MRG ORAL INTERVENTION

Thank you Honourable Justice President and Honourable Justices of the Court.

I am Lucy Claridge, Head of Law at Minority Rights Group International, one of the original Complainants. Pursuant to Rule 29(3)(c) of the Rules of Court, and on behalf of the original Complainants, Minority Rights Group International, Ogiek Peoples' Development Programme and the Centre for Minority Rights Development, and indeed on behalf of all 30,000 Ogiek of Kenya's Mau Forest, representatives of whom are seated here today, I have the honour of addressing you.

The Ogiek are some of Africa's last remaining forest dwellers. Traditionally honey-gatherers, they survive mainly on wild fruits and roots, game hunting and traditional bee-keeping. The Ogiek have lived since time immemorial in Kenya's Mau Forest, and are friendly to the environment on which they depend. They have a unique way of life well-adapted to the forest. To them, the Mau Forest is a home, school, cultural identity and way of life that gives them pride and destiny. In fact, the term 'Ogiek' literally means 'caretaker of all plants and wild animals'. Unsurprisingly, the survival of the indigenous Mau Forest is therefore inextricably linked with the survival of the Ogiek.

Since independence, and indeed prior to it, the Ogiek have been routinely subjected to arbitrary forced evictions from their ancestral land by the Respondent Government, without consultation or compensation. The Ogiek's rights over their traditionally owned lands have been systematically denied and ignored. The Respondent Government has allocated land to third parties, including political allies[1], and permitted substantial commercial logging to take place, without sharing any of the benefits with the Ogiek. The eviction of the Ogiek from their ancestral land and the refusal to allow them access to their spiritual home has prevented the Ogiek from practising their traditional cultural and religious practices. The culmination of all these actions has resulted in the Ogiek being prevented from practising their traditional hunter-gatherer way of life, thus threatening their very existence.

Honourable judges, these claims have of course already been amply illustrated by the Applicant in the written pleadings already before the Court and will likely be argued in their oral submissions. The purpose of this intervention is instead to draw the Court's attention to some concerning recent developments which, it is submitted, are symptomatic of the Respondent Government's attitude to the Ogiek.

[1] See eg MFTF Report and TJRC findings - paras 108, 116-117 and 175 of Merits submissions.

Honourable Judges, as you are more than aware, on 15 March 2013, the Court issued a provisional measures order against the Government of Kenya.[2] The Court considered that "there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Ogiek" and accordingly ordered the Respondent Government firstly, to reinstate the restrictions it had imposed on land transactions in the Mau Forest ; and secondly, to refrain from any act or thing that would or might irreparably prejudice the main application before the Court, until the final determination of the application.

The original Complainants emphasise here that this Order mirrors the provisional measures order already issued by the Applicant on 23 November 2009, when the case was pending before it. The Respondent Government's repeated violation of this order led to the case being referred to the Honourable Court.

Honourable Judges, it is with grave concern that I now inform the Court that the Respondent Government has consistently and repeatedly failed to comply with the Court's provisional measures order. The Applicant has already provided the Court with multiple examples of this non-compliance and indeed, in February this year, this non-compliance was the subject of an interlocutory application to the Honourable Court by the Applicant. However, I wish, if I may, in this intervention to draw the Court's particular attention to the following specific instances.

Firstly, Ogiek people continue to be unlawfully evicted from their land with the complicity of Government officials, and are often subsequently charged with trespass on their own land and/or experience arbitrary harassment and detention. Although difficult to gather comprehensive statistics, Minority Rights Group International and Ogiek Peoples' Development Programme have received evidence of at least 5 instances of this occurring in the latter half of 2013. We have received reports that this is particularly prevalent in Nakuru County, with the involvement of the Nakuru District Land Registry, the District Commissioner of Njoro, and the Nessuit Assistant Chief. Forced evictions are often based on a directive from the District Commissioner's office who will collaborate with the police to carry out evictions, having been contacted by someone who wishes to possess the land. If the Ogiek victim resists or questions the move, the police then arrest them and he or she is charged with creating a disturbance, malicious damages, issuing threats or resisting arrest. He or she may also be charged with trespass, erecting illegal structures or forcible detainer. These charges require the victim to post bonds of between 5,000 and 20,000 KES (approximately 55 to 220 USD), which is far beyond the capacity of most Ogiek to pay. Courts in most instances require a title deed if the victim cannot raise this amount, but most Ogiek were never given title deeds by

[2] ACHPR v Kenya, Application 006/12, Order of Provisional Measures, 15 March 2013

the Government and so are held on remand. Police and local administrators may then demolish the Ogiek victim's property and the new owner erect structures on the victim's land. Such actions are clearly in contravention of the Court's Order.

In addition to these concerning events, a number of Ogiek activists have suffered violent physical attacks against them because of their advocacy and other work regarding the Ogiek land eviction issue. In February 2011, Mr. James Rana, an Ogiek land activist living in the Ngongogeri area of Nessuit location, who has given written witness evidence to the Court in this application and is in fact presently seated in the public gallery, was brutally attacked in his home, in the middle of the night. Around the same time, an Ogiek woman also from Nessuit, Ms. Rosaline Kuresoi - the sister of witness Patrick Kuresoi, who has given evidence before this Court today - was assaulted on her way home from the Njoro market. The latter attack was particularly worrying as Ms Kuresoi was pregnant at the time. Both victims had been objecting to attempts by land speculators to forcibly take over Ogiek ancestral land in Ngongogeri. In January 2014, Mr Rana, his family and Mr Patrick Kuresoi were again subjected to threats, intimidation, harassment and trespass on their property when defending themselves against those who wished to take Ogiek land. These attacks appear to be an attempt to silence Ogiek activists in order to prevent them from protesting against the eviction from their ancestral land. Although complaints have been lodged with the local police, they have not been fully investigated.

Further, despite the Honourable Courts' clear order that the Respondent Government should "refrain from any act or thing that would or might irreparably prejudice the main application before the Court, until the final determination of the said application", logging continues unabated in the Mau Forest. In particular, the Kenya Forest Service - a Government body - has permitted logging in the Londiani area of the Mau Forest. The Court has already been provided with photographs showing non-Ogiek individuals extracting logs from Sorget, where Ogiek have long made claims for settlement. Logging causes irreparable damage to the Ogiek community's way of life. The Ogiek people depend upon the trees in the Mau Forest for their livelihood and the preservation of their culture. Logging also contributes to the overall environmental degradation of the Mau Forest, damaging other natural resources on which the Ogiek depend. Londiani Ogiek feel that the Respondent Government is allowing logging in order to destroy Ogiek resources – this way, if Ogiek people are eventually settled, their land will have little value.

In addition to the logging, the Respondent Government has recently entered into an extensive reforestation and restoration project - via its agencies, the Kenya Forestry Service and the Ministry of Finance - within the Mau Forest, without consulting the Ogiek. This project has been developed under the Clean Development Mechanism established by the Kyoto Protocol; that is, it is an emission-reduction project for which the Respondent Government is very likely to be receiving some international investment in return for carbon credits. The project will include commercial plantation which will involve others being given rights over Ogiek land. In addition, it appears from the documentation that the project will involve the planting of mainly non-indigenous trees, such as cupress and eucalyptus, which have been selected because they are fast-growing. These trees will not maintain the Mau's ecosystem nor will they support the Ogiek's traditional way of life, since they do not produce the flowers and therefore nectar required for honey production.

It is quite clear from the relevant documentation relating to this reforestation and restoration programme - copies of which have already been provided to the Honourable Court - that authorities at the Respondent Government were made aware of the Ogiek's presence and rights over the land in the Mau Forest, yet the Ogiek were not consulted about this project in any way, shape or form. International law requires 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. It also requires a guarantee from the state that the Ogiek will receive a reasonable benefit from any such plan within their territory. The state must also 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.[1] It is quite clear that the Respondent Government has not met these requirements in the case of this restoration and reforestation project, as far as the Ogiek's rights are concerned. Of additional and significant concern is the Government's assertion in the project documentation that there is no legal dispute over land tenure rights - which is entirely untrue, given the current application before the Court and the number of cases challenging the denial of Ogiek land rights which have been lodged and remain pending before Kenya's domestic courts.

Finally, despite stating in its response to the Court dated 30 April 2013 that restrictions on land sales in the Mau Forest would be reinstated, on 7 September 2013, the President of Kenya announced during a public meeting at Kuresoi South, Nakuru District, that he intended to remove the reinstated ban on land transactions in the Mau Forest. This announcement was widely publicised in national media. The President stated that this would be lifted so that internally displaced people in the areas and Kuresoi residents could conduct land transactions in the Mau Forest. Although the President

has not yet acted on his stated intentions, making such a public statement is a clear indication of his attitude to both compliance with the provisional measures order and the Ogiek's land rights in general.

The Court has previously clarified, in its 2013 interim report to the Executive Council on Libya's non-compliance with such an order, that a provisional measures order "is as binding as any judgment of the Court" and failure to report in compliance with that Order "is the same as failure to comply with a judgment of the Court". The Court noted in its 2013 report that "the failure of Libya not to comply with the Order of the Court threatens the very foundation of the existence of the Court as a judicial arm of the African Union. It erodes public confidence in our judicial system and mobilises negative public precedent about the ability of the Court to protect human rights on the continent.... and puts into question the credible utility of..[the Court]". It is submitted that the same principles should apply to the Respondent Government's actions on this occasion.

Further, it is humbly submitted on behalf of the original Complainants and the Ogiek that these flagrant violations of the Court's provisional measures order are indicative of the Government's attitude towards protecting and respecting the rights of the Ogiek and indeed the rights of other indigenous peoples in Kenya. The Honourable Judges will no doubt already be aware of the African Commission's 2010 decision in the Endorois case against Kenya, which requires restitution of ancestral land and the payment of compensation and royalties to the Endorois people, and which, nearly 5 years later, the Government still has yet to implement. In addition, in January 2014, the Respondent Government, via its agents, forcibly evicted thousands of Sengwer people (another indigenous people within the Respondent State territory) from their homes in the Embobut Forest, despite a court injunction clearly forbidding the eviction. Sengwer also number some 30,000 members.

Honourable Judge President, Honourable Judges: in light of these statements, and on behalf of the original Complainants and the Mau Ogiek, I now wish to raise the issue of remedies and reparations, a matter which I know is close to the Ogiek's hearts.

As the Applicant has already stated, the Ogiek - both individually, and as a collective people – claim to have suffered major violations of their rights under Articles 1, 2, 4, 8, 14, 17, 21 and 22 of the African Charter of Human and Peoples' Rights. Should the Court find in their favour, it is respectfully submitted that the Ogiek are accordingly entitled to full reparations for these violations.

It is a matter of established international law and jurisprudence 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(s) had not been committed. Indeed, the Court has already recognised in *Tanganyika Law Society & LHRC v Tanzania*[3] that any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation. It is submitted on behalf of the original Complainants and the Ogiek themselves that, due to the serious nature of the violations against the Ogiek, adequate reparation must necessarily include restitution and compensation, as well as satisfaction and guarantees of non-repetition.

Firstly, in relation to restitution, Article 21(2) of the African Charter 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." In cases of violations of indigenous communities' rights to property, natural resources, equality and the right to life before the Inter-American Court and Commission, the Respondent State has frequently been required to identify and restitute the community's ancestral and communally owned land. It is respectfully submitted, Honourable Judges, that restitution is appropriate to the circumstances of the Ogiek now before you and expert evidence has been presented to show that this would indeed be possible under Kenyan legislation. Restitution is the only way that the Ogiek's way of life can be preserved.

With regards to compensation, the UN Basic Principles and Guidelines provide that 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'. In addition, many of the international and regional human rights treaties and declarative instruments contain an explicit right to compensation for human rights violations, and the Inter-American Court of Human Rights, the European Court of Human Rights, the International Court of Justice and the ECOWAS Community Court of Justice have all made specific monetary awards for material *and* moral damages. Further, in the *Endorois* decision, the African Commission ordered the Government of Kenya to "pay adequate compensation to the community for all loss suffered" in relation to the expropriation of Endorois ancestral lands, their forced eviction, and the Government's refusal to allow the community to use the land in any

[3] Para 27

meaningful way. It also required that the Government of Kenya "pay royalties to the Endorois from existing economic activities and ensure they benefit from employment opportunities within the [Lake Bogoria] Game Reserve". Honourable Judges, it is humbly submitted that these principles clearly apply to the Ogiek of the Mau.

In addition to restitution and compensation, the Ogiek seek a number of other remedies, including the adoption of legislative and other measures ensuring their right to be effectively consulted, the issuance of a full and public apology, the erection of a public monument acknowledging the violation of Ogiek rights, and full recognition of the Ogiek as an indigenous people of Kenya.

Honourable judges, it is respectfully submitted that, given the importance of ancestral land to Ogiek religion, culture, way of life and indeed their very existence, restitution of their land as well as the payment of pecuniary and non-pecuniary damages and the issuing of the various guarantees of non-repetition already brought to the Court's attention, are the only way of providing appropriate reparation for the breach of Ogiek rights, given these violations are both numerous and life-threatening.[4]

Honourable judges, should the Ogiek's claims before this Court be successful, it is very likely that the Respondent Government will require considerable guidance and monitoring from the Court and other African Union bodies in implementing any findings in the Ogiek's favour. This is abundantly evident from the Respondent Government's failure to implement the African Commission's *Endorois* decision as well as the failure to comply with the Court's provisional measures order in the instant case. In the original Complainants' view, implementation of both these rulings has been delayed both due to lack of political will and also a lack of effective guidance on how implementation can practically take place. Restitution, compensation and other initiatives require and deserve facilitation, along with technical assistance on particular aspects. The original Complainants therefore respectfully invite the Court to take a central role in monitoring the implementation of any judgment in the Ogiek's favour.

Conclusion:

Honourable Judge President, Honourable Judges, in conclusion, the original Complainants are deeply concerned that, as a direct result of the Ogiek's repeated and arbitrary forced eviction from their

[4] Need to emphasise causal nexus between situation of Ogiek and Government actions (in light of *Tanganyika Law Society & LHRC v Tanzania* ruling that finding of a violation is sufficient just satisfaction).

ancestral land by the Respondent Government, without their free, prior and informed consent, as well as the routine discrimination suffered by the Ogiek, their livelihoods are seriously threatened. Events on the ground are already causing irreparable harm to the Ogiek. Ogiek cultural life and hunter-gatherer activities are being destroyed, never to be resumed. The Ogiek people's very identity and survival as an indigenous people is under threat. This is a situation which must be urgently resolved.

I thank you.