

**IN THE AFRICAN COMMISSION ON HUMAN & PEOPLES' RIGHTS**

**Communication no 381/09**

**CEMIRIDE, MINORITY RIGHTS GROUP INTERNATIONAL &  
OGIEK PEOPLES DEVELOPMENT PROGRAMME  
(ON BEHALF OF THE OGIEK COMMUNITY)**

**V**

**REPUBLIC OF KENYA**

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**COMPLAINANTS' SUBMISSIONS ON ADMISSIBILITY**

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## **I. INTRODUCTION**

1. The Centre for Minority Rights Development (CEMIRIDE), Minority Rights Group International (MRG) and the Ogiek Peoples Development Programme (OPDP) hereby submit their official Communication on admissibility to the African Commission on Human and Peoples Rights (the Commission) against the Republic of Kenya, in accordance with Article 56 of the African Charter for Human and Peoples Rights (the Charter).<sup>1</sup> This Communication is sent by way of complement to the Letter of Seizure forwarded for the Honourable Commission's attention on 13 November 2009 and following the Commission's confirmation on 26 November 2009 that it had been seized of the matter.

### **A. The Complainants**

2. The Letter of Seizure submitted to the Commission on 13 November 2009 indicated that the author of the communication was CEMIRIDE, on behalf of the Ogiek community. However, since submission of the letter of intent, two further relevant non-governmental organisations, MRG and OPDP, have been requested by the Ogiek community to co-author the communication, and therefore have respectfully been included as Complainants. Full details of these organisations are set out at paragraphs 3-5 below, whilst submissions in relation to their standing as Complainants are set out at paragraphs 74-78 below.
3. CEMIRIDE is a non-governmental organisation registered in the Republic of Kenya working to secure the rights of minority and indigenous communities in the country and within the African region. It is engaged in research, advocacy on public policy and legal intervention and, in this capacity, has been working with the Ogiek community to give their issue visibility both nationally and internationally. CEMIRIDE has observer status at the African Commission on Human and Peoples Rights. The Ogiek community (on behalf of whom this Communication is lodged) has requested that CEMIRIDE seek a further solution to their predicament due to the lack of progress in the various cases in the Kenyan courts.

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<sup>1</sup> The Republic of Kenya ratified the African Charter on Human and Peoples Rights on 23 January 1992.

4. MRG is an international non-governmental organisation working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. MRG works with over 150 organisations in nearly 50 countries. MRG has consultative status with the United Nations Economic and Social Council (ECOSOC) and observer status with the African Commission on Human and Peoples Rights. The Ogiek community (on behalf of whom this Communication is lodged) has requested that MRG assist them by seeking a further solution to their predicament due to the lack of progress in the various cases in the Kenyan courts.
  
5. OPDP is a non-governmental organisation registered in Kenya in 2001. It was formed by typical Ogiek elders, opinion leaders, farmers and professionals after long land historical injustices that deprived the Ogiek community of its rights as Kenyan citizens. Its aim is to promote and protect Ogiek culture, land, language, environment, and human rights. In this context, OPDP has been working with the Ogiek community to give their issue visibility both nationally and internationally. The Ogiek community (on behalf of whom this Communication is lodged) has requested that OPDP assist them to seek a further solution to their predicament due to the lack of progress in the various cases in the Kenyan courts.

## **B. Alleged Violations**

6. The Ogiek community, which has suffered displacement from their ancestral lands following the Government's gazetting and subsequent de-gazetting and excision of their land, unlawful allocation of the land to other non-Ogiek individuals, and continuous threats of further eviction, alleges violations of Articles 2, 4, 8<sup>2</sup>, 14, 17(2), 17(3), 21<sup>3</sup> and 22<sup>4</sup> of the Charter. Further, through its

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<sup>2</sup> Originally, the religious significance attached to Ogiek ancestral land was framed within the broader socio-cultural scope of Articles 17(2) and 17(3). However, upon further consultation with the Ogiek people, the community has expressed its wish that freedom of religion is submitted as a self-standing violation.

<sup>3</sup> Originally, the eviction and further threatened eviction of the Ogiek from their ancestral land was framed within the broader scope of Article 14, the right to property. However, upon further consultation with the Ogiek, and in light of the current action to restore and rehabilitate the Mau Forest, the community has expressed its wish that their right to free disposition of natural resources is submitted as a self-standing violation.

acts and omissions, the Government of Kenya has violated its general obligations to respect and ensure the above rights and to adopt legislation to give them domestic legal effect. The Ogiek community therefore also claims a violation of Article 1.

## **II. BACKGROUND TO THE COMMUNICATION AND THE ARGUMENTS ON ADMISSIBILITY**

### **A. The Ogiek People**

7. The Ogiek are an indigenous minority ethnic group comprising approximately 20,000 members across Kenya, that live in and around the Mau Forest Complex<sup>5</sup> in central Rift Valley, and in the forests around Mount Elgon in Western Kenya. Approximately 15,000 Ogiek people live within the Mau Forest Complex, concentrated mainly, but not solely, in the following areas: Marioshoni location (Eastern Mau), Nessuit location (Eastern Mau), Sururu (Eastern Mau) Sogoo (Maasai Mau), Nkaroni (Maasai Mau), Kiptungah (Molo), Tertit (Eastern Mau), Tinet area and Saino (South Western Mau), Sasimwani (Maasai Mau), Olopirik (Maasai Mau), Nkareta (Maasai Mau), Olmekenyu (Maasai Mau), Uasin-Gishu (Northern Tinderet), Kipkurere (Northern Tinderet), Ndulungulu (Northern Tinderet), Seregonik (Northern Tinderet) and Tindiret Forest. The remainder of the Ogiek mainly live in the forested areas of Mount Elgon, at Chepkitalea.
  
8. The first mention of the Ogiek in published literature was by W.A. Chandler who noted their unique physical features and thought they were different compared to other tribes<sup>6</sup>, while C.W. Hobley<sup>7</sup> said they reminded him of "Mongolian types". The final conclusion reached by 1974 was that "there is nothing in the traditional

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<sup>4</sup> Originally, the eviction and further threatened eviction of the Ogiek from their ancestral land was framed within the broader scope of Article 14, the right to property. However, upon further consultation with the Ogiek, and in light of the current action to restore and rehabilitate the Mau Forest, the community has expressed its wish that their right to economic, social and cultural development is submitted as a self-standing violation.

<sup>5</sup> The Mau Forest Complex forms the largest closed-canopy forest ecosystem of Kenya, measures approximately 900 square kilometres, and is divided into 22 forest blocks, a map of which is included at Annex 1

<sup>6</sup> W.A. Chandler, 1896, *Through the Jungle and the Desert: Travels in East Africa*, Macmillan, London

<sup>7</sup> C.W. Hobley, 1903, *Notes Concerning the Eldorobbo of Ogiek Man*, 317, 33-4.

Ogiek life of hunting and gathering which would indicate a prior adaptation to a plains environment or to pastoralism or agriculture".<sup>8</sup>

9. Derogatorily referred to as Dorobo by their neighbours, the Ogiek identify themselves as an indigenous community and claim the Mau Forest Complex and Mount Elgon Forest as their cradle land over which they have enjoyed continuous occupation for thousands of years.<sup>9</sup> The term "Ogiek" itself means "the caretaker of all plants and wild animals".<sup>10</sup> The Ogiek are a nomadic hunter gatherer group which depends on the forest for food (honey), medicine, shelter and preservation of their culture.<sup>11</sup> Ogiek people speak their own language and practice a unique lifestyle common to the forest-dwelling communities. They survive by hunting wild game and gathering fruits and honey. They strongly disassociate themselves from the Maasai and Kalenjin communities. Indeed, as one researcher has recognised:

"[The Ogiek] are a hunting and gathering people of antiquity greater than other peoples amongst whom they now live i.e. the Nandi, Kipsigis, Maasai, Kikuyu, etc."<sup>12</sup>

10. More recently in response to their displacement from the forest, some Ogiek have been known to keep livestock, while others practice peasant farming. Bee keeping and farming form a common factor. Some are good herbalists, while others are skilled in iron making and pottery.<sup>13</sup>
11. In contrast to their neighbouring communities, which had a hierarchical form of governance, the Ogiek was a fairly egalitarian society with no centralised leadership. Instead, the Ogiek were organised around clans and families that still exist today.<sup>14</sup> Land was managed collectively by the clan and its norms governed

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<sup>8</sup> Yeoman, G.H., 1993: *High Altitude Forest Conservation in Relation to Dorobo People*, Kenya Past and Present, at page 3.

<sup>9</sup> See, for example, Affidavit of John Koipitat Sena, paragraph 3, at Annex 2

<sup>10</sup> <http://www.ogiek.org/indepth/owc-org-profile.htm>

<sup>11</sup> R.H. Blackburn, 1974, *The Ogiek and their History*, Azania vol. 9.

<sup>12</sup> Yeoman, G.H., *supra* note 8 at page 3

<sup>13</sup> Minority Rights Group International, *Kenya's Castaways: The Ogiek and National Development Processes* (January 2003) available at [www.minorityrights.org/download.php?id=91](http://www.minorityrights.org/download.php?id=91).

<sup>14</sup> See Affidavit of Barno Christopher Kipsang, paragraph 3, at Annex 3

access, use and limited any disposition.<sup>15</sup> Women in the Ogiek community held a special place as mothers, caretakers and medicine women.

12. The Ogiek way of life embraces the traditions and values of a unique African population. Their concept of land rights, seen from the African perspective, is dramatically different from the concept of land rights developed in the Western world. Land for the Ogiek is held in very high respect, since, in addition to securing subsistence and livelihood, it is seen as sacred: being inextricably linked to the cultural integrity of the community and its traditional way of life<sup>16</sup> The Ogiek assert their right as a collective, in that their land belongs to the community, not to the individual. They are, in this sense, the trustees of that land for future generations. Their relationship with the land is essential to their way of life and ultimately, their preservation and survival as a traditional people.<sup>17</sup>

13. The Honourable Commission well understands this conception of land rights. At the outset of the preamble to the Charter, the virtues of their historical tradition and the values of African civilisations are proclaimed to inspire and characterise the African concept of human and peoples rights. Indeed, in its recent decision *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, the Commission specifically stated 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”*.<sup>18</sup>

14. For over 100 years, the Ogiek as a community have been evicted from and denied access to their ancestral land, and continue to be threatened with eviction from their current homes. Their ability to make use of the indigenous forest for food, cultural and religious ceremonies, and traditional medicines, is under threat.

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<sup>15</sup> John Kamau, *The Ogiek: The Ongoing Destruction of a Minority Tribe in Kenya* (2000) at 12.

<sup>16</sup> The importance of the relationship of traditional communities to their land, territories and resources has been recognised and explored by the United Nations Sub-Commission on the Promotion and Protection of Human Rights, see "Indigenous Peoples and their relationship to Land: Final working paper prepared by the Special Rapporteur, Erica-Irene A. Daes" UN Doc. E/CN.4/SUB.2/2001/21.

<sup>17</sup> David Okwembah, *Dorobo Elders Write to Moi*, East African Standard, 30 May 1996.

<sup>18</sup> African Commission, Communication 276/2003, at § 251

Their exclusion from effective participation in the management of their ancestral land, their inability to share in the benefits of logging concessions granted over it, and indeed their inability to challenge their eviction, threatens their very existence, and results in a violation of their right to economic, social and cultural development with due regard to their freedom and identity. The Ogiek seek the protection of the Commission, in its uniqueness amongst regional human rights tribunals, to grant them an effective remedy for the impact of the dispossession of their land on their cultural integrity, their hunter-gatherer enterprise and their ability to secure their livelihood and that of future generations of the community.

## **B. Domestic Law**

### *Background*

15. Ogiek land rights challenges begun during the British colonial period at the turn of the twentieth century. In its quest to rationalise land relations and inter alia define the area, generally known as the Highlands, within which persons of European descent are to have a privileged position,<sup>19</sup> the colonial Government established a Land Commission in 1933. In examining the Ogiek claim, the Land Commission recommended that 'Ogiek were a savage and barbaric people who deserved no tribal status.'<sup>20</sup> Most specifically, the Commission recommended that the 'Dorobo (sic) should become members of and be absorbed into the tribe in which they have the most affinity'. Whereas this is done, a reasonable addition should be made to the reserve concerned, if there is any land available for this purpose.<sup>21</sup> The deliberate dispersal of the Ogiek and their forced assimilation was designed to weaken any future attempts by the Ogiek to claim their ancestral land.

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<sup>19</sup> John Kamau, *supra* note 15 at page 12.

<sup>20</sup> See Ogiek Memorandum to the Committee of Experts on the Constitutional Review Process available at <http://www.ogiekpeople.org/Home/ogiek-memorandum>

<sup>21</sup> The Carter Land Commission Report (1934) at § 4556. This explains how some Ogiek in Narok became beneficiaries of a portion of Trust Land within Maasai country, which was later converted to Group ranches and thereafter individualised; see Affidavits of John Koipitat Sena and Joseph Kimeto Mapelu at Annexes 2 and 33

16. As a consequence, no native reserve was allotted to the community. This created at least two problems for the Ogiek. First, it left the Ogiek without tribal recognition, a crucial requirement for access to any entitlement as subjects of the crown. Second, new colonial laws promulgated in 1939<sup>22</sup> 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 at paragraph 19 below.

### ***Kenya Constitution***

17. Section 75 protects property of every description, but the only land specifically provided for in Sections 114-117 of the Constitution is Trust Land, which is defined in Section 114 as including "the areas of land that were known before 1st June, 1963 as Special Reserves, Temporary Special Reserves [or] communal reserves." Further, Section 115 of the Constitution provides:

“(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.”

18. Consequently, a community such as the Ogiek that was previously not vested with a "special reserve," "temporary reserve" or "communal reserve" under colonial law, are not beneficial owners of land vested to county councils by virtue

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<sup>22</sup> See Kenya Highlands Order-in-Council, and Kenya Native Areas Order-in-Council

of their being persons ordinarily resident in that land within the meaning of Section 115(1) of the Constitution. Moreover, the Constitution does not recognise collective ownership.

### ***Government Lands (GLA) Act Cap 280***

19. The 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.<sup>23</sup> Under the GLA, the President, through the Commissioner of Lands, has the power to allocate any unalienated land to any person he/she so wishes.<sup>24</sup> 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<sup>25</sup> or 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.<sup>26</sup> Most of the zones occupied by the Ogiek are covered by the Forest Act (see further paragraph 22 below) and thus deemed unalienated land, in the sense that it is not occupied.

### ***Registered Land Act Cap 300***

20. Under this Act, any person may acquire absolute ownership to any land once he or she has been registered as the absolute owner. On registration, such a person acquires freehold or leasehold interests on the land.<sup>27</sup> Freehold implies absolute

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<sup>23</sup> Sections 30 and 31 of the Crown Lands Ordinance 1902

<sup>24</sup> GLA Section 3 (a) mandates the President to "make grants or dispositions of any estates, interests or rights in or over unalienated Government land."

<sup>25</sup> Section 2, GLA

<sup>26</sup> Section 3, GLA

<sup>27</sup> Section 27 of the Registered Land Act provides that (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges

proprietorship. Between 1988 and 1997, the President through the Minister for Environment de-gazetted Government forests amounting to 107,000 hectares which the Ogiek claim as their ancestral land,<sup>28</sup> and converted it to absolute proprietorships under the Registered Land Act.

### ***Trust Land Act Cap 285***

21. As detailed above at paragraphs 17 and 18 above, Trust Land is a Constitutional issue in Kenya. The Constitution of Kenya prescribes in section 115(4) that, subject to contrary indications or prescriptions in the chapter on trust land, parliament has the power to make law for the administration of trust land by county councils. The Trust Land Act (TLA) is the law which now governs trust lands. Section 53 of the TLA confers direct power on the Commissioner of Lands to administer Trust Lands on behalf of the County Council including the power to execute on behalf of the county council such grants, leases, licenses, and other documents relating to the Trust Land as may be necessary or expedient.<sup>29</sup>

### ***Forest Act Cap 385***

22. This Act, enacted first in 1942 and amended at the turn of Kenya's independence in 1964, gives the Minister in charge of Environment wide powers to declare any unalienated land to be a forest area, to declare the boundaries of such forest and to alter the boundaries.<sup>30</sup> The Minister is also vested with powers to declare that a forest area ceases to be a forest, in which case, all he must do is give a 28-day notice to the public via a Kenyan gazette notice.<sup>31</sup> The Act also grants the Minister powers to issue licences for the use of forest produce. Under this Act, the Ogiek have found they are contravening the law by using forest products, including honey, without the consent of the minister. The provisions of this Act has also resulted in the excision of much Ogiek ancestral land and their eviction

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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.

<sup>28</sup> See paragraphs 30-38 below for specific particulars of the conversion of government forest into private lands to the prejudice of the Ogiek.

<sup>29</sup> Section 53(2)(a) TLA, Cap 288 Laws of Kenya.

<sup>30</sup> Section 4 (1), Forest Act, Cap 385 Laws of Kenya

<sup>31</sup> Section 4 (2), Forest Act, Cap 385 Laws of Kenya

at very short notice. While this law has been succeeded by a new Forest Management Act that incorporates better communities in forest conservation, the latter law does not grant any concrete tenurial rights in favour of a forest community such as the Ogiek.

***Land (Group Representatives) Act Cap 287***

23. The Land (Group Representatives) Act (GRA) gives group ranch status to a group of herders that is 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 recognized 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 recognized customary law exercised rights in or over land which should be recognized as ownership.<sup>32</sup>
24. Under the GRA, the procedure of acquiring the rights is sophisticated: there are requirements that the group must have a constitution and elected group officers in accordance with their constitution; 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.<sup>33</sup>
25. The summation of these requirements is that, although the law tries to conceptualise the African notion of property rights, it does not effectively serve the interests of such a people. The GRA also provides an element of confusion and uncertainty in regard to the aspect of disposition of land. Although the group representatives are to hold the land and other assets on behalf of the group for the

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<sup>32</sup> Section 23 (2)(a), GRA. See also, Patricia Kameri-Mbote, *Property Rights and Biodiversity Management in Kenya: the Case of Land Tenure and Wildlife*, Nairobi: ACTS Press, 2002 at pages 71 and 72.

<sup>33</sup> Sections 2, 5 and 7 of GRA.

collective benefit of all members, disposition of group land may be made simply with approval of the group representatives themselves.

26. 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<sup>34</sup> Indeed, most of the Group Ranches have been individualised, hence defeating the purpose of the legislation.<sup>35</sup>

### ***Summary of effect of legislation***

27. 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. The Ogiek of Mount Elgon, on the other hand, became dispossessed of any entitlement under Trust Land by virtue of the creation of the Mount Elgon Game Reserve and a few of them became beneficiaries of small parcels of land granted through the Registered Lands Act.

### **C. Evictions**

28. In approximately 1979, Ogiek land at Sasimwani and Olokirikirai, Maasai Mai block, Olokurto division, was demarcated as trust land, owned by Narok County Council. The land at Sasimwani was officially given to the Ogiek and the community was given papers denoting parcel numbers in relation to their individual plots of land (see further Affidavit of Wilson Mamusi Ngusilo at Annex 5). However, in 1986, when President Moi came into power, police and security forces and forest guards forcibly evicted the Ogiek from their homes in

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<sup>34</sup> See Affidavit of David Lekuta Sulunya & Nayieyo Olole Sirma at Annex 4

<sup>35</sup> Rutten, M. M. E. M., "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* 10 (1992)

Sasamwani, destroying houses, food stores, and livestock (see further Affidavit of Wilson Mamusi Ngusilo at Annex 5). For the following 10 years, the community lived in makeshift houses nearby, despite threats and intimidation from the neighbouring Maasai. The community eventually had no choice but to return to Sasamwani, where they continue to be regularly threatened with eviction, in particular in 2005 by the Maasai Administration of Chiefs (see affidavit of Wilson Mamusi Ngusilo at Annex 5) and more recently in 2009 (see further paragraph 38 below). The community were not able to challenge their eviction and subsequent treatment in the courts, due to lack of capacity, access to advice and legal aid, and obstacles raised by the Government, as further elaborated upon at paragraphs 131-133 and 165 - 167 below.

29. In 1982, the Respondent Government began evicting Ogiek from four villages in Tindiret Forest (part of the Mau Forest Complex). Houses, property and food was 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 (see further Affidavit of Barno Christopher Kipsang at Annex 3). The community were not able to challenge their eviction and subsequent treatment in the courts, due to lack of capacity, access to advice and legal aid, and obstacles raised by the Government, as further elaborated upon at paragraphs 131-133 and 165 - 167 below.

30. Between 1988 and 1999, the Kenyan Government purportedly resettled landless communities and individuals, including members of the Ogiek community, by de-gazetting and excising over 107,000 hectares from the Mau Forest Complex for this purpose.

31. Contrary to its avowed intention, the members of the Ogiek community never benefited from the excised land, which instead was allocated to extremely wealthy and influential members of the then ruling party, Kenya African National Union, KANU.<sup>36</sup> This large influx of commercial farmers, loggers and peasant cultivators has impacted the Mau ecosystem most deleteriously.<sup>37</sup>
32. At the same time, Ogiek in the forested areas of Mount Elgon were removed from their land, as settlement schemes were established which benefited other communities, and a national game reserve was created (see Affidavit of Fred Matei at Annex 7).
33. In a Memorandum to the Kenyan Parliament in July 1996, the Ogiek claimed to have a ðbirth right í [on their] ancestral land in the Mau Forestö.<sup>38</sup> Similarly, in 2000, they made a submission to the Njonjo Land Commission, in which they stated ðour history has shown that we are environmentally friendly. Our land tenure system is also environmentally friendlyí help us live in our ancestral land and retain both our human and cultural identities as Kenyans of Ogiek originö.<sup>39</sup>
34. In 2005, the Kenyan Government violently forced out some 50,000 people who had encroached into the Mau Forest, but did not evict or interfere with the property of influential individuals who benefited from the illegal allocation of the forest land.<sup>40</sup> In response to political demands preceding the 2007 elections, the Government later retracted this decision and proceeded to issue titles to these individuals. The Ogiek, owing to their numerical inferiority, did not, however, benefit from this politically inspired land entitlement even though they were affected by the eviction.

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<sup>36</sup> See generally, Republic of Kenya, *Report of the Commission of Inquiry into the Irregular/Illegal Allocation of Public Land (The Ndungu Report)* (2004), at Annex 6

<sup>37</sup> See e.g., Daily Nation, *Moi Mama Ngina in Ndungu Land Report* (17<sup>th</sup> December 2004) available online at <http://www.ogiek.org/news-post-04-12-7.htm>

<sup>38</sup> See Memorandum to All MPs by Representatives of Kenyans of Ogiek Community living in Nessuit and Mariosioni parts of the Mau Forest at Annex 8

<sup>39</sup> See further <http://www.ogiek.org/report/ogiek-app1.htm>, accessed 2 August 2010. The Land Review Commission, known as the Njonjo Land Commission, was set up by the Kenyan government to assess, amongst others, various land claims by different communities. The Commission takes the term ðNjonjoö from its Chairpersonö name, Charles Njonjo, a respectable former Attorney General of Kenya.

<sup>40</sup> See generally, Amnesty International, *Nowhere to Go: Forced Evictions in Mau Forest Kenya* (May 2007) page 3

35. On 15 July 2008, following the constitution of a coalition Government based on the National Accord,<sup>41</sup> the Prime Minister of the Republic of Kenya established a Task Force on the Conservation of the Mau Complex in response to the wanton environmental destruction of the forest that had resulted in the near drying up of important water sources originating from the Mau.<sup>42</sup>
36. 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 and recommended the immediate eviction of encroachers to the forest, and the due compensation of all affected persons with due regard in particular to the protection of property rights as recognised in the Kenyan constitution.<sup>43</sup>
37. The Mau Task Force Report, while recognising that: "The Mau Forests Complex is the home of a minority group of indigenous forest dwellers, the Ogiek . . . [and that] the Ogiek who were to be settled in the excised areas have not yet been given land,"<sup>44</sup> still proceeded to recommend blanket eviction of all forest occupiers without any consideration of the unique cultural and spiritual connection of the Ogiek in the Mau. It 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."<sup>45</sup>
38. 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 Forestry Service, issued a 30 day eviction notice to the Ogiek

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<sup>41</sup> The National Accord and Reconciliation Act, 2008 available online at <http://www.communication.go.ke/media.asp?id=530>>.

<sup>42</sup> The Mau is the water catchments for rivers that feed into Lake Victoria and Turkana in Kenya, Lake Natron in Tanzania and the great River Nile, see further footnote 5 above

<sup>43</sup> See, Daily Nation, 'Big Fish' in Mau to Get Payout, MPs Rule available online at <http://allafrica.com/stories/200909150967.html>>.

<sup>44</sup> Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9, pages 11 and 16.

<sup>45</sup> *Ibid.*, page 69.

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.<sup>46</sup> 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. The threat of eviction remains very real, especially since the Ogiek still have not been granted binding legal title to their ancestral land.

#### **D. Chronology of Domestic Action**

39. The Ogiek evictions have been challenged in a number of cases in the domestic courts, further details of which are set out below.

*Joseph Letuya and 21 others v Attorney General and 5 others, HCCA case no 635 of 1997, and Joseph Letuya and 21 others v Minister of Environment, HCCA case no 228 of 2001*

40. In January 1991, the Ogiek of Eastern Mau were informed by the then Provincial Commissioner of Rift Valley Province, Mr Yusuf Haji, that a settlement scheme would be devised, under which part of the forest land would be de-gazetted and given to the Ogiek. The Ogiek were shown the part of Marioshoni location where the settlement scheme was to be. However, from 1993 onwards, Kenyan citizens of non-Ogiek origin principally from Kericho, Bomet and Baringo Districts were settled on Ogiek ancestral land by the Rift Valley Provincial Administration under a scheme which was not supported by any Government policy, paper or law. The land which was part of the scheme was still part of the Mau Forest, within the meaning of the Forests Act Cap 385 of the Laws of Kenya, and had not been de-gazetted. As a result, the Ogiek were driven out of Sururu, Likia and Teret Forests, and forced to relocate in Nesuit location of Njoro Division, and Marioshoni location of Elburgon Division, in abject poverty. Attempts to raise the

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<sup>46</sup> Government Lands Act, Chapter 301 of the Laws of Kenya; see Annex 10 for copy of eviction notice

issue with the Government, including demonstrations, advocacy efforts and consultations, proved futile; many Ogiek were arrested and detained on falsified charges, whilst demonstrations were met with violence at the hands of the security forces (see affidavits of Joseph Nburumaina, Linah Tapsolom, John Lesingo Lembigas and Christopher Kipkones at Annexes 11-14, and Memorandum submitted to Members of Parliament dated 15 July 1996, at Annex 8).

41. On 25 June 1997, proceedings were filed before the Nairobi High Court, arguing that the eviction of every member of the Ogiek from the Mau Forest violated their constitutional rights to life<sup>47</sup>, to protection of law<sup>48</sup>, to not be discriminated against<sup>49</sup>, and to reside in any part of Kenya<sup>50</sup>, and that the settlement scheme was *ultra vires*. The applicants sought an injunction prohibiting further allocation of their ancestral lands and stopping the settlement of others in Sururu, Likia, Teret and Sigotik Forests, and Mariosioni and Nessuit in Eastern Mau (see copies of pleadings at Annexes 15-19).
42. On 15 October 1997, the High Court issued an injunction prohibiting further land allocation until the issues in dispute had been resolved (see Annex 19). This injunction was not complied with, and the Government continued issuing title deeds and allocating Ogiek ancestral land to non-Ogiek individuals (see affidavits of Joseph Nburumaina, Linah Tapsolom, John Lesingo Lembigas and Christopher Kipkones at Annexes 11-14). This Order remains in force and has not been appealed against, stayed, reviewed or otherwise set aside.
43. One month later, President Moi issued in flagrant violation of the court injunction issued a further 700 title deeds to non-Ogiek settlers. The issuance of these title deeds intimidated the judiciary and this caused them to abort the first hearing set for 26 February 1998. Since then, there has never been a further hearing.

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<sup>47</sup> As provided for in section 71 of the Constitution

<sup>48</sup> As provided for in section 77 of the Constitution

<sup>49</sup> As provided for in sections 70 & 82 of the Constitution

<sup>50</sup> As provided for in section 81 of the Constitution

44. On January and February 2001, a series of Gazette Notices were issued by the Minister in Charge of Forestry notifying an intention to alter boundaries of the Eastern Mau Forest, South-Western and Western Mau Forests, the Western Mau Forests, the Nakuru Forest, the Nakboi Forest, the Marmanet Forest, the Northern Tinderet Forest, the Mount Londiani Forest, the South Nandi Forest, the Molo Forest and the Kapsaret Forest, and excise vast areas of the forest (copies of the Gazette Notices can be found at Annex 20)<sup>51</sup>.
45. On 9 March 2001, the applicants sought an Order of Certiorari to quash Gazette Notice 889, which published an intention to excise 35,000 hectares from the Eastern Mau Forest, in violation of the injunction granted on 15 October 1997 (Miscellaneous Civil Application no 228 of 2001). On 15 March 2001, the Court granted leave to the Ogiek, which operated as a stay of implementation of the Gazette Notice (see Annex 21). Again, the Government did not respect the order, and proceeded to change the boundaries, by issuing legal notices in October 2001 (see Annex 22).
46. In spite of these orders, the Kenyan Government authorities have continued to threaten, harass, arrest and arbitrarily detain and intimidate the applicants, and in some cases have demolished their property (see further Letter from Kamau Kuria & Kiraitu Advocates to the Provincial Commissioners and others, dated 6 February 2007 at Annex 23).
47. In November 2009, one of the applicants, Joseph Towett, submitted affidavits to the court in both cases, referring to both the Government's change in national land policy to recognise the rights of minority communities, and the Mau Task Force Report's recommendation to expedite the cases, and informing the court that the applicants and Ogiek community still wished to prosecute the case (see Annexes 24 and 25).
48. To date, the case remains pending before the Court and no further hearing or adjudication of the applicants' claims has taken place. Representatives for the applicants repeatedly attend court for a hearing, but the Respondent Government

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<sup>51</sup> Gazette Notice 889 was issued on 30 January 2001 but published on 16 February 2001

never appears, the hearing becomes a mention, and the case is never determined. No reasons have been given for non-attendance.<sup>52</sup> The applicants have not been able to progress the case of their own accord for the reasons set out at paragraphs 118-119, 131-133 and 165-167 below.

***Francis Kemai and 9 Others v Attorney-General and 3 Others, HCCA case no 238 of 1999***

49. In May 1999, the Government through the District Commissioner issued an eviction notice to the Ogiek community of Tinnet, South Western Mau (see eviction notice at Annex 26).
50. In 1999, proceedings were filed in the Nairobi High Court by 10 applicants on behalf of the 5000 members of the affected Ogiek community, arguing the evictions violated their constitutional rights to life, to the protection of law, to not be discriminated against, and to reside in any part of Kenya.<sup>53</sup>
51. On 23 March 2000, the Court issued a judgment in favour of the Respondent Government representatives (see Annex 27). The Court found that the evictions were aimed at persons who... are exploiting [the forest] resources, that the Ogiek have alternative land given to them, that they can live anywhere in Kenya, and that there was no evidence of discriminatory treatment on ethnic or improper grounds. This was a very negative development for the entire Ogiek community in the Mau Forest Complex as it sent a strong signal that a judicial submission would not assist with the protection of their land rights (see Affidavit of Christopher Kipkones at Annex 14).
52. Following the judgment, much political pressure was placed on the Ogiek community by the office of the President to drop the cases. They were also told not to appeal and were threatened with further evictions, arrests and other harassment should they take any further legal action. Lacking resources, in the absence of legal aid, and fearing further harassment and intimidation, the

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<sup>52</sup> Copies of the court records evidencing have been requested from the court and will be forwarded to the Commission shortly

<sup>53</sup> Copies of the relevant pleadings have been requested from the court and will be forwarded to the Commission shortly

applicants did not pursue the case to an appeal (see Affidavit of Christopher Kipkones at Annex 14). Further submissions in relation to the inability to appeal are set out at paragraphs 131-133 below.

***Republic v Minister for Environment and 5 Others, ex parte the Kenya Alliance of Resident Associations and 4 Others, HCCA case no 421 of 2002***

53. In January and February 2001, eleven months after the judgment in case 238 of 1999, the Government issued gazette notices publishing their intention to alter the Mau Forest boundaries and excise vast areas of the Mau Forest Complex (see further paragraph 44 above and Annex 20). The Ogiek community challenged the situation and filed case no 334 of 2001 (Professor Wangari Mathai and 6 Others v Minister for Environment), which aimed to stop the alteration of the forest boundaries; legal objection was also raised through an Order of Certiorari in relation to the Eastern Mau in case no 635 of 1997, which was granted (see paragraph 45 above). Case no 334 of 2001 was overtaken by events as legal notices authorising the alteration of the boundaries were then issued in October 2001 (see Annex 22).
54. The Ogiek decided to challenge the legal notices through the institution of a further legal case, on environmental grounds, and issued proceedings in April 2002 in the Nairobi High Court seeking judicial review for orders of certiorari, prohibition and mandamus in relation to the legal notices (see Annexes 28-30). The applicants alleged that the Government had violated the Constitution and laws by altering the forest boundaries without creating an approved plan or consulting with Parliament or local residents.
55. The case remains pending before the Court, and progress has been very slow. In 2007, the case file disappeared from the Court's registry and was only recovered 2 years later in 2009. Hearing dates are set but turn into motions as the Government does not turn up. For example, hearing dates were most recently set for 21 and 28 June 2010, but the Government did not attend and the hearings became motions. No reasons have been given for non-attendance. The applicants have not been able to progress the case of their own accord for the reasons set out

at 118-119, 131-133 and 165-167 below. Further, a decision in favour of the applicants will invalidate the legal notices, but will not grant the Ogiek the return of their ancestral land, so will not provide sufficient legal redress in any event.

***Republic ex parte William Kipsoi Kimeto & Others v Commissioner of Lands and Others, Nakuru High Court Civil Case no 157 of 2005***

56. In 2005, proceedings were commenced in the Nakuru High Court regarding the land in Tinnet, Western and Southwestern Mau, which was de-gazetted by the October 2001 gazette notice (see Annex 22 and paragraph 45 above). The applicants argued that the Government had failed to use the 'Blue Book' of a census of the Ogiek conducted between 1991 and 1994 to allocate land and that the Ogiek should have first priority for the allocations.<sup>54</sup>

57. The applicants therefore sought an order prohibiting the Government from issuing title deeds in respect of the land in Tinnet which was degazetted by the October 2001 legal notices.

58. The case remains pending before the Court.

***Johnstone Kipketer Talam and 3 Others v Principal Land Adjudication & Settlement Officer and 2 Others, Nakuru High Court Civil Case no 446 of 1999***

59. In 1973, pursuant to the Land (Group Representatives) Act, the Kenyan Government created the Nkaroni and Enakishomi Group Ranches for the Ogiek communities in the Narok District.<sup>55</sup> While the Ranches were originally held communally, in 1996 the Government began subdividing them and issuing individual title deeds. Although the Government purported to subdivide the Ranches among their members, some of the land was given to non-members.<sup>56</sup>

60. In February 1999, the 467 members of the Nkaroni Group Ranch prepared a list of their names so that the authorities could issue them individual title deeds as

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<sup>54</sup> Copies of the relevant pleadings should be forwarded to the Commission shortly

<sup>55</sup> Affidavit of David Lekuta Sulunya & Nayieyo Olole Sirma at Annex 4, Affidavit of John Koipitat Sena at Annex 2, Affidavit of Joseph Kimetto Mapelu at Annex 33; see also Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9, page 39.

<sup>56</sup> Affidavit of Joseph Kimetto Mapelu at Annex 33; Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9, page 13 and 40.

part of the subdivision of the Ranch.<sup>57</sup> However, the Chairman altered the list without the consent of the Nkaroni community, adding non-members to the list and excluding true members.<sup>58</sup> According to Joseph Mapelu, the non-members bribed the Chairman to add their names to the list in an effort to obtain land within the Nkaroni Group Ranch.<sup>59</sup> Frustrated by the loss of their land to non-members, members of the Nkaroni Group Ranch brought case no. 446 of 1999 before the Nakuru High Court challenging the Government's subdivision of the lands and allocation of Ranch lands to non-members. This case remains pending.

61. Indeed, in support of the plaintiffs' arguments in this case, the Mau Task Force Report notes that during the subdivision of the Nkaroni and Enakishomi Group Ranches in the 1990s, "the title deeds issued were well in excess of the Group Ranches originally adjudicated areas." The extra land included in the deeds was part of the Mau Forest and "benefited politically well-connected individuals and Government officials."<sup>60</sup> The Task Force found that the Narok County Council was complicit in the illicit expansion of the Ranches' boundaries and the issuance of title deeds to non-members.<sup>61</sup> Further, despite the now well-documented expansion of the boundaries of the Nkaroni and Enakishomi Group Ranches by Government authorities into the Mau Forest,<sup>62</sup> the Narok County Council in June 2000 sent letters to the Ranches' chairmen stating that the Ranches did not encroach on the Mau Forest.<sup>63</sup> Further submissions about this case, in relation to the exhaustion of domestic remedies, are set out at paragraphs 134-143 below.

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<sup>57</sup> Affidavit of Joseph Kimetto Mapelu, *Johnstone Kipketer Talam and 3 Others v Principal Land Adjudication & Settlement Officer and 2 Others*, HCCA case no. 446 of 1999, at Annex 34

<sup>58</sup> Affidavit of Joseph Kimetto Mapelu, *Johnstone Kipketer Talam and 3 Others v Principal Land Adjudication & Settlement Officer and 2 Others*, HCCA case no. 446 of 1999, at Annex 34

<sup>59</sup> Affidavit of Joseph Kimetto Mapelu, *Johnstone Kipketer Talam and 3 Others v Principal Land Adjudication & Settlement Officer and 2 Others*, HCCA case no. 446 of 1999, at Annex 34

<sup>60</sup> Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9, pages 39-40.

<sup>61</sup> Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9, page 24.

<sup>62</sup> See Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9

<sup>63</sup> Letter from Narok County Council to the Chairman of the Nkaroni Group Ranch, 27 June 2000, at Annex 35; Letter from Narok County Council to the Chairman of the Enakishomi Group Ranch, 27 June 2000, at Annex 36

***Joseph Kimetto Ole Mapelu & Others v County Council of Narok, Nakuru  
High Court Civil Case no 157 of 2005***

62. In 2004, the members of the Nkaroni Group Ranch became aware of an illegitimate transfer of parcel no. 9470 to Iingina Contractors Limited. The parcel, which was originally 141.7 hectares and was owned by Livingstone Kunini Ole Ntutu, was deeded to Iingina Contractors without Ntutu's consent.<sup>64</sup> The new deed increased the size of the parcel to 1364.7 hectares.<sup>65</sup> The surveyors also created a new survey sheet, sheet no. 5, to accommodate the larger parcel.<sup>66</sup> The members of the Nkaroni Group Ranch complained of this illegitimate transfer and increase in the size of the parcel to the Narok District Commissioner in January 2004.<sup>67</sup>

63. In 2005, the Government began evicting the Ogiek from the Nkaroni and Enakishomi Group Ranches. In response, members of the Ogiek community brought case no. 157 of 2005 before the Nakuru High Court. The applicants argued that the Government was unlawfully evicting the Ogiek from their rightfully held lands instead of the evicting the illegitimate title holders such as Iingina Contractors who titles were based on survey sheet no. 5.<sup>68</sup> This case remains pending, although some temporary orders in favour of the applicants have been granted in the interim.<sup>69</sup> The members of the Nkaroni Group Ranch have in the meantime petitioned the Prime Minister of Kenya for relief to no avail.<sup>70</sup> Further submissions about this case, in relation the exhaustion of domestic remedies, are set out at paragraphs 141-143 below.

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<sup>64</sup> Letter from Johnstone Kipketer Talaam, Chairman of the Nkaroni Group Ranch, to the Narok District Commissioner, 5 January 2004 at Annex 37

<sup>65</sup> Title deed for parcel no. 9470 for Iingina Contractors Limited, 13 July 1999, at Annex 38

<sup>66</sup> Letter from Johnstone Kipketer Talaam, Chairman of the Nkaroni Group Ranch, to the Narok District Commissioner, 5 January 2004 at Annex 37

<sup>67</sup> Letter from Johnstone Kipketer Talaam, Chairman of the Nkaroni Group Ranch, to the Narok District Commissioner, 5 January 2004 at Annex 37

<sup>68</sup> Affidavit of Joseph Kimetto Mapelu, *Joseph Kimetto Ole Mapelu and Others v County Council of Narok*, HCCA case no. 157 of 2005, 18 July 2005, at Annex 39

<sup>69</sup> Copies of the relevant court documents should be forwarded to the Commission shortly

<sup>70</sup> Letter from Nkaroni Group Ranch members to the Prime Minister of Kenya, 12 August 2009 at Annex 40; Letter from Nkaroni Group Ranch members to the Prime Minister of Kenya, 17 May 2010 at Annex 41

***Kalyasoi Farmers Co-Operative Society & 6 Others v County Council of Narok, HCCA Case 664 of 2005***

64. In 2005, the Government notified the Ogiek community that they had to leave the Nkaroni and Enakishomi Group Ranches or else they would be evicted.<sup>71</sup> In response, the community brought case no. 664 of 2005 before the Nairobi High Court. The applicants sought an injunction prohibiting the Government from interfering with the quiet enjoyment of their land. The Court granted the injunction, holding that the Narok County Council was restrained from harassing, intimidating, threatening, provoking, inciting, detaining, arresting, trespassing into, demolishing and burning the plaintiffs' properties in Narok South, Narok formerly known as Enkaroni and Enekishomi Group Ranches.<sup>72</sup>
65. The Government ignored the injunction and proceeded with the evictions. In June and August 2005, Government rangers set fire to homes, schools, churches, and other buildings in the Nkaroni and Enakishomi Group Ranches and confiscated livestock.<sup>73</sup> The applicants appealed to the High Court again on 10 June 2005 arguing that the Government had ignored the injunction and requesting that the defendant be held in contempt of court. On 2 December 2005, the Court issued its decision finding the Narok County Council in contempt of court and holding that all acts done over the suit lands in violation of the plaintiffs' rights of property since 3<sup>rd</sup> June 2005 when service of the court order was effected upon the County Council of Narok are null and void.<sup>74</sup> Despite this 2005 ruling, the Ogiek were not permitted to return to the Nkaroni and Enakishomi Group Ranches until 2007.<sup>75</sup> The case has never been determined and remains pending before the court.

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<sup>71</sup> Affidavit of David Lekuta Sulunya & Nayieyo Olole Sirma at Annex 4; Affidavit of John Koipitat Sena at Annex 2; Affidavit of Joseph Kimetto Mapelu at Annex 33

<sup>72</sup> Ruling, *Kalyasoi Farmers Cooperative Society and 6 Others v County Council of Narok*, HCCA case no. 664 of 2005, 2 December 2005, at Annex 42, page 2.

<sup>73</sup> Affidavit of David Lekuta Sulunya & Nayieyo Olole Sirma at Annex 4 ; Affidavit of John Koipitat Sena at Annex 2; Affidavit of Joseph Kimetto Mapelu at Annex 33

<sup>74</sup> Ruling, *Kalyasoi Farmers Cooperative Society and 6 Others v County Council of Narok*, HCCA case no. 664 of 2005, 2 December 2005, at Annex 42, pages 79-80.

<sup>75</sup> Affidavit of David Lekuta Sulunya & Nayieyo Olole Sirma at Annex 4; Affidavit of John Koipitat Sena at Annex 2; Affidavit of Joseph Kimetto Mapelu at Annex 33

66. In 2010, Government authorities returned, under the auspices of the Mau Conservation Task Force, to determine the boundaries of the ranches. They are now again threatening evictions in defiance of the 2005 injunction.<sup>76</sup> Further submissions about this case, in relation the exhaustion of domestic remedies, are set out at paragraphs 144-147 below.

***Fred Matei & 3 Others v Mount Elgon County Council, Kitale High Court Civil Case No 109 of 2008***

67. In June 2000, the Government ó by a resolution of the Mount Elgon County Council ó converted part of the Chepkitale Trust Land into a national game reserve without any consultation or compensation to the community. This was pursuant to a gazette notice issued on 1 June 2000. The reserve measures approximately 12 square kilometres and is known for the African elephant and buffaloes (see further Affidavit of Fred Matei at Annex 7).

68. In 2008, 4 members of the Mount Elgon Ogiek community commenced legal action in Kitale High Court, on behalf of all the local community, seeking *inter alia*, the revocation of the gazette notice of dated 1 June 2000. The case remains pending before the court. Further submissions about this case in relation to exhaustion of domestic remedies are set out at paragraphs 151-153 below.

69. There are a number of other legal cases which have sought to challenge the eviction of the Ogiek from their ancestral land and denial of associated rights, including Stephen Kipruto Tigerer v Attorney General & 5 Others, Nakuru High Court Civil Case no 129 of 2005/25 of 2006; Case 325 of 2008 in Nairobi High Court, John Mibey & 5 Others v Forester Ndoinet Station & 4 Others; and Olenguruone Land Disputes Tribunal, Claim No 148 of 2006. These have all failed to achieve sufficient redress for the Ogiek community.

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<sup>76</sup> Affidavit of David Lekuta Sulunya & Nayieyo Olole Sirma at Annex 4; Affidavit of John Koipitat Sena at Annex 2; Affidavit of Joseph Kimetto Mapelu at Annex 33

### III. SUBMISSIONS ON ADMISSIBILITY

#### A. Introduction

70. The conditions for the admissibility of individual communications are clearly set out in Article 56 of the Charter, and supplemented by the Commission's Rules of Procedure and its jurisprudence. The compliance of this communication with these conditions is set out in further detail below.

71. Article 56(1) of the Charter requires that a communication will be considered if it indicates the author. The Complainants submit that this communication has clearly indicated the authors as CEMIRIDE, MRG and OPDP, on behalf of the Ogiek community (see paragraphs 1-5 above), whose contact details are clearly provided at the end of this submission.

72. The communication is not written in disparaging or insulting language (Article 56(3) of the Charter) and is not based exclusively on information from the media (Article 56(4)).

73. The Communication has been brought to the attention of the Commission whilst domestic remedies are still pending but, due to delay on the part of the Respondent Government, are unduly prolonged. The requirements of Article 56(6) have therefore been met. Further, the Communication has not been examined by any other international mechanism for the promotion and protection of human rights or settlement body (Article 56(7)).

#### B Compatibility 'ratione personae'

74. Article 56(2) provides that communications must be compatible with the AU Constitutive Act and the Charter<sup>77</sup>. The essence of this provision is that the Commission considers communications only if they are compatible with the Charter.<sup>78</sup> This includes the condition that communications must be ratione

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<sup>77</sup> Article 56 (2) reads 'are compatible with the Charter of the OAU or with the present Charter'. In 2001, the Charter of the OAU became the AU Constitutive Act.

<sup>78</sup> See *The African Charter on Human and Peoples' Rights, The System in Practice 1986-2006*: Malcolm Evans and Rachel Murray, eds, (2008, Cambridge University Press) at page 95

personae they must be directed at a State Party and must be submitted by an individual or group that has standing to do so.

75. In respect of this requirement, the Commission has made it clear that the author of a communication under the Charter need not be a victim or a member of the victim's family. This line of reasoning is based, textually, on Article 56(1) of the Charter, which makes reference to "authors" rather than "victims". Indeed, in *Cameroon v Bakweri Land Claims Committee*<sup>79</sup>, the Commission stated

*"The African Commission notes that the locus standi requirement is not restrictive so as to imply that only victims may seize the African Commission. In fact, all that Article 56(1) demands is a disclosure of the identity of the author of the communication, irrespective of him/her being the actual victim of the alleged violation. This requirement is conveniently broad to allow submissions not only from aggrieved individuals but also from other individuals or organisations (like NGOs) that can author such complaints and seize the Commission of a human rights violation. The existence of a direct interest (like being a victim) to bring the matter before the Commission is not a requirement under the African Charter."*

Thus the Commission has declared admissible numerous communications submitted by African NGOs or NGOs with a regional focus.

76. The lack of a victim requirement has additional consequences. Firstly, communications may be filed by individuals or NGOs from countries that are not State Parties to the Charter. In *Maria Baes v Zaire*,<sup>80</sup> Maria Baes, a Danish national, submitted a communication on behalf of a Zairean colleague at the University of Zaire, Dr Kondola. The Commission declared the communication admissible. Secondly, the absence of a victim requirement also means that authors may complain to the Commission about the compatibility of national laws or practices without being themselves directly or even indirectly affected by a particular law or practice.

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<sup>79</sup> African Commission, Communication No 260/02 at § 46

<sup>80</sup> African Commission, Communication No 31/89

77. This communication is being submitted by three complainant NGOs on behalf of the Ogiek community. Two of these NGOs, CEMIRIDE and OPDP, are Kenyan-registered and work directly to secure the rights of minorities and indigenous peoples in Kenya. OPDP in fact works specifically to promote the rights of the Ogiek community, on whose behalf this complaint is brought. The third Complainant, MRG, is an international NGO registered in the UK. In accordance with the requirements set out at paragraphs 74-76 above, there can be no doubt that the Complainants have *locus standi* to appear before this Commission. Indeed, two of the Complainants ó MRG and CEMIRIDE ó recently received a decision on the merits from the Commission on behalf of the Endorois indigenous community against the Kenyan State.<sup>81</sup> In considering admissibility, the Commission saw no issue with regards to the Complainants' respective standing and accordingly declared the communication admissible.

78. The Commission's broad standing requirements also allow communications to be submitted on behalf of victims in the public interest (*actio popularis*). This fits precisely with the Charter's protection of the rights of "peoples" which is an undefined term denoting a collectivity of national or minorities within a State. Indeed, this Commission has accepted previous *actio popularis* communications. For example, in *Social Economic Rights Action Centre (SERAC) and another v Nigeria (Ogoniland case)*<sup>82</sup>, the Commission characterised the Communication as an *actio popularis* and emphasised the usefulness of this procedure which had been "wisely allowed under the African Charter"<sup>83</sup>. For these reasons, it is submitted that the Complainants, on behalf of the Ogiek community, have *locus standi* to appear before the Commission.

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<sup>81</sup> African Commission, Communication No 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*

<sup>82</sup> African Commission, Communication No 155/96

<sup>83</sup> *Ibid*, at § 49

### C Compatibility ‘ratione temporis’

79. Article 56(2) also requires that communications must be based on events that have occurred within the period of the Charter’s application. This is based on the operation of the principle of non-retroactive application of international treaties.

80. Whilst the Complainants are mindful of the fact that some of the Ogiek were dispossessed of their traditional land area prior to Kenya’s ratification of the African Charter<sup>84</sup>, it is submitted that the communication is not barred in relation to such dispossession of land by the operation of the principle of non-retroactive application of international treaties.

81. The jurisprudence of both the Honourable Commission and the UN Human Rights Committee is clear in defining two exceptions to the principle of non-retroactivity:

(i) where the violations complained of *continue* after the entry into force of the relevant treaty<sup>85</sup>; or

(ii) where there are *effects* after the entry into force of the treaty, constituting in themselves, violations of that treaty<sup>86</sup>.

82. In this respect, the Human Rights Committee interprets a continuing violation as "an *affirmation*, after the entry into force of the Optional Protocol, by act or by *clear implication*, of the previous violations of the State Party."<sup>87</sup> The European Court of Human Rights has noted a similar exception to the general prohibition against the retroactive application of treaties, finding that it may have regard to the facts prior to ratification inasmuch as they could be considered to have created a situation extending beyond that date or may be relevant for the understanding of facts occurring after that date.<sup>88</sup>

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<sup>84</sup> For example, the Ogiek of Eastern Mau were evicted in 1997

<sup>85</sup> See for example African Commission decision *Annette Pagnouille (on behalf of Abdoulaye Mazou) v Cameroon*, Communication No. 39/90 § 15; African Commission decision *Louis Emgba Mekongo v Cameroon*. Communication No 59/91 and African Commission decision. *Amnesty International v Sudan*. Communication No 48/90, 50/91, 52/91, 89/93.

<sup>86</sup> See for example UN Human Rights Committee, *A.S. and L.S. v Australia*. Communication 490/1992 at § 4.2.

<sup>87</sup> UN Human Rights Committee, *E and A.K. v Hungary*, Communication No 520/1992, at §6.4.

<sup>88</sup> European Court of Human Rights, *Skrzyński v. Poland*, ECHR, App. No. 38672/02 at § 41.

83. Notwithstanding the fact that, to some extent, the present situation of the Ogiek community arises from or originates in pre-Charter events, the respective violations of the Charter committed by the Government of Kenya in relation to these events are either of a continuing nature and/or have effects which, of themselves, constitute current violations. Moreover, the Government of Kenya has explicitly *affirmed* its pre-Charter actions and violations in its rejection of the HCCA case no 238/1999: *Francis Kemai and 9 Others v Attorney-General and 3 Others*. Although this case primarily concerned the Tinnet area of South Western Mau, the issue of a ruling in favour of the Respondent Government sent a strong signal that a judicial submission would not assist the Ogiek with the protection of their land rights.

84. As a direct effect of the dispossession of their land, the Ogiek are *presently* denied meaningful access to, use of, and participation in decisions concerning, their ancestral land, resulting in *current* violations of Article 17(2) and (3) and Article 22(1) of the Charter. Violations of the right to property (Article 14) and the right to freely dispose of wealth and natural resources (Article 21), deriving from the dispossession of the Ogiek land and the logging concessions which have been granted over it, remain continuing, as benefits of the property interest of the Ogiek community over the land continue to be denied and rendered worthless. The Ogiek people's continued exclusion from their ancestral land, their inability to make use of the indigenous forest for food, cultural and religious ceremonies and traditional medicines, and indeed their inability to challenge their eviction, continues to threaten their very existence, in violation of Articles 4 and 8 of the Charter.

85. That the communication is admissible on the facts is evident by the approach of the UN Human Rights Committee in *Hopu and Bessert v France*.<sup>89</sup> In a complaint concerning a dispute over ancestral land - in which the descendants of the owners of the land tract were dispossessed of their property by a court judgment *predating* the entry into force of the Optional Protocol for the State Party - the Committee declared the communication admissible in accordance with

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<sup>89</sup> UN Human Rights Committee, Communication 549/1993, Views of 29 July 1997.

the author's submissions that their rights connected with the land *continued* to be violated *after* the entry into force of the Covenant and the Optional Protocol for the State Party.

86. Further, the Honourable Commission has recently adopted the same approach in its recent decision of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*<sup>90</sup>. The communication concerned an indigenous people's traditional land in Kenya, which was gazetted as a game reserve prior to the ratification of the Charter by the Kenyan State. Nevertheless, the Commission declared the Communication admissible, similarly following the Complainant's arguments that the indigenous group's rights connected with the land *continued* to be violated *after* the entry into force of the Charter.

87. The current situation of the Ogiek community demonstrates that the Government of Kenya has committed violations of the Charter which have a continuing nature and/or effects that constitute, in themselves, violations within the meaning of the Commission's own jurisprudence and that of other authoritative international human rights bodies. Nothing having been done by the Government of Kenya to cease or remedy the continuing violations or effects, it is submitted that the communication deserves full consideration on the merits.

#### **D. The Principle of Exhaustion of Domestic Remedies**

##### ***Underlying rationale of the requirement***

88. Article 56(5) of the Charter states that Communications relating to human and people's rights received by the Commission shall be considered if they are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.<sup>91</sup>

89. The requirement of exhaustion of local remedies is founded on the principle that a government should have notice of a human rights violation in order to have the

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<sup>90</sup> African Commission, Communication No 276/2003

<sup>91</sup> Similar provisions are to be found in other regional human rights instruments: for example, the European Convention on Human Rights Art.35(1) and the American Convention on Human Rights Art. 46(1)(a).

opportunity to remedy such violations before being called to account before an international tribunal and in order to ensure that the Commission acts as a court of last resort rather than one of first instance.<sup>92</sup> The principle of exhaustion of domestic remedies further avoids the difficulty of contradictory judgments arising between national and international levels. Thus, where the facts and issues of the complaint are, as a matter of law or fact, not subject to effective legal or administrative redress within the national system concerned, potential conflict cannot arise and the complainant may proceed directly to the international level. Further, the Commission has "never held the requirement of local remedies to apply literally in case where it is impractical or undesirable for the complainant to seize the domestic courts in the case of each violation"<sup>93</sup>.

90. It is recognised by the Honourable Commission, and indeed by other international mechanisms for the protection of human rights, that complainants are required to exhaust local domestic remedies before the Commission can take up a case, provided such remedies are "available", "effective" and "sufficient".<sup>94</sup> The Commission has further stated that: "a remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."<sup>95</sup>

91. Notwithstanding the Ogiek community's legal efforts and the urgency of this claim, the analysis below demonstrates that the domestic actions *as a whole* do not constitute an *available, effective or sufficient* remedy for the violations complained of, and, as such, all domestic remedies have been exhausted.

### ***Lack of available, sufficient or effective remedy***

92. As stated above, the Honourable Commission has consistently found, in *Dawda Jawara v The Gambia* and *SERAC v Nigeria*, that such remedies as do exist at the

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<sup>92</sup> See *SERAC v Nigeria*, *supra* note 82

<sup>93</sup> African Commission. *Free Legal Assistance Group Lawyer' Committee for Human Rights v Zaire*. Communication No. 25/89, § 37.

<sup>94</sup> See eg African Commission, *Dawda Jawara v Gambia* Communication Nos 147/95 & 149/96, § 31. See also, before the European Court of Human Rights, *Akdivar v Turkey* App no 21893/93, 16.9.96 §§ 66-7.

<sup>95</sup> *Dawda Jawara v Gambia*, *supra* note 94, at § 32.

domestic level must be "*available, effective and sufficient*"<sup>96</sup>, such that "if the right is not well provided for, there cannot be effective remedies, or any remedies at all"<sup>97</sup>. A remedy is considered "*available* if the petitioner can pursue it without impediment or if he can make use of it in the circumstances of the case",<sup>98</sup> "*effective* if it offers a prospect of success" and "*sufficient* if it is capable of redressing the complaint"<sup>99</sup>.

93. Such an approach is also well established in the work of other regional and international mechanisms for the protection of human rights. The European Court of Human Rights, for instance, has held that the remedy must be capable of redressing the applicant's complaints<sup>100</sup> and that effective protection means that any national action must offer a remedy for the act itself, rather than relieving the *consequences* of an act.<sup>101</sup> The Inter-American Court of Human Rights has noted that under generally recognised principles of international law, domestic remedies must not only formally exist but must also be adequate and effective.<sup>102</sup>

94. The Commission will consider the exhaustion requirement in light of the circumstances of the specific case, such that a remedy that may be available, effective, and sufficient in general can still be found to be unavailable, ineffective, or insufficient in a given case.<sup>103</sup> The European Court of Human Rights has likewise held that *the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each*

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<sup>96</sup> *Dawda Jawara v The Gambia*, *supra* note 94, at § 31.

<sup>97</sup> *SERAC and another v Nigeria*, *supra* note 82, at § 37.

<sup>98</sup> *Anuak Justice Council v Ethiopia*, African Commission Communication No 299/05 (2006) at the Law: Admissibility

<sup>99</sup> *Dawda Jawara v The Gambia*, *supra* note 94, at § 32.

<sup>100</sup> See for example European Court of Human Rights, *Stögmüller v Austria*. Case 1602/62 (Admissibility Decision) at § 11.

<sup>101</sup> See for example European Court of Human Rights, *Case of Deweer v Belgium*. Case 6903/75 at § 29, *Akdivar and Others v Turkey*, Application No 21893/93 16 September 1996 at § 65 (requiring that the remedy be effective *vis-à-vis* the alleged breach) and *Aksoy v Turkey*, Application No 21987/93, 18 December 1996 at § 51 (same)

<sup>102</sup> *Fairén Garbí and Solís Corrales Case*, IACtHR (Ser. C) No. 6 (1989) at § 87.

<sup>103</sup> African Commission, *Ilesanmi v. Nigeria*, Communication No. 268/2003 at § 45; see also African Commission, *Centre for Free Speech v. Nigeria*, Communication No. 206/97 at § 8 (holding that the determination of whether a case satisfies the conditions of Article 56 "must be assessed based on the circumstances of each particular case"); European Court of Human Rights, *Donnelly and Others v. United Kingdom*, App. Nos. 5577/72 and 5583/72 (1973) at The Law § 4 ("The exhaustion of a given remedy ceases to be necessary if the applicant can show that, in the particular circumstances of his case, this remedy was unlikely to be effective and adequate in regard to the grievances in question.")

*individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicant.*"<sup>104</sup>

95. The Complainants seek restitution of their rights to the land and preservation of their community and traditional way of life as a collective. Such national remedies as are available to the Ogiek community *are not* and *cannot* be effective and adequate *in regard to the grievances in question.*<sup>105</sup>

96. 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. In so far as the current Constitution of Kenya provides for the protection of fundamental rights and freedoms,<sup>106</sup> this is contained within Chapter V, Sections 70-83, of the Constitution, in the form of a bill of rights *of the individual* (see Annex 43). This Constitutional chapter protects fundamental rights such as the right to life, liberty, freedom from slavery or servitude, property, due process, freedom of expression, assembly and association. Unlike the African Charter, Kenya's Constitution is framed on a highly individualistic conception of society, so it is unsurprising that Chapter V of the Constitution does little to protect the concept of *group or collective rights* in the sense asserted by the Complainants. Neither does the jurisprudence of the High Court of Kenya in matters pertaining to constitutional rights serve to expand the nature of the rights contained therein.<sup>107</sup>

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<sup>104</sup> European Court of Human Rights *Aksoy v. Turkey*, App. No. 21987/93 (1996) at § 53.

<sup>105</sup> See for example European Court of Human Rights. *G.D. and Others v United Kingdom*. Case 5577/72 at § 4

<sup>106</sup> A draft new Constitution for Kenya was approved by the Parliament in April 2010, published in May 2010 and is subject to a referendum on 4 August 2010

<sup>107</sup> As detailed in the previous footnote, as this submission is being drafted, Kenya is preparing for a referendum on a new Constitution. The implications of this if it is passed - are not yet certain, but some potential developments in relation to indigenous land rights, are discussed below.

In relation to **Land Tenure**, the proposed constitution in Articles 80, 81 and 82 creates 3 land tenure categories; public land, community land and private land.

Public land, which will vest in the government [read national government] and district governments in trust for the people of Kenya and residents of the specific district respectively, shall be administered by the National Land Commission created under Article 85. It is noteworthy that the scope of public land has been expanded beyond the purview of Section 4 of the present Government Lands Act, and includes not only unalienated government land, but also, game reserves, and land surrendered to the government by way of reversion. This means that some districts, particularly in the coastal province will continue to disentitle

97. Moreover, the nature of the fundamental rights contained in Sections 70-83 of the Constitution of Kenya places them mainly within the civil and political rights sphere. Economic, social and cultural rights, such as the right to development (protected by Article 22 of the Charter) or the right to cultural life (protected by

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communities of the right to own their ancestral lands, leading to a proliferation of conflicts, as has happened in Tana River and Likoni. Moreover, the undue expansion of public land to include game reserves and land transferred to the Republic by way of reversion or surrender in article 80 of the Proposed constitution, basically means that most pastoralists communities that have historical claims to land will not find due recompense through this constitution. This is a major issue of contention in most parts of the Rift Valley which has often led to tribal/ ethnic conflicts. It has also led to serious human/wildlife conflicts within these regions, and impeded the development of the pastoralists enterprise

The Proposed Constitution also creates community tenure, and defines it to include land lawfully held as trust land by *district governments* and ancestral lands traditionally occupied by hunter gatherer communities. The problem with this proposal which looks good *prima facie* is lack of clarity. Trust land, as we currently know it, is vested by section 114 of the current Constitution in local authorities in trust for the residents thereof and local authorities have never been defined as district governments under any law as we know it at present. Secondly, the exact locus of ancestral land traditionally occupied by hunter gatherer communities is in doubt. The Ogiek for instance, traditionally claim the entire Mau and Tinet forests which straddle several districts. Does the Proposed constitution therefore give them the right to control land in these districts? Likewise, the Sengwer claim a great part of Trans Nzoia. Will this transform into community land? That parliament, which under this proposed constitution is more likely to favour the interests of the majority, is empowered to legislate on community land tenure, creates a real likelihood that hunter gatherers full interests will never really be ventilated.

In relation to **Historical Land Claims and Institutional arrangements**: While the creation of the National Land Commission by section 85 is a positive step in so far as ensuring policy and legislative development in the land sector, the fact that the same Commission is vested with power to investigate historical and present land injustices, leaves us in doubt whether historical land claims will ever be resolved in a substantial manner.

We say this on the grounds that the National Land Commission - like any other Constitutional commission - will be composed of only 9 persons appointed by the President after parliamentary approval. It is unlikely that any of the 9 will represent minority interests, since there is no requirement as such. Moreover, the most the Commission will do under the powers vested upon it by Article 275 are limited to investigation, compelling witnesses, instituting court proceedings, undertaking mediation, and awarding limited compensation. It is doubtful, therefore, that the proposed National Land Commission would actually have the teeth to address the onerous historical land claims of, for instance, the Ogiek, Maasai, Sengwer, Pokot.

In any event, a look at Section 14 of Schedule Six on consequential and transitional arrangements reveals that the National Land Commission will be established long after 11 other commissions have been established. The time frame for its establishment, coupled with the political nature of its mandate, means that, this mechanism could take a long time to take off. What happens in the meantime?

Finally, in relation to **Radical title and the Integrity of the devolution arrangements**, the exact location of radical title [ultimate land title] seems to remain the government-both the national and district government, with the proposed National Land Commission playing an administrative and management function [See Articles 80 (2)(3), 81(3) and 85(2)]. This makes the provision of Article 79(1) to the effect that land belongs to the people of Kenya, seem quite hollow.

Articles 80(1) (a), (b), (d) and (f) of the proposed constitution provides that district governments shall hold certain categories of land in trust for the people resident in the district. This means that the survival of the district structure is critical for the security of land relations in a given district. Yet the security of the district structure, particularly those in pastoralists areas, now without their main revenue source, game reserves, is in doubt.

Article 17 of the Charter) - as primarily complained of by the Complainants in the present communication - receive no equivalent degree of Constitutional protection. It is therefore very difficult for the Ogiek community to bring such grievances before the national courts.

98. Thus, to the extent that Constitutional, and other *non*-Constitutional national remedies are, or were, open to the Ogiek community, it is the Complainants' position that none were at any time, nor are now, capable of offering an effective remedy to restore or protect the traditional livelihood and culture of the group for future generations. As the petitioners in *Lubicon Lake Band* submitted:

*"The recognition of aboriginal rights or even treaty rights by a final determination of the courts will not undo the irreparable damage to the society of the Lubicon Lake Band, will not bring back the animals, will not restore the environment, will not restore the Band's traditional economy, will not replace the destruction of their traditional way of life and will not repair the damages to the spiritual and cultural ties to the land. The consequence is that all domestic remedies have indeed been exhausted with respect to the protection of the Band's economy as well as its unique, valuable and deeply cherished way of life."*<sup>108</sup>

99. In declaring the *Lubicon Lake Band* communication admissible, the UN Human Rights Committee observed that at issue was the important question of whether the road of domestic litigation would have represented an "effective method of saving or restoring the traditional or cultural livelihood" of the community. Having considered the petitioners' submissions it concluded that it was not persuaded that domestic litigation would have constituted an effective remedy for the purposes of the Optional Protocol<sup>109</sup>. This approach has been adopted by other international systems, including the Honourable Commission.<sup>110</sup>

100. The Ogiek community find themselves in exactly such a situation. In the absence of meaningful access to, and use of, their ancestral land in the Mau

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<sup>108</sup> UN Human Rights Committee. *Lubicon Lake Band v Canada*. Communication 167/1984 at § 11.2.

<sup>109</sup> *Ibid* at § 31.1.

<sup>110</sup> In *SERAC v Nigeria*, *supra* note 82, § 37, the Commission held that if the domestic legal system does not recognise the right at issue, it cannot provide an effective remedy to a petitioner's complaint

Forest Complex and Elgon Forest, together with concrete steps to safeguard their culture and identity - a remedy which no domestic action offers - violations of the Ogiek community's rights to cultural life, religious practice, development, property and health under the Charter remain outstanding and unchecked.

101. The rule that only those remedies which are *effective* are required to be exhausted has already been explored, in a range of circumstances, by the Honourable Commission.<sup>111</sup> Indeed, the situation in which the Ogiek community find themselves - that where Charter rights complained of are not protected directly, or even indirectly, in the national legal system - is not unusual in the experience of international bodies concerned with the protection of human rights. The facts and issues of the case have been raised before the national courts, and no effective remedy being available, the Complainants merely request that the Honourable Commission follow established international jurisprudence<sup>112</sup> in finding a complaint admissible where the road of domestic litigation is unable to offer an effective method of directly saving or restoring the damage caused by violations of Charter rights.

#### ***Unduly prolonged domestic proceedings***

102. It is an accepted principle of international jurisprudence that prolonged litigation and intentional obstruction of justice may indicate that domestic remedies are ineffective. The UN Human Rights Committee has held that a case may be admissible if lengthy delays in proceedings are "neither attributable to the alleged victims nor explained by the complexity of the case."<sup>113</sup> In *John K. Modise v. Botswana*, the African Commission found that the petition of man whose appeal had been pending in domestic courts for 16 years and had been "repeatedly interrupted" by deportations was admissible because the "national legal procedures were wilfully obstructed."<sup>114</sup> Similarly, in *Akdivar and Others v. Turkey*, the European Court of Human Rights found that the exhaustion

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<sup>111</sup> For instance, in African Commission Communication No. 87/93, *The Constitutional Rights Project v Nigeria*, the Commission found that "the remedy available [was] not of a nature that required exhaustion according to Article 56, paragraph 5 of the African Charter." § 9.

<sup>112</sup> As expressed by the UN Human Rights Committee in *Lubicon Lake Band v Canada*, *supra* note 108

<sup>113</sup> UN Human Rights Committee, *Fillastre, Bizouarn v. Bolivia*, Communication No. 336/1988 (1991) at § 5.2.

<sup>114</sup> African Commission, *John K. Modise v. Botswana*, Communication No. 97/93 (1997) at §§ 19-22.

requirement may be waived if the national authorities remain [ ] totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance.<sup>115</sup> Indeed, in *Bakweri Land Claims Committee v Cameroon*, the Commission stated that the exhaustion of local remedies requirement under Article 56(5) of the African Charter should be interpreted liberally so as not to close the door on those who have made at least a modest attempt to exhaust local remedies. Under this Article, all that the African Commission wishes to hear from the complainant is that it has approached either local or national judicial bodies.<sup>116</sup> Further, in *Embaga Mekongo Louis v Cameroon*, the Commission declared admissible a communication in which the domestic appeal had been pending in the domestic courts for 12 years, considering that domestic remedies had been unduly prolonged.<sup>117</sup> As will be set out in further detail at paragraphs 104-153 below, the Complainants submit that such steps that they have taken to exhaust domestic remedies have been unduly delayed and prolonged by the Kenyan judicial system and the failure of the Government authorities to engage with the proceedings. Therefore, the Complainants submit that there are no effective domestic remedies available to them and as such, the communication should be declared admissible.

103. Notwithstanding the Complainants' position that domestic litigation offers no effective remedy for the violations complained of, the Complainants 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 are detailed further below.

***Joseph Letuya and 21 others v Attorney General and 5 others, HCCA case no 635/1997, and Joseph Letuya and 21 others v Minister of Environment, HCCA case no 228 of 2001***

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<sup>115</sup> European Court of Human Rights, *Akdivar and Others v. Turkey*, App. No.21893/93 (1996) at § 68.

<sup>116</sup> African Commission, Communication no 26/2002 *Bakweri Land Claims Committee v Cameroon*, at § 55

<sup>117</sup> African Commission, Communication No 59/91

104. In 1997, members of the Ogiek community filed a suit (HCCA case No 635 of 1997) challenging the de-gazetting and excision of areas within Eastern Mau and allocation of their ancestral land to persons who were non-members of the Ogiek, on the grounds that the Ogiek are the *bona fide* owners of the Mau Forest since time immemorial (see paragraphs 40-52 above for further details). This action was, and is, however, incapable of restoring the Ogiek's Charter rights.

105. HCCA case No 635 of 1997 was brought, *inter alia*, under Section 84(1) of the Constitution of Kenya, which empowers the High Court to provide a remedy for a person who alleges that a provision of Section 70-83 of the Constitution has been, is being or is likely to be contravened. By way of background, the operation of Section 84(1) is governed by rules promulgated by the Chief Justice of Kenya under Section 84(6) of the Constitution. The constitutionality of a number of these rules has been challenged, with one having been declared *ultra vires*, resulting in a low level of legal certainty over the invocation of Section 84(1) before the High Court.

106. In addition to Section 84(1), Section 67(1) of the Constitution provides that a lower court may refer a question of interpretation of the Constitution for determination by the High Court. Apart from Sections 84 and 67, there are no other provisions in the Constitution by which a party may move to the High Court for constitutional redress.

107. In light of this limited number of routes for protection of fundamental Constitutional rights, the community asserted their claim under Section 84(1) of the Constitution of Kenya, submitting:

(i) that the right to life protected by section 71 of the Constitution of every member of the Ogiek community in the Mau Forest is being contravened by forcible eviction from their parcels of land in the Mau Forest and by the settlement of other non-Ogiek persons in the area, in depriving them of their livelihood;

(ii) that the eviction of the Ogiek community from their land in the Mau Forest and settlement of other people on their land is a contravention of their

right to protection of law, right not to be discriminated against, and their right to reside in any part of Kenya, under sections 77, 81 and 82 of the Constitution;

(iii) that the allocation of Ogiek traditional land to non-Ogiek was *ultra vires* and accordingly an order should be granted restraining further allocation, and ordering the return of traditional land to the Ogiek;

(iv) that the Ogiek community was entitled to compensation.

108. On 25 October 1997, the Nairobi High Court granted an order that there should be no further allocation of lands until the case had been heard and determined. This injunction was not complied with, and the Government continued issuing title deeds and allocating Ogiek ancestral land to non-Ogiek individuals (see affidavits of Joseph Nburumaina, Linah Tapsolom, John Lesingo Lembigas and Christopher Kipkones at Annexes 11-14). This Order remains in force and has not been appealed against, stayed, reviewed or otherwise set aside.

109. Later in October 1997, after the injunction was issued, the Kenyan Government submitted an affidavit to the court (see Annex 44). This is the only document which the Respondent has ever provided to the court. In brief, it alleges that the Ogiek occupy the Eastern Mau Forest illegally and are therefore squatters, disputes that the area is Ogiek ancestral land, and that the Government's settlement scheme does not involve indigenous lands but instead plantation lands. It also disputes that any discrimination has taken place. No documentation or evidence in support of these allegations has ever been provided nor, as further explained below, has the Respondent Government ever attended court to make oral representations in support of this position.

110. One month later, President Moi ó in flagrant violation of the court injunction ó issued a further 700 title deeds to non-Ogiek settlers. The issuance of these title deeds intimidated the judiciary and this caused them to abort the first hearing set for 26 February 1998. Since then, there has never been a further hearing. The original judges in the case were Juma Vitalis and Mbogoli Msagha,

who were removed from the bench for corruption, misbehaviour and unethical conduct in the 2003 judicial purge.<sup>118</sup>

111. A further hearing date was set for approximately June 1998, but this turned out to be a mention because of judicial interference: the judges did not wish to hold a hearing. This situation occurred several more times without any substantial determination of the case. In May 1999, the applicants requested a hearing and the case was set to be heard for two consecutive days. The first date turned out to be a mention. The second date was aborted (see Affidavit of Christopher Kipkones at Annex 14).

112. In January and February 2001, a series of Gazette Notices were issued by the Minister in Charge of Forestry notifying an intention to alter boundaries of the Eastern Mau Forest, South-Western and Western Mau Forests, the Western Mau Forests, the Nakuru Forest, the Nakboi Forest, the Marmanet Forest, the Northern Tinderet Forest, the Mount Londiani Forest, the South Nandi Forest, the Molo Forest and the Kapsaret Forest, and excise vast areas of the forest (copies of the Gazette Notices can be found at Annex 20).

113. On 9 March 2001, the applicants sought an Order of Certiorari quashing Gazette Notice 889, which published an intention to excise 35,000 hectares from the Eastern Mau Forest, in violation of the injunction granted on 15 October 1997 (Miscellaneous Civil Application no 228 of 2001). On 15 March 2001, the Court granted the requested order, which operated as a stay of implementation of the Gazette Notice (see Annex 21). Again, the Government did not respect the order, and proceeded to change the boundaries, by issuing legal notices in October 2001 (see Annex 22).

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<sup>118</sup> Before the judicial purge in 2003, a team known as the Integrity and Anti-Corruption Committee of the Judiciary, otherwise referred to as the Ringera Committee, was appointed. The terms of reference of the team were to investigate and report on the magnitude of corruption in the Kenyan judiciary, identify the nature, forms and causes and report on its impact on the performance of judges and magistrates. The team was also to recommend strategies for detection and prevention of corruption among judicial officials and identify corrupt members among the judges and magistrates. After travelling around the country, the committee identified 23 judges and 73 magistrates and accused them of corruption, misbehaviour and unethical conduct. These included High Court Judges Juma Vitalis and Mbogholi Msagha. The injunction in favour of the community dated 15 October 1997 was issued by Justice Aluoch, who has recently served a member of the UN Committee on the Rights of the Child.

114. In spite of these orders, the Kenyan Government authorities have continued to threaten, harass, arrest and arbitrarily detain and intimidate the applicants, and in some cases have demolished their property (see for example, Letter from Kamau Kuria & Kiraitu Advocates to the Provincial Commissioners and others, dated 6 February 2007 at Annex 23).
115. In November 2009, one of the applicants, Joseph Towett, submitted affidavits to the court in both cases, referring to both the Government's change in national land policy to recognise the rights of minority communities, and the Mau Task Force Report's recommendation to expedite the cases, and informing the court that the applicants and Ogiek community still wished to prosecute the case (see Annexes 24 and 25).
116. To date, the case remains pending before the Court and no further hearing or adjudication of the applicants' claims has taken place. Representatives for the applicants repeatedly attend court for a hearing, but the Respondent Government never appears, the hearing becomes a mention, and the case is never determined. No reasons have been given for non-attendance.<sup>119</sup> It is therefore submitted that these attempts by the Ogiek community to resolve the dispossession of their traditional land within the national justice system, have been unduly delayed and prolonged by the Kenyan Government, in violation of the principle set out at paragraphs 102-103 above.
117. In the light of this principle, the serious delay by the national courts in determining this case, and the total failure of the Respondent Government to engage with the case by repeated non-appearance, it is submitted that the national remedies cannot be considered to be effective.
118. It is well known that the Kenyan judiciary and judicial system are hugely corrupt, inefficient and lack independence, as concluded by a number of independent investigations. These include a report by the International Bar Association 'Restoring integrity: An assessment of the needs of the justice system

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<sup>119</sup> Copies of the court records evidencing have been requested and will be forwarded to the Commission shortly

in the Republic of Kenya<sup>120</sup> (see Annex 45); The Kreigler Commission Report<sup>121</sup> (see Annex 46), and the International Commission of Jurists report *Kenya: Judicial Independence, Corruption and Reform*<sup>122</sup> (see Annex 47). These have widely condemned Kenya's judiciary, stating, *Public confidence in the judicial system has virtually collapsed. Partiality and a lack of independence in the judiciary, judicial corruption and unethical behaviour, inefficiency and delays in court processes, a lack of awareness of court procedures and operations, and the financial cost associated with accessing the court system have, amongst other factors, all served to perpetuate a widely held belief among ordinary Kenyans that formal justice is available to only a wealthy and influential few*<sup>123</sup>. Successive investigations have revealed that corruption is widespread in Kenya's judicial and legal system.<sup>124</sup> *Extraordinary levels of corruption persist within the Kenyan judiciary..... the judiciary is the third most bribery-prone public institution in Kenya (behind the police and the Ministry of Defence)*.<sup>125</sup>

119. In particular, in relation to the lack of judicial independence and the influence of the executive, *The belief persists that the judiciary operates de facto as a part of executive branch, reflected in the dominance of the Ministry of Justice and the Presidency. This prevalent perception derives from the long history of executive control of the judiciary since 1963. This is supported by previous survey findings that the executive branch continues to pose a danger to the independence of the judiciary and that political interference is the chief obstacle to judicial reform.*<sup>126</sup> *The financial independence of the judiciary is not presently entrenched in the Constitution or otherwise provide for by legislation... the allocation and management of funds to the judiciary continue to be controlled by the Treasury.*<sup>127</sup>

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<sup>120</sup> Published February 2010

<sup>121</sup> Published 2008

<sup>122</sup> Published April 2005

<sup>123</sup> International Bar Association report *Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya*, at pages 7-8; see Annex 45

<sup>124</sup> International Commission of Jurists report *Kenya: Judicial Independence, Corruption and Reform* at page 17; see Annex 47

<sup>125</sup> International Bar Association report *Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya*, at pages 50-51; see Annex 45

<sup>126</sup> International Commission of Jurists report *Kenya: Judicial Independence, Corruption and Reform* at page 39; see Annex 47

<sup>127</sup> International Bar Association report *Restoring integrity: An assessment of the needs of the justice system in the Republic of Kenya*, at page 50; see Annex 45

120. Further, with respect to the remedies available for an action brought under Section 84(1) of the Constitution of Kenya, Section 84(2) empowers the High Court to "make such orders, issue such writs and give such directions as it may consider appropriate." However, constitutional courts have strictly interpreted the meaning of this 'any remedy' clause to mean existing remedies under *common law* only. Such remedies are limited to a *declaration* and/or *damages*. In the context of the violations experienced by the Ogiek, they therefore offer merely the possibility of recompense for the *consequences* of the dispossession of their land, and not an effective remedy in the sense required by the jurisprudence of the Honourable Commission (see paragraphs 92-94 above).

121. The application to the High Court, even had it been successful, could not have represented anything other than a preservation of rights and the *status quo* of the Ogiek situation, as demonstrated by the jurisprudence of the European human rights system. Having held in *Donnelly v UK* that there was a distinction between *compensation* for breach of a Convention right and a domestic remedy for the *breach* itself,<sup>128</sup> the European Commission of Human Rights<sup>129</sup> found, in *Egue v France*, that where a violation was *continuing*, compensation alone *could not* represent an effective or adequate remedy:

*"Elle [La Commission] remarque que la droit d'obtenir la cessation de la privation de liberté et celui d'obtenir la réparation de toute privation de liberté... sont deux droits distincts... La Commission considère, à la lumière de ce que précède, que les voies de droit préconisées par le Gouvernement ne visent pas la cessation de privation de liberté mais au contraire la réparation de dommage dû à une privation de liberté... La Commission considère dès lors que les voies de droit suggérées par le Gouvernement ne pouvaient constituer dans les circonstances de l'espèce, un recours efficace au sens de l'article 26 (Art. 26) de la Convention."*<sup>130</sup>

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<sup>128</sup> European Commission of Human Rights, *Donnelly v UK*. Case 5577/72 (1975). Notably, the Commission observed that compensation alone could not be seen as an adequate remedy where the *occurrence or repetition* of the acts and violations in question was *not prevented*.

<sup>129</sup> This is now the European Court of Human Rights

<sup>130</sup> European Commission of Human Rights, *Egue v France*. Case 11256/84 at § 1, "En Droit".

122. In light of the above, it is submitted that there are no available effective national remedies which would address the complaints set out in the case, and therefore domestic remedies have been exhausted.

***Francis Kemai and 9 Others v Attorney-General and 3 Others, HCCA case no 238 of 1999***

123. As detailed at paragraph 49 above, in May 1999, the Government through the District Commissioner issued an eviction notice to the Ogiek community of Tinet, South Western Mau (see eviction notice at Annex 26).

124. In 1999, proceedings were filed in the Nairobi High Court by 10 applicants on behalf of the 5000 members of the affected Ogiek community, arguing the evictions violated their constitutional rights to life (Article 71 of the Constitution), to the protection of law (Article 78), to not be discriminated against (Article 82), and to reside in any part of Kenya and seeking an order that the Government compensate the plaintiffs and applicants for their loss.<sup>131</sup>

125. On 23 March 2000, the Court issued a judgment in favour of the Respondent Government representatives (see Annex 27). This was a very negative development for the entire Ogiek community in the Mau Forest Complex as it sent a strong signal that a judicial submission would not assist with the protection of their land rights (see Affidavit of Christopher Kipkones at Annex 14).

126. Following the judgment, much political pressure was placed on the Ogiek community by the office of the President to drop the cases. They were also told not to appeal and were threatened with further evictions, arrests and other harassment should they take any further legal action. Lacking resources, in the absence of legal aid, and fearing further harassment and intimidation, the applicants did not pursue the case to an appeal (see Affidavit of Christopher Kipkones at Annex 14).

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<sup>131</sup> Copies of the relevant pleadings have been requested from the Court and will be forwarded to the Commission shortly

127. In dismissing the Ogiek's cause of action, the court doubted that the Ogiek community, in their modern existence, could hold themselves out as conservators of Tinnet in the Mau or any other forest on the basis of their culture or indigenous attachment:

*“[W]hilst in their undiluted culture the Ogiek knew their environment best and exploited it in the most conservational manner, they have embraced modernity which does not necessarily conserve their environment. As we have just said, they cannot build a school or a church house, or develop a market centre, without cutting down a tree or clear a shrub and natural flowers on which bees depend, and on which bee-hives can be lodged, from which honey can be collected, and from which fruits and berries can be gathered.”<sup>132</sup>*

128. The court also foreclosed the community's prayer that their right to life would be prejudiced by the eviction, finding that the Ogiek were not the poorest people and had in any event been compensated with land elsewhere in the country,<sup>133</sup> a finding which subsequent research has discounted.<sup>134</sup> A similar fate befell the community's assertion that the eviction was discriminatory, and therefore a violation of the Kenyan Constitution.<sup>135</sup> As a result, the Court did not find any violation of the Constitution.

129. In dismissing the application the judges were categorical that “In the context of this case, we know no safe way for this country and for these litigants, than dismissing this case with costs to the respondents.”<sup>136</sup> Judges Samuel Oguk and Richard Kuloba stated that “The eviction is for the purposes of saving the whole of Kenya from a possible environmental disaster and it is being carried out for the common good within statutory powers.” The judges went further and held that “There is no reason why the Ogieks should be the only favoured community to own and exploit our natural resources, a privilege not enjoyed or extended by

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<sup>132</sup> See judgment at Annex 27

<sup>133</sup> See judgment at Annex 27

<sup>134</sup> See Republic of Kenya, *Report of Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9

<sup>135</sup> See judgment at Annex 27

<sup>136</sup> See judgment at Annex 27

other Kenyans.<sup>137</sup> The Court therefore seemed to reach its reasoning on the basis that indigenous land rights can and should be trumped by environmental concerns, rather than attempting to ensure that the two issues complemented each other.

130. The judges agreed with the Government that the disputed forest is a prime area reserved for the benefit of the public and found that the Ogiek could not practice their cultural activities without breaking the law. "These people do not think much about the law, especially the Forest Act, ...there is no reason why the Ogieks should be the only community to own and exploit a means of livelihood preserved and protected for all Kenyans...the Ogieks can live anywhere in Kenya subject to the laws of the country. The eviction is for the common good for all Kenyans."<sup>138</sup>

131. The applicants have not appealed against the decision because access to the Court of Appeal for an indigent community such as the Ogiek is constrained by the cost of such proceedings.

132. Case law demonstrates that where legal services are required either as a matter of fact or law in order for a right guaranteed by international human rights law to be recognised, and a person is unable to obtain such services because of his indigency and the absence of legal aid, then, particularly with respect to a constitutional motion, this may render the recourse essentially unavailable to the indigent applicant.<sup>139</sup> In particular, the Commission has recognised that a lack of legal aid can render domestic remedies inaccessible and/or ineffective. In *Purohit and Moore v. The Gambia*, the Commission found that while the domestic courts were in theory available, the "category of people being represented in the present communication are likely to be people picked up from the streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the Constitution are realistic remedies for them in the absence of legal

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<sup>137</sup> See judgment at Annex 27

<sup>138</sup> See judgment at Annex 27

<sup>139</sup> See for example UN Human Rights Committee, *Wright and Harvey v Jamaica*. Communication 459/1991 and Inter-Am. CHR *Neville Lewis v Jamaica*, Communication 11.825. See also European Commission of Human Rights. *Airey v Ireland*. Case 6289/73, which confirms a state's positive obligation to provide legal assistance to those lacking financial means.

aid services.<sup>140</sup> Further, the Inter-American Commission on Human Rights has found that *constitutional motions* are procedurally and substantively complex and cannot be effectively raised or presented in the absence of legal representation, which must be provided to an applicant by way of legal aid in the event of indigency<sup>141</sup>. Further, the *serious* consequences of a constitutional motion, which, in the case of the Ogiek, impacts upon the very *livelihood* of the community, dictates that legal aid is required to be provided by the state. That the Ogiek community were able to bring national constitutional legal proceedings at all steps beyond the requirements of international law.

133. In the circumstances, and particularly in light of the urgent requirement to prevent further evictions of the Ogiek community from their ancestral land (see paragraph 38 above), any appeal would fail to offer the Complainants either a reasonable prospect of recompense for loss of use of the land to date, or an effective final remedy for the outstanding African Charter violations.

***Republic v Minister for Environment and 5 Others, ex parte the Kenya Alliance of Resident Associations and 4 Others, HCCA case no 421 of 2002***

134. In February 2001, eleven months after the judgment in case 238 of 1999, the Government issued gazette notices publishing their intention to alter the Mau Forest boundaries and excise vast areas of the Mau Forest Complex (see further paragraph 44 above and Annex 20). The Ogiek community challenged the situation and filed case no 334 of 2001 (Professor Wangari Mathai and 6 Others v Minister for Environment), which aimed to stop the alteration of the forest boundaries; legal objection was also raised through an Order of Certiorari in relation to the Eastern Mau in case no 635 of 1997, which was granted. Case no 334 of 2001 was overtaken by events as legal notices were then issued in October 2001 (see Annex 22).

135. The Ogiek decided to challenge the legal notices through the institution of a further legal case, on environmental grounds, and issued proceedings in April

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<sup>140</sup> African Commission, *Purohit and Moore v. The Gambia*, Communication No. 241/2001 (2003) at § 37.

<sup>141</sup> Inter-Am. CHR *Rudolphe Baptiste v Grenada*. Communication 11.743.

2002 in the Nairobi High Court seeking judicial review for orders of certiorari, prohibition and mandamus in relation to the legal notices (see Annexes 28-30). The applicants alleged that the Government had violated the Constitution and laws by altering the forest boundaries without creating an approved plan or consulting with Parliament or local residents.

136. The case remains pending before the Court, and progress has been very slow. In 2007 the case file disappeared from the Court's registry and was only recovered 2 years later in 2009. Hearing dates are set but turn into motions as the Government does not turn up. For example, hearing dates were most recently set for 21 and 28 June 2010 but became motions, as the Government did not attend. It is submitted that these attempts by the Ogiek community to resolve the dispossession of their traditional land within the national justice system, have been unduly delayed and prolonged by the Kenyan Government and, as set out at paragraphs 102-103 above, it is an accepted principle of international jurisprudence that prolonged litigation and intentional obstruction of justice may indicate that domestic remedies are ineffective. In addition, as detailed at paragraphs 118-119 above, it is well known that the Kenyan judiciary and judicial system are hugely corrupt, inefficient and lack independence, which further illustrates the ineffectiveness of the domestic remedy sought. Finally, a decision in favour of the applicants will invalidate the legal notices, but will not grant the Ogiek the return of their ancestral land, so will not provide sufficient legal redress in any event.

***Johnstone Kipketer Talam and 3 Others v Principal Land Adjudication & Settlement Officer and 2 Others, Nakuru High Court Civil Case no 446 of 1999***

137. In 1973, pursuant to the Land (Group Representatives) Act, the Kenyan Government created the Nkaroni and Enakishomi Group Ranches for the Ogiek communities in the Narok District.<sup>142</sup> While the Ranches were originally held communally, in 1996 the Government began subdividing them and issuing

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<sup>142</sup> Affidavit of David Lekuta Sulunya & Nayieyo Olole Sirma at Annex 4; Affidavit of John Koipitat Sena at Annex 2; Affidavit of Joseph Kimetto Mapelu at Annex 33; see also Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9, page 39.

individual title deeds. Although the Government purported to subdivide the Ranches among their members, some of the land was given to non-members.<sup>143</sup>

138. In February 1999, the 467 members of the Nkaroni Group Ranch prepared a list of their names so that the authorities could issue them individual title deeds as part of the subdivision of the Ranch.<sup>144</sup> However, the Chairman altered the list without the consent of the Nkaroni community, adding non-members to the list and excluding true members.<sup>145</sup> According to Joseph Mapelu, the non-members bribed the Chairman to add their names to the list in an effort to obtain land within the Nkaroni Group Ranch.<sup>146</sup> Frustrated by the loss of their land to non-members, members of the Nkaroni Group Ranch brought case no. 446 of 1999 before the Nakuru High Court challenging the Government's subdivision of the lands and allocation of Ranch lands to non-members. This case remains pending.

139. Indeed, in support of the plaintiffs' arguments in this case, the Mau Task Force Report notes that during the subdivision of the Nkaroni and Enakishomi Group Ranches in the 1990s, "the title deeds issued were well in excess of the Group Ranches originally adjudicated areas." The extra land included in the deeds was part of the Mau Forest and "benefited politically well-connected individuals and Government officials."<sup>147</sup> The Task Force found that the Narok County Council was complicit in the illicit expansion of the Ranches' boundaries and the issuance of title deeds to non-members.<sup>148</sup> Further, despite the now well-documented expansion of the boundaries of the Nkaroni and Enakishomi Group Ranches by Government authorities into the Mau Forest,<sup>149</sup> the Narok County

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<sup>143</sup> Affidavit of Joseph Kimetto Mapelu at Annex 33; Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9, pages 13, 40.

<sup>144</sup> Affidavit of Joseph Kimetto Mapelu, *Johnstone Kipketer Talam and 3 Others v Principal Land Adjudication & Settlement Officer and 2 Others*, HCCA case no. 446 of 1999, at Annex 34

<sup>145</sup> Affidavit of Joseph Kimetto Mapelu, *Johnstone Kipketer Talam and 3 Others v Principal Land Adjudication & Settlement Officer and 2 Others*, HCCA case no. 446 of 1999, at Annex 34

<sup>146</sup> Affidavit of Joseph Kimetto Mapelu, *Johnstone Kipketer Talam and 3 Others v Principal Land Adjudication & Settlement Officer and 2 Others*, HCCA case no. 446 of 1999, at Annex 34

<sup>147</sup> Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9, pages 39-40.

<sup>148</sup> Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9, page 24.

<sup>149</sup> See Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9

Council in June 2000 sent letters to the Ranchesø chairmen stating that the Ranches did not encroach on the Mau Forest.<sup>150</sup>

140. It is submitted that this attempt by the Ogiek community to resolve the dispossession of their traditional land within the national justice system, have been unduly delayed and prolonged by the Kenyan Government. As set out at paragraphs 102-103 above, it is an accepted principle of international jurisprudence that prolonged litigation and intentional obstruction of justice may indicate that domestic remedies are ineffective. In addition, as detailed at paragraphs 118-119 above, it is well known that the Kenyan judiciary and judicial system are hugely corrupt, inefficient and lack independence, which further points to the ineffectiveness of the domestic remedy sought.

***Joseph Kimetto Ole Mapelu & Others v County Council of Narok, Nakuru High Court Civil Case no 157 of 2005***

141. In 2004, the members of the Nkaroni Group Ranch became aware of an illegitimate transfer of parcel no. 9470 to Iingina Contractors Limited. The parcel, which was originally 141.7 hectares and was owned by Livingstone Kunini Ole Ntutu, was deeded to Iingina Contractors without Ntutuø consent.<sup>151</sup> The new deed increased the size of the parcel to 1364.7 hectares.<sup>152</sup> The surveyors also created a new survey sheet, sheet no. 5, to accommodate the larger parcel.<sup>153</sup> The members of the Nkaroni Group Ranch complained of this illegitimate transfer and increase in the size of the parcel to the Narok District Commissioner in January 2004.<sup>154</sup>

142. In 2005, the Government began evicting the Ogiek from the Nkaroni and Enakishomi Group Ranches. In response, members of the Ogiek community

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<sup>150</sup> Letter from Narok County Council to the Chairman of the Nkaroni Group Ranch, 27 June 2000, at Annex 35; Letter from Narok Country Council to the Chairman of the Enakishomi Group Ranch, 27 June 2000, at Annex 36

<sup>151</sup> Letter from Johnstone Kipketer Talaam, Chairman of the Nkaroni Group Ranch, to the Narok District Commissioner, 5 January 2004 at Annex 37

<sup>152</sup> Title deed for parcel no. 9470 for Iingina Contractors Limited, 13 July 1999, at Annex 38

<sup>153</sup> Letter from Johnstone Kipketer Talaam, Chairman of the Nkaroni Group Ranch, to the Narok District Commissioner, 5 January 2004 at Annex 37

<sup>154</sup> Letter from Johnstone Kipketer Talaam, Chairman of the Nkaroni Group Ranch, to the Narok District Commissioner, 5 January 2004 at Annex 37

brought case no. 157 of 2005 before the Nakuru High Court. The applicants argued that the Government was unlawfully evicting the Ogiek from their rightfully held lands instead of the evicting the illegitimate title holders such as Iingina Contractors who titles were based on survey sheet no. 5.<sup>155</sup> This case remains pending and has never been determined, although some temporary orders have been granted by the court in the interim. The members of the Nkaroni Group Ranch have in the meantime petitioned the Prime Minister of Kenya for relief to no avail.<sup>156</sup>

143. It is submitted that such an attempt by the Ogiek community to resolve the dispossession of their traditional land within the national justice system, has been unduly delayed and prolonged by the Kenyan Government. As set out at paragraphs 102-103 above, it is an accepted principle of international jurisprudence that prolonged litigation and intentional obstruction of justice may indicate that domestic remedies are ineffective. In addition, as detailed at paragraphs 118-119 above, it is well known that the Kenyan judiciary and judicial system are hugely corrupt, inefficient and lack independence, which further emphasises the ineffectiveness of the domestic remedy sought.

***Kalyasoi Farmers Co-Operative Society & 6 Others v County Council of Narok, HCCA Case No 664 of 2005***

144. In 2005, the Government notified the Ogiek community that they had to leave the Nkaroni and Enakishomi Group Ranches or else they would be evicted.<sup>157</sup> In response, the community brought case no. 664 of 2005 before the Nairobi High Court. The applicants sought an injunction prohibiting the Government from interfering with the quiet enjoyment of their land. The Court granted the injunction, holding that the Narok County Council was òrestrained

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<sup>155</sup> Affidavit of Joseph Kimetto Mapelu, *Joseph Kimetto Ole Mapelu and Others v County Council of Narok*, HCCA case no. 157 of 2005, 18 July 2005, at Annex 34

<sup>156</sup> Letter from Nkaroni Group Ranch members to the Prime Minister of Kenya, 12 August 2009 at Annex 40; Letter from Nkaroni Group Ranch members to the Prime Minister of Kenya, 17 May 2010 at Annex 41

<sup>157</sup> Affidavit of David Lekuta Sulunya & Nayieyo Olole Sirma at Annex 4; Affidavit of John Koipitat Sena at Annex 2; Affidavit of Joseph Kimetto Mapelu at Annex 33

from harassing, intimidating, threatening, provoking, inciting, detaining, arresting, trespassing into, demolishing and burning the plaintiffs' properties in Narok South, Narok formerly known as Enkaroni and Enakishomi Group Ranches.<sup>158</sup>

145. The Government ignored the injunction and proceeded with the evictions. In June and August 2005, Government rangers set fire to homes, schools, churches, and other buildings in the Nkaroni and Enakishomi Group Ranches and confiscated livestock.<sup>159</sup> The applicants appealed to the High Court again on 10 June 2005 arguing that the Government had ignored the injunction and requesting that the defendant be held in contempt of court. On 2 December 2005, the Court issued its decision finding the Narok County Council in contempt of court and holding that all acts done over the suit lands in violation of the plaintiffs' rights of property since 3<sup>rd</sup> June 2005 when service of the court order was effected upon the County Council of Narok are null and void.<sup>160</sup> Despite this 2005 ruling, the Ogiek were not permitted to return to the Nkaroni and Enakishomi Group Ranches until 2007.<sup>161</sup> The case has never been finally determined and remains pending before the court.

146. In 2010, Government authorities returned, under the auspices of the Mau Conservation Task Force, to determine the boundaries of the ranches. They are now again threatening evictions in defiance of the 2005 injunction.<sup>162</sup>

147. It is submitted that this attempt to resolve the dispossession of Ogiek traditional land within the national justice system, has been unduly delayed and prolonged by the Kenyan Government. As set out at paragraphs 102-103 above, it is an accepted principle of international jurisprudence that prolonged litigation

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<sup>158</sup> Ruling, *Kalyasoi Farmers Cooperative Society and 6 Others v County Council of Narok*, HCCA case no. 664 of 2005, 2 December 2005, at Annex 42, page 2

<sup>159</sup> Affidavit of David Lekuta Sulunya & Nayieyo Olole Sirma at Annex 4; Affidavit of John Koipitat Sena at Annex 2 ¶ 9; Affidavit of Joseph Kimetto Mapelu at Annex 33

<sup>160</sup> Ruling, *Kalyasoi Farmers Cooperative Society and 6 Others v County Council of Narok*, HCCA case no. 664 of 2005, 2 December 2005, at Annex 42, pages 79-80.

<sup>161</sup> Affidavit of David Lekuta Sulunya & Nayieyo Olole Sirma at Annex 4; Affidavit of John Koipitat Sena at Annex 2; Affidavit of Joseph Kimetto Mapelu at Annex 33

<sup>162</sup> Affidavit of David Lekuta Sulunya & Nayieyo Olole Sirma at Annex 4; Affidavit of John Koipitat Sena at Annex 2; Affidavit of Joseph Kimetto Mapelu at Annex 33

and intentional obstruction of justice may indicate that domestic remedies are ineffective. In addition, as detailed at paragraphs 118-119 above, it is well known that the Kenyan judiciary and judicial system are hugely corrupt, inefficient and lack independence, which further adds to the ineffectiveness of the domestic remedy sought.

***Republic ex parte William Kipsoi Kimeto & Others v Commissioner of Lands and Others, case no 157 of 2005***

148. In 2005, proceedings were commenced in the Nakuru High Court regarding the land in Tinnet, Western and Southwestern Mau, which was degazetted by the October 2001 gazette notice (see Annex 22 and paragraph 45 above). The applicants argued that the Government had failed to use the Blue Book a census of the Ogiek conducted between 1991 and 1994 to allocate land and that the Ogiek should have first priority for the allocations.

149. The applicants therefore sought an order prohibiting the Government from issuing title deeds in respect of the land in Tinnet which was degazetted by the October 2001 legal notices.

150. The case remains pending before the Court and has not been determined. It is submitted that, in common with the majority of the domestic proceedings described above, given the undue delay in the proceedings and the corrupt and inefficient nature of the Kenyan judicial system, this domestic remedy is ineffective.

***Fred Matei & 3 Others v Mount Elgon County Council, Kitale High Court Civil Case No 109 of 2008***

151. As detailed at paragraph 67 above, in June 2000, the Government by a resolution of the Mount Elgon County Council converted part of the Chepkitale Trust Land into a national game reserve without any consultation or compensation to the community. This was pursuant to a gazette notice issued on 1 June 2000. The reserve measures approximately 12 square kilometres and is

known for the African elephant and buffaloes (see further Affidavit of Fred Matei at Annex 7).

152. In 2008, 4 members of the Mount Elgon Ogiek community commenced legal action in Kitale High Court, on behalf of all the local community, seeking *inter alia*, the revocation of the gazette notice of dated 1 June 2000. The case remains pending before the court, and progress is slow. It is submitted that this attempt by the local Ogiek community in Mount Elgon to resolve the dispossession of their traditional land, is very likely to be further delayed and prolonged by the Kenyan Government and, as set out at paragraphs 102-103 above, it is an accepted principle of international jurisprudence that prolonged litigation and intentional obstruction of justice may indicate that domestic remedies are ineffective. In addition, as detailed at paragraphs 118-119 above, it is well known that the Kenyan judiciary and judicial system are hugely corrupt, inefficient and lack independence, which further illustrates the ineffectiveness of the domestic remedy sought. Finally, a decision in favour of the applicants will invalidate the legal notices, but will not grant the Ogiek the return of their ancestral land, so will not provide sufficient legal redress in any event. It is therefore submitted that recourse to this court does not represent an effective remedy.

153. As detailed at paragraph 69 above, there are a number of other legal cases which have sought to challenge the eviction of the Ogiek from their ancestral land and denial of associated rights, including *Stephen Kipruto Tigerer v Attorney General & 5 Others*, Nakuru High Court Civil Case no 129 of 2005/25 of 2006; Case 325 of 2008 in Nairobi High Court, *John Mibey & 5 Others v Forester Ndoinet Station & 4 Others*; and *Olunguruone Land Disputes Tribunal, Claim No 148 of 2006*. These have all failed to achieve sufficient redress for the Ogiek community. In common with the majority of the domestic proceedings described above, given the undue delay in the proceedings and the corrupt and inefficient nature of the Kenyan judicial system, it is submitted that these domestic remedies are similarly ineffective.

### ***Burden lies on the Respondent Government***

154. In its written submissions to the Commission dated 15 March 2010, the Respondent Government claims that local remedies have not been exhausted. It is well-established in the jurisprudence of the Commission and indeed other international tribunals that in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof.<sup>163</sup> It is incumbent on the Government claiming non-exhaustion to satisfy the Commission that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, capable of providing redress in respect of the Charter violations alleged in this Communication, and offered reasonable prospects of success.

155. The burden is therefore on the Government to point to a particular domestic remedy which it claims should have been invoked by the Ogiek community, and to prove that in the circumstances of the particular case that remedy was capable of providing redress in respect of the complaints and offered reasonable prospects of success. In *Rencontre Africaine pour la Defense de Droits de l'Homme v. Zambia*, the Commission emphasised that the burden of proof which falls on the Government is high, finding that when the Zambian Government argues that the communication must be declared inadmissible because the local remedies have not been exhausted, the government then has the burden of demonstrating the existence of such remedies.<sup>164</sup>

156. In *Bakweri Land Claims Commission v. Cameroon*, the communication was found inadmissible *only* after the Commission had determined that the

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<sup>163</sup> See African Commission, *Rencontre Africaine pour la Defense de Droits de l'Homme v. Zambia*, Communication No. 71/92, § 12 (1996); for relevant jurisprudence of the European Court of Human Rights see also *Akdivar v Turkey*, *supra* note 115, § 68; see also *Tokic and Others v. Bosnia and Herzegovina*, nos. 12455/04, 14140/04, 12906/06 and 26028/06, 8 July 2008, § 59; *Sejdovic v. Italy* [GC], no. 56581/00, 1 March 2006, § 46; *Lepojić v. Serbia*, no. 13909/05, 6 November 2007, § 46; *De Jong, Baljet & Van Den Brink*, nos. 8805/79; 8806/79; 9242/8122, May 1984, § 39; *Kangasluoma v. Finland*, no. 48339/99, 20 January 2004, § 48; *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, 13 November 2007, § 115.

<sup>164</sup> *Rencontre Africaine pour la Defense de Droits de l'Homme v. Zambia*, *supra* note 163, §12

complainant, ðnot even once, [had] seized any local or national court.ð<sup>165</sup> Under the jurisprudence of the Commission, a complainant is required only to lay the foundation for a potential finding of admissibility.<sup>166</sup> The jurisprudence of the Human Rights Committee adopts a similar position, requiring the author of the communication only to set out facts sufficient for a potential finding of admissibility.<sup>167</sup> Once the complainant fulfils his or her initial burden, the onus shifts to the State to *prove* the existence of an unexhausted remedy. It is submitted that the Government fails to do this.

***Discretionary and extraordinary remedies do not need to be exhausted***

157. In its written submissions to the Commission dated 15 March 2010, the Respondent Government states that local remedies have not been exhausted because the Complainants have not lodged an official claim with the Kenya National Human Rights Commission (KNHRC) to seek redress.

158. As recognised by the Kenyan Government, the KNHRC is a quasi-judicial independent human rights institution. While the KNHRC has a quasi-judicial mechanism for hearing complaints, this mechanism is extremely under-developed and unrespected by the state. Indeed, the only significant claim it has arbitrated related to claims of human rights violations by salt manufacturing firms in the Magarini area of Malindi, where it recommended compensation for the affected communities. Five years later, the state has yet to implement any of the recommendations<sup>168</sup> As such, any redress which may have been afforded to the Complainants would have been purely discretionary and not of a legal nature.

159. The Honourable Commission has previously held that there is no requirement to exhaust remedies which are of a discretionary nature. Thus in *Constitutional Rights Project v Nigeria* it was held that a remedy was neither adequate nor effective where it was a ðdiscretionary, extraordinary remedy of a

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<sup>165</sup> African Commission, Communication No 260/2002

<sup>166</sup> See African Commission, Communication. No. 198/97, *SOS--Esclaves v. Mauritania*, § 15

<sup>167</sup> See *The African Charter on Human and Peoples' Rights, The System in Practice 1986-2000*: Malcolm Evans and Rachel Murray, eds, (2002, Cambridge University Press) at page 82

<sup>168</sup> See, Kenya National Commission on Human Rights, *The Malindi Inquiry Report* (2006) available at [http://www.knchr.org/dmdocuments/Malindi\\_Inquiry.pdf](http://www.knchr.org/dmdocuments/Malindi_Inquiry.pdf).

non-judicial natureö.<sup>169</sup> In *Alfred Cudjoe v Ghana*,<sup>170</sup> a Communication which had only been considered by the Ghanaian national human rights institution was declared inadmissible, as remedies of a judicial nature ó ñaction before the law courtsø had not been exhausted. Similarly, in *Ilesanmi v Nigeria*<sup>171</sup>, the Commission reiterated that non-judicial bodies ó including in that case, the National Human Rights Commission ó need not be approached. The Commission found that, even though they may ñgrant remediesø, these bodies are not ñpart of the judicial structureø

160. This approach of the Honourable Commission is consistent with that of the European Court of Human Rights. For example, in the case of *Temple v UK* it was stated that:

*õThe applicant may have the right to have his case fairly considered by the Secretary of State under principles of administrative law, but this does not remove the completely discretionary character of the procedure and thus cannot be regarded as an effective or sufficient remedy in respect of his complaint under the Convention. ”*<sup>172</sup>

161. It is therefore submitted that a claim to the Kenya National Human Rights Commission would not provide an adequate or sufficient remedy to the alleged violations and therefore all domestic remedies have been exhausted.

***There is no requirement to exhaust domestic remedies where it is impractical or undesirable for the Complainants to seize the domestic courts in the case of each violation***

162. Where there are a large number of victims of serious human rights violations, it may be õimpractical or undesirableö to require the petitioner õto

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<sup>169</sup> *Constitutional Rights Project v Nigeria*, supra note 111, § 8. See also African Commission Communication no 231/99, *Avocats Sans Frontieres v Burundi*, §§ 22-3.

<sup>170</sup> African Commission, Communication No 221/98 at §14

<sup>171</sup> *Supra* note 103 at § 42

<sup>172</sup> European Court of Human Rights, *Temple v UK* App no 10530/83, 16.5.85, § 10. Similarly, the jurisprudence of the ECtHR establishes that there is no requirement to bring a case before a domestic ombudsman or any other body which has no power to render a binding decision, *Devlin v UK* 29545/95, 11.4.02.

seize the domestic courts in the case of each individual complaint.<sup>173</sup> In these cases the "seriousness of the human rights situation . . . and the great numbers of people involved render [domestic] remedies unavailable in fact, or, in the words of the Charter, their procedure would probably be "unduly prolonged."<sup>174</sup>

163. As indicated above, a number of domestic actions have been brought challenging the evictions and dispossession of land by the Respondent Government. The majority of these remain pending before the domestic courts, whilst some have been unsuccessful. In some cases, such as the Ogiek of Sasimwani in Maasai Mau and the Ogiek of Tindiret, the community has been unable to bring domestic action to challenge their evictions, due to lack of capacity, resources and/or legal aid, and obstacles raised by the Government (see further paragraphs 118-119, 131-133 above and 165-167 below).

164. The Ogiek community number approximately 20,000. It is submitted that it would be impractical and undesirable within the meaning of *Free Legal Assistance Group Lawyers' Committee for Human Rights v Zaire*<sup>175</sup> for every member of the Ogiek community to bring a domestic legal case challenging the dispossession of their land. It follows therefore that the Ogiek people, who, of necessity must assert group or collective rights and which are, in any event, unprotected by the Constitutional Bill of Rights, benefit from the *Free Legal Assistance Group* exception to the rule on domestic remedies.

***Any remaining obligations on the Complainants to pursue domestic remedies are annulled by the actions of the Government of Kenya in raising obstacles to their attempts to obtain such domestic redress as exists***

165. The Honourable Commission has held, in circumstances where the actions of the State Party are such as to frustrate attempts of the complainant to seek domestic redress, that there can be no requirement of exhaustion of domestic

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<sup>173</sup> *SERAC v Nigeria*, *supra* note 82 at § 43; see also *Free Legal Assistance Group and Others v. Zaire*, *supra* note 93 at § 37.

<sup>174</sup> African Commission, *Amnesty International and Others v. Sudan*, AC, Comm. Nos. 48/90, 50/91, 52/91, 89/93 (1999) at § 39.

<sup>175</sup> *Supra* note 93

remedies<sup>176</sup>. Further, if the complainant cannot turn to the judiciary of his country because of generalised fear for his life (or even those of his relatives), local remedies would be considered to be unavailable to him.<sup>177</sup> The Inter-American Commission of Human Rights has similarly held that the rule of exhaustion of domestic remedies does not require the invocation of remedies where this would place the physical integrity of the petitioner at risk.<sup>178</sup>

166. The Complainants respectfully submit that the Government of Kenya has, in the past, raised obstacles to the attempts of the Ogiek community to bring their grievances before the national authorities. For example, as set out at paragraph 48 above, the Respondent Government has repeatedly failed to attend numerous court hearings in a number of domestic cases challenging the Ogiek eviction, preventing the Ogiek community from obtaining redress. Further, as set out above, violence has been used during evictions, members of the Ogiek community have been repeatedly arrested and detained on falsified charges, peaceful demonstrations by the Ogiek became violent at the hands of the Kenyan security forces and much political pressure was placed on the Ogiek community by the office of the President to drop the legal cases challenging the dispossession of their land (see further affidavits of John Lesingo Lembigas, Joseph Nburumaina, Linah Tapsolom, Christopher Kipkones, Wilson Mamusi Ngusilo, John Koipitat Sena, Barno Christopher Kipsang, Joseph Kimetto Mapelu, David Lekuta Sulunya & Nayeiyi Olole Sirma, and Fred Matei at Annexes 2-5, 7, 11-14 and 33). Members of the community were also told not to appeal and were threatened with further evictions, arrests and other harassment should they take any further legal action. These incidences continue. In 2007, for example, the applicants in case no 635 of 1997<sup>179</sup> were harassed by the District Officers of Njoro and Elbergon, through their police officers, in a bid to evict them from their parcels of land. This harassment took the form of unjustified arrests, intimidation and, in the worst cases, demolition of their houses in flagrant violation of the 15 October 1997 High Court Order (see further letter from Kamau Kiria & Kiraitu

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<sup>176</sup> See African Commission. *John K Modise v Botswana*. Communication 97/93 at § 20-22.

<sup>177</sup> *Dawda Jawara v The Gambia*, *supra* note 94 at § 35.

<sup>178</sup> *Plan de Sánchez Massacre*, IACHR, Rep. No. 31/99 (1999) at § 27.

<sup>179</sup> *Joseph Letuya & 21 Others v The Attorney-General & 5 Others*

Advocates to the Provincial Commissioners and others, dated 6 February 2007, at Annex 23).

167. The harassment of the Ogiek community, reportedly in connection with the attempts of the Ogiek people to obtain recognition of their rights under Kenyan national law, evidences the extent to which the community have met severe resistance in their attempts to make use of those domestic 'remedies' as do exist, and the futility of such action. To the extent that the Government of Kenya has engaged, or acquiesced, in such activities, the Ogiek have been frustrated in their attempts to pursue national recourse. For this reason, the Complainants are relieved of any additional/remaining obligation to exhaust domestic remedies.

***The Government of Kenya has had ample time with which to deal with the complaint and urgent action is now required to prevent irreparable damage to the way of life of the community***

168. Although legal action was not commenced until 1997 in relation to the alleged violations, the Government of Kenya has been aware of the assertion of rights by the Ogiek people since the 1960s at the very least, when attempts were made to settle the Ogiek by developing a register of Ogiek people (see further Affidavit of Fred Matei at Annex 7). In 1977, Ogiek elders from Eastern Mau sought an audience with the then Vice-President Arap Moi, and discussed with him the eviction from their ancestral land. The issue was subsequently discussed with the then President Jomo Kenyatta (see Affidavits of Joseph Nburumaina and Linah Tapsolom at Annexes 11 and 12).

169. In the late 1980s, when the dispossession of Ogiek land in the Mau Forest in particular started becoming more frequent, the Ogiek frequently mentioned their claims over land in the Mau Forest Complex and forested areas of Mount Elgon to the relevant authorities, but without success. In November 1995, the Ogiek of Eastern Mau staged a demonstration seeking recognition of their ancestral land rights, walking from their homes to Nakuru, but this became violent at the hands of the police (see Affidavits of John Lesingo Lembigas, Joseph Nburumaina, Linah Tapsolom and Christopher Kipkones at Annexes 11-

14). In 1996, in a final attempt to resolve the issue, the Ogiek of Eastern Mau submitted a lengthy memorandum to all Members of Parliament, asserting their rights over their traditionally owned land.<sup>180</sup> This again, was unsuccessful.

170. The Government of Kenya remains fully aware of the complaint of the Ogiek people by virtue of the numerous domestic proceedings which remain pending before the domestic courts, the submissions made by the Ogiek Council of Elders to the Interim Coordinating Secretariat which is implementing the Mau Taskforce Report,<sup>181</sup> and the numerous and regular observations and recommendations made by a wide range of international bodies on the issue. These include the UN Human Rights Committee<sup>182</sup>, the UN Committee on the Rights of the Child<sup>183</sup>, the UN Committee on Economic, Social and Cultural Rights<sup>184</sup>, the UN Working Group on Universal Periodic Review<sup>185</sup>, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples<sup>186</sup>, the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living<sup>187</sup>, the UN Working Group on Minorities<sup>188</sup>, the UN Human Settlements Programme (HABITAT)<sup>189</sup> and The International Labour Organization (ILO).<sup>190</sup>

171. Notwithstanding that the issue of the rights to the land remain contested and legal proceedings remain largely unresolved, the situation on the ground

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<sup>180</sup> See Memorandum to All MPs by Representatives of Kenyans of Ogiek Community living in Nessuit and Marioshoni parts of the Mau Forest at Annex 8; see also Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9, at page 45

<sup>181</sup> Republic of Kenya, *Report of the Government's Task Force on the Conservation of the Mau Forest Complex* (2009) at Annex 9

<sup>182</sup> See in particular Concluding Observations on Kenya (CCPR/CO/83/KEN), 29 April 2005 at §22

<sup>183</sup> See in particular Concluding Observations on Kenya (CRC/C/KEN/CO/2), 19 June 2007 at § 70

<sup>184</sup> See in particular Concluding Observations on Kenya (E/C.12/KEN/CO/1), 1 December 2008 at §§ 31 and 35

<sup>185</sup> See in particular Summary on Kenya (A/HRC/WG.6.8/KEN/3), 5 February 2010, at § 65

<sup>186</sup> See in particular Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Mission to Kenya (A/HRC/4/32/Add.3), 26 February 2007 at §§ 37-41 and 102; see also the Special Rapporteur's 2004 report (E/CN.4/2004/80) 26 January 2004, at § 18

<sup>187</sup> See in particular Report by the Special Rapporteur Miloon Kothari: Mission to Kenya (E/CN.4/2005/48/Add.2), 17 December 2004, at §§ 60-62 and § 81

<sup>188</sup> Report of the Working Group on Minorities (E/CN.4/Sub.2/2004/29), 8 June 2004 at § 11

<sup>189</sup> See *Forced Evictions – Towards Solutions?* Second Report of the Advisory Group on Forced Evictions to the Executive Director of UN HABITAT, 2007, at pages 27-28

<sup>190</sup> 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 ILO, Feb. 2008, at pages 13-14 and page 25

continues to change to the detriment of the Ogiek people and the future generations of the community. For example, in 2000, the Kenyan Government imposed a logging ban, yet several logging companies (including Pan African Paper Mills, Raiply Timber and its sister firm, Timsales Ltd) are still allowed to cut down trees in the Mau Forest. According to the Government, the three firms were exempted because Raiply and Timsales employ over 30,000 Kenyans, while Pan African was exempted because "the government has shares in it and is important to the economy."<sup>191</sup>

172. It is deeply concerning to the Community that the delay in the hearing of their claims results in their situation being ever more likely to remain unresolved, particularly as third party rights intervene. Yet, the Ogiek have made every effort to seek to resolve the position and seek a remedy through the proper domestic proceedings.

173. That an international body is under a special responsibility to consider an application when action is required *urgently* is demonstrated by the United Nations Human Rights Committee case of *Lubicon Lake Band v Canada*.<sup>192</sup> Despite the fact that a number of domestic appeals were pending at the time of the communication, the Committee declared the communication admissible, noting the importance of saving the community which, at the material time was, according to the applicants, "on the brink of collapse". It is submitted that the Ogiek community also faces a grave and urgent situation. The community and its culture are splintered and the practice of the Ogiek hunter-gather lifestyle is severely curtailed, threatening the continued existence of their traditional way of life.

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<sup>191</sup> <http://www.ogiek.org/action/index.htm>, accessed 2 August 2010

<sup>192</sup> UN Human Rights Committee. Communication 167/1984.

#### IV. CONCLUSION

174. It is submitted that:
- (i) The Complainants possessing the necessary *locus standi* to appear before the Commission;
  - (ii) The communication not being barred by reason of the application of the rule of non-retroactive application of international treaties;
  - (iii) The principle of the requirement of sufficiency and effectiveness of national remedies being recognised by the Honourable Commission and other international mechanisms for the promotion and protection of human rights;
  - (iv) Those national remedies which are available being ineffective and insufficient, in that they do not offer restitution of the Complainants' rights to the land or preservation of their community and traditional way of life as a collective;
  - (v) Those national remedies being further ineffective in that they have been unduly prolonged and delayed by both the corruption and inefficiency of the Kenyan judicial system and the failure of the Government authorities to engage with the proceedings;
  - (vi) The Ogiek community having sought recompense for loss of use of the land to date by way of a number of cases before various courts and tribunals;
  - (vii) There being no requirement to exhaust domestic remedies where it is impractical or undesirable for the Complainants to seize the domestic courts in the case of each violation;
  - (viii) The Government of Kenya having engaged in, acquiesced in, or allowed local authorities to raise obstacles to the attempts of the Complainants to obtain domestic recourse;
  - (ix) The Government of Kenya having had notice of the complaint since the 1960s, being ample time with which to deal with the complaint; and
  - (x) Urgent action now being required to prevent irreparable damage to the way of life of the community;

The application satisfies Article 56 of the African Charter in relation to the requirements for admissibility.

Lucy Claridge and Korir Sing'Oei

**COMPLAINANTS' REPRESENTATIVES**

5 August 2010

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