or with the right to give or withhold their free, prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land within the Mau Forest, and implement adequate safeguards to minimise the damaging effects such projects may have upon the social, economic and cultural survival of the Ogiek;

[1055] This reparation is intended to address violations of Articles 1, 2, 4, 8, 14, 17 and 21 in particular

[1056] This reparation is intended to address violation of Article 22 in particular

(iv) A full **apology**[1057] to be issued publicly by the Respondent Government:

(v) A **public monument**[1058] acknowledging the violation of Ogiek rights to be erected within the Mau Forest by the Respondent Government, in a place of significant importance to the Ogiek and chosen by them;

(vi) Full **legal and political recognition**[1059] of the Ogiek as a people of Kenya, including but not limited to the recognition of the Ogiek language and Ogiek cultural and religious practices; provision of health, social and education services for the Ogiek; and the enacting of positive steps to ensure national and local political representation of the Ogiek;

(vii) The legislative processes specified in (i) and (iii) above to be completed within one year of the date of the judgment;

(viii) The demarcation process specified in (i) above to be completed within three years of the date of the judgment;

(ix) The independent assessor on compensation to be appointed within three months of the judgment; the amount of compensation, royalties and the community development fund to be agreed upon within one year, and payment to be effected within eighteen months;

(x) The apology to be issued within three months of the date of the judgment;

(xi) The monument to be erected within six months of the date of the judgment;

(xii) For the African Court to avail its good offices to assist the parties in the implementation of these remedies, including requiring a three monthly report from the Respondent Government on the process of implementation - such report to be provided to and commented upon by the African Commission -until the orders as provided in the judgment are fully met to the satisfaction of the African Court, the African Commission, the African Union Commission and/or any other organ of the African Union which the Court and Commission shall deem appropriate;

(xiii) For the Council of Ministers to monitor and provide guidance to the African Court on execution of the judgment on behalf of the Assembly of

[1057] This reparation is intended to address all the violations complained of

[1058] This reparation is intended to address all the violations complained of

[1059] This reparation is intended to address violations of Articles 1, 2, 4, 8 and 17 in particular

Heads of State and Government, in accordance with Article 29(2) of the Protocol Establishing the African Court, and to ensure States Parties compliance with Article 30 of the same Protocol.