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Clerk of the senate/secretary, PSC
Date 03/07/23

REPUBLIC OF KENYA

THIRTEENTH PARLIAMENT SECOND SESSION

THE SENATE

APPROVED
RT. HON. SEN
AMASON J. KINGI

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

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11/7/23

REPORT ON THE PETITION BY PAULO MOSBEI AND 19 OTHERS CONCERNING HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY

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TABLED BY	CHAIR JLAHRC
COMMITTEE	JLAHRC
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June, 2023

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LIST OF ABBREVIATIONS/ACRONYMS

KNCHR	Kenya National Commission on Human Rights
NGEC	National Gender and Equality Commission
NLC	National Land Commission
TJRC	Truth, Justice and Reconciliation Commission
AG	Attorney General

PRELIMINARIES

Establishment and Mandate of the Committee

The Standing Committee on Justice, Legal Affairs and Human Rights is established under the Standing Orders of the Senate and is mandated *'to consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.*

Membership of the Committee

The Committee is comprised of –

1)	Sen. Wakili Hillary Kiprotich Sigei, MP	- Chairperson
2)	Sen. Raphael Chimera Mwinzagu, MP	- Vice-Chairperson
3)	Sen. Fatuma Adan Dullo, CBS, MP	- Member
4)	Sen. William Cheptumo Kipkiror, CBS, MP	- Member
5)	Sen. Hamida Ali Kibwana, MP	- Member
6)	Sen. Catherine Muyeka Mumma, MP	- Member
7)	Sen. Veronica W. Maina, MP	- Member
8)	Sen. Karen Njeri Nyamu, MP	- Member
9)	Sen. Andrew Omtatah Okoiti, MP	- Member

The Minutes of the Committee in considering the Petition by Paulo Mosbei and 19 others concerning historical injustices suffered by the Torobeek Community are attached to this Report as ***Annex 1***.

FOREWORD BY THE CHAIRPERSON

Hon. Speaker,

The Petition submitted by Mr. Paulo Kiprotich Mosbei on behalf of the Torobeek Community was reported in the Senate on 22nd February, 2023, following which it was committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.

The salient issue in the Petition relates to the eviction of members of the Torobeek community from the Mau Forest and other forests across the country, without either being resettled or compensated. The Petitioners also alleged to have been systematically marginalized and discriminated against by the colonial and subsequent governments, including in access to employment opportunities and government services. The Petitioners therefore prayed that the Senate intervenes by ensuring that the community is recognized and treated fairly as other Kenyan citizens and, in the case of the ancestral lands they have lost through evictions, that members of the community are resettled or compensated.

Hon. Speaker,

In considering the Petition, the Committee visited Molo sub-County in Nakuru County where it met with and listened to first-hand accounts of the Petitioners. This was to enable the Committee to understand who the Torobeek community are, where they are found, the plight of the community, the interventions they have sought so far and whether the same have been successful, and the remedies that they seek from the Committee and the Senate.

The Committee subsequently held meetings with the National Gender and Equality Commission, and considered written responses submitted by the Kenya National Commission on Human Rights, the National Land Commission and the Office of the Attorney General. These are summarized at Chapter Two of this Report.

Hon. Speaker,

Having heard from the Petitioners as well as the other stakeholders, the Committee made various observations which are set out at Chapter Three of the Report. These relate to the claim of marginalization and discrimination by the Torobeek community, the question of resettlement or compensation for loss of their ancestral lands, the delayed implementation by the Kenya government of the Judgments of the African Court on Human and People's Rights on the *Ogiek* case, and the failure by Constitutional commissions to effectively discharge their mandates and functions.

The Committee was particularly concerned that the historical land injustices claim by the Torobeek community has been pending at the National Land Commission since it was admitted for consideration in 2021. Had it been addressed, then the Petitioners would not have had to approach the Senate on the same matter. The Committee was also concerned that, while the National Gender and Equality Commission has been in existence for over a decade, it is yet to come up with guidelines on how to evaluate who qualifies as a minority or marginalized community, and is further yet to document and map the minority groups and marginalized communities in the country.

Hon. Speaker,

Arising from its observations on the Petition, the Committee has made three key recommendations, namely –

a) That, the National Land Commission expeditiously investigates the issue of historical land injustices against the Torobeek as submitted by the petitioners and admitted by the Commission under file reference number NLC/HLI/1117/2021, and the Commission to submit a status report to the Senate within **three months** of the tabling of this Report.

b) That, the National Gender and Equality Commission works with the Ministry of Interior and National Administration and other relevant government agencies to facilitate the recognition of the Torobeek community by being –
   i) issued with a unique identification code;
   ii) recognized as an ethnic community in Kenya; and
   to submit a status report to the Senate within **three months** of the tabling of this Report.

c) That, the National Gender and Equality Commission undertakes investigation on the complaints relating to human rights violations, discrimination and marginalization of the Torobeek community, and submit a report to the Senate within **three months** of the tabling of this Report.

Hon. Speaker,

While indeed this matter is live before the National Land Commission and, following intervention by the Committee, before the National Gender and Equality Commission, the Standing Committee on Justice, Legal Affairs and Human Rights will follow up on a quarterly basis to ensure that justice is done for the members of the Torobeek Community.

Hon. Speaker,

Allow me to thank the Members of the Committee for their diligence and insights during the consideration of this Petition. I also wish to thank the members of the Torobeek community for bringing this matter to the attention of the Senate and for the submissions made when the Committee visited Molo. I further wish to thank the Office of the Attorney General as well as the Commissions mentioned earlier who presented written submissions or appeared before the Committee. Lastly, I wish to thank the Offices of the Speaker and the Clerk of the Senate for the support accorded to the Committee during consideration of this Petition.

Hon. Speaker,

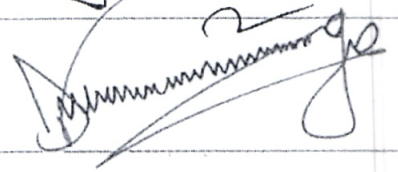
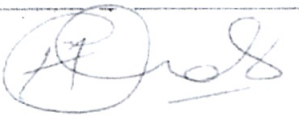
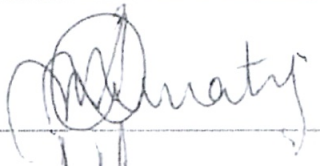
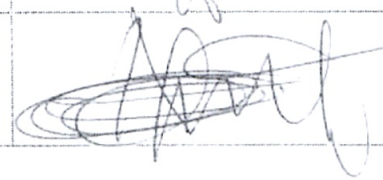
It is now my pleasant duty, pursuant to Standing Order 238(2), to present the Report of the Standing Committee on Justice, Legal Affairs and Human rights on the Petition by Mr. Paulo Kiprotich Mosbei regarding the historical injustices suffered by the Torobeek Community.

Signed ..... Date 15/06/2023

SEN. WAKILI HILLARY SIGEI, MP
CHAIRPERSON, STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS.

ADOPTION OF THE REPORT OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE PETITION BY PAULO MOSBEI AND 19 OTHERS CONCERNING HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY

We, the undersigned Members of the Standing Committee on Justice, Legal Affairs and Human rights, do hereby append our signatures to adopt this Report

No	Name	Signature
1.	Sen. Wakili Hillary Kiprotich Sigei, MP *(Chairperson)*	
2.	Sen. Raphael Chimera Mwinzagu, MP *(Vice-Chairperson)*	
3.	Sen. Fatuma Adan Dullo, CBS, MP	
4.	Sen. William Cheptumo Kipkiror, CBS, MP	
5.	Sen. Hamida Ali Kibwana, MP	
6.	Sen. Catherine Muyeka Mumma, MP	
7.	Sen. Veronica W. Maina, MP	
8.	Sen. Karen Njeri Nyamu, MP	
9.	Sen. Andrew Omtatah Okoiti, MP	

CHAPTER ONE: INTRODUCTION

1.1 Summary of the Petition

1. The right to present petitions to public authorities is provided for at Article 37 of the Constitution. Article 119(1) further provides that 'Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation.'

2. Parliament enacted the Petition to Parliament (Procedure) Act, No. 12 of 2012, to make provision for the procedure for the exercise of this right. Further, Part XXVII of the Standing Orders of the Senate also makes provision of how this right may be exercised.

3. Pursuant to the said provisions, at the sitting of the Senate held on Wednesday, 22nd February, 2023, the Deputy Speaker of the Senate reported to the Senate that a Petition had been submitted by Mr. Paulo Mosbei and 19 others concerning historical injustices suffered by the Torobeek Community. A copy of the Petition is attached to this Report as ***Annex 2***, while an extract of the Hansard for the Senate sitting of Wednesday, 22nd February, 2023 is attached as ***Annex 3***.

4. The salient issues raised in the Petition were that –
   (a) a majority of persons from the Torobeek Community originally lived together with the Ogiek Community in the regions of Mau Complex of Nakuru and Narok counties, Mt. Londiani across to the forest to the northern Tinderet in Nandi County, Timboroa from Maji Mazuri across Rift Valley, with some going as far as Kiambu, Nyandarua, Migori, Isiolo and Bungoma counties;
   (b) the community was evicted from their original habitat by the colonialists and thereafter by the Kenya Government after independence rendering them internally displaced;
   (c) while some internally displaced persons from the Ogiek Community have been compensated and resettled by the national Government, the Torobeek Community have neither been compensated nor resettled. Additionally, the Torobeek Community have remained marginalized; and
   (d) the Torobeek community, through their leaders had made efforts to have the matter addressed by the relevant Government agencies, all of which had not borne fruits.

5. The Petitioners therefore prayed that the Senate –
   i) addresses their grievances expeditiously hence saving the community from further marginalization and neglect by the government;
   ii) recommends a mechanism or framework for resettling the Torobeek community members in their respective counties;
   iii) sets aside funds to compensate or resettle the community; and
   iv) considers the community members during relief food distribution in counties and when employment opportunities arise.

6. Pursuant to standing order 238(1) of the Senate Standing Orders, the Petition was committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.

1.2 Indigenous land rights and forced evictions

7. The key issues in the Petition by the Torobeek community relate to indigenous land rights and forced eviction of the community from their traditional, ancestral and habitual dwelling places, without being either resettled or appropriately compensated to enable them acquire alternative lands to settle on.

8. According to the United Nations, forced evictions constitute gross violations of a range of internationally recognized human rights, including the right to adequate housing, food, water, health, education, work, security of the person, freedom from cruel, inhuman and degrading treatment, and freedom of movement.[1]

9. As a result of forced evictions, people are often left homeless and destitute, without means of earning a livelihood and often with no effective access to legal or other remedies. Forced evictions intensify inequality, social conflict, segregation and invariably affect the poorest, most socially and economically vulnerable and marginalized sectors of society, especially women, children, minorities and indigenous people.

[1] UNHABITAT and OHCHR (2014), *Forced Evictions: Fact Sheet No. 25, Rev 1,* UN, New York and Geneva

10. Arising from this realization, States are obligated under various international human rights instruments to refrain from, and protect against forced evictions of peoples and communities from their home(s) and lands. Among these are the Universal Declaration of Human Rights[2] and the International Covenant on Economic, Social and Cultural Rights[3] which instruct parties to take necessary steps to safeguard the rights to housing.

1.3 The constitutional rights to property and adequate housing

11. In Kenya, the right to property is guaranteed under Article 40 of the Constitution. Article 40(3) prohibits the State from depriving a person of property unless it is for a public purpose or in the public interest, and is carried out in accordance with the Constitution and the relevant laws. This includes the prompt payment in full or just compensation to the affected persons. Provision is further made for payment of compensation to occupants of land in good faith who may not hold title to the land.

12. Related to the right to property is the right to adequate housing, which is provided for at Article (43)(1)(b) of the Constitution. This right is further recognized in the National Land Policy of 2009[4], the National Land Use Policy of 2017[5], and the Land Act, No. 6 of 2012, which sets out elaborate procedures to be complied with in carrying out evictions.[6] The application of these provisions is however restricted to unlawfully occupied public, community or private land, and does not address instances of evictions from ancestral or indigenous lands, as is the case with traditional forest dwellers such as the Ogiek and the Torobeek.

13. Article 67(2) (e) of the Constitution of Kenya mandates the National Land Commission to initiate investigations, on its own initiative or on a complaint, into historical land injustices and recommend appropriate redress. To give effect to this constitutional requirement, section 15 of the National Land Commission Act, No. 5 of 2012, provides the legal framework for redressing historical land injustices.

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[2] Ratified by Kenya on 31st July, 1990
[3] Acceded to by Kenya on 1st May, 1972
[4] Sessional Paper No.3 of 2009 on National Land Policy, Government of Kenya, 2009
[5] Sessional Paper No. 1 of 2017 on National Land Use Policy, Government of Kenya, 2017
[6] Sections 152A to 152I of the Land Act, No. 6 of 2012.

14. The complaints that may be investigated by the Commission are those that were occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement; resulted in displacement from their habitual place of residence; occurred between 15th June, 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when the Constitution of Kenya was promulgated; and, have not been sufficiently resolved.

15. The National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017[7] further set out the procedure for the investigation and resolution of claims arising out of historical land injustices. This includes how an investigation may be commenced, the conduct of hearings, the making and publication of decisions of the Commission, as well as the right to appeal against such a determination.

1.4 The Mau Forest Evictions of 2004 to 2008

16. In the Petition by Mr. Paulo Mosbei on behalf of the Torobeek community, the petitioners state that they originally lived together with the Ogiek Community in the regions of Mau Complex of Nakuru and Narok counties before they were evicted. They further claim to have been treated differently from their Ogiek neighbours when it came to compensation and resettlement.

17. The evictions that took place in the Mau Forest Complex between 2004 and 2008 are documented in, among others, a Briefing Paper published by Amnesty International in May 2007.[8] In the Paper, it was reported that over a hundred thousand persons were forcibly evicted from six forest areas with the government stating that this was done in order to protect Kenya's forests and water towers. A direct consequence of the Mau forest eviction was the forced displacement of thousands of families.[9]

18. It is to be recalled that, from the year 2001, the government excised parts of the Mau Forest with the aim of resettling members of the Ogiek community who were then living in the forest. This was done to secure the long-term conservation of the biodiversity and water catchments of the Mau Forest.

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[7] Legal Notice No. 258 published in Kenya Gazette Supplement No. 154 of 6th October, 2017
[8] Amnesty International (2007), *Nowhere to go: Forced evictions in Mau Forest*, AFR 32/006/2007
[9] Ibid

19. However, according to the Report of the Government Taskforce on the Conservation of the Mau Forest Complex[10], the resettlement did not proceed as planned, with beneficiaries of the excisions including government officials, political leaders and companies. The Taskforce therefore recommended that the Ogiek who were to be settled in the excised areas and had not been given land be settled outside the critical catchment and biodiversity areas.[11]

20. The National Land Policy of 2009[12] acknowledged the infringement of the rights of the Ogiek and other minority communities that were evicted from forests, and identified this as one of the priority areas requiring special intervention to address.

21. Paragraphs 198 and 199 thereof stated that –

"198. Minority communities are culturally dependent on specific geographical habitats. Over the years, they have lost access to land and land-based resources that are key to their livelihoods. For example, such loss of access follows the gazettement of these habitats as forests or national reserves or their excision and allocation to individuals and institutions, who subsequently obtain titles to the land.

199. These communities are not represented adequately in governmental decision making at all levels since they are relatively few in number. Their political and economic marginalization has also been attributed to the fact that colonial policies assimilated them into neighbouring communities. In addition, the colonial Government alienated their lands through forest preservation policies, which effectively rendered them landless as they were denied the right to live in the forests. Colonial administration also led to the marginalization of other minority communities both urban and rural, such as hunter-gatherers. To protect and sustain the land rights of minority communities, the Government shall:

(a) Undertake an inventory of the existing minority communities to obtain a clear assessment of their status and land rights;

(b) Develop a legislative framework to secure their rights to individually or collectively access and use land and land based resources."

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[10] Government of Kenya (2009), *Report of the Government Taskforce on the Conservation of the Mau Forest Complex*, March 2009

[11] Ibid, pages 10 - 11

[12] Session Paper No. 3 of 2009

22. It is observed that, in the Report of the Government Taskforce on the Conservation of the Mau Forest Complex, no reference was made to the Torobeek community, while members of the Ogiek community are referred to inter-changeably as the '*Dorobo*'. In the present Petition, the petitioners state that the name 'Torobeek' is derived from the word 'Dorobo'. It is further observed that, besides the Mau Forest complex, the petitioners claim to have been evicted from forests in other parts of Kenya where they traditionally inhabited as hunters and gatherers.

1.5 Case Study: The Ogiek Community Claim

23. While there is no record of the Torobeek community having litigated their claim of historical land injustices in Court, the Ogiek community has argued its case at various fora and obtained judgments in its favour at both national courts and regional human rights bodies, on facts almost similar to those of the Torobeek.

24. In *Joseph Letuya & 21 others v. Attorney General & 5 others [2014] eKLR*, twenty two members of the Ogiek community filed a representative suit on behalf of communities living in East Mau Forest. They demanded a declaration recognizing that through forcible eviction, the government had violated their right to life and to livelihood. They claimed that their evictions contravened their constitutional protections, and sought orders restoring their lands to them and restraining the government from evicting them. The High Court ruled in favour of the community and directed the National Land Commission to work with the Ogiek Council of Elders to identify land on which the community may be settled. A copy of the decision is attached to this Report as ***Annex 4***.

25. In a separate case filed at the African Court on Human and Peoples Rights, the community successfully challenged their eviction from their ancestral land and territories in the Mau Forest and the systematic denial of associated rights.[13] In a landmark judgment delivered on 26th May, 2017, the Court made clear rulings regarding the role of indigenous peoples and hunter–gatherers specifically in conservation, stating that the preservation of the Mau Forest could not justify the lack of recognition of the indigenous status of the Ogiek, nor the denial of the rights associated with that status. A copy of the decision is attached to this Report as ***Annex 5***.

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[13] ACtHPR (2017) *African Commission on Human and People's Rights v. Republic of Kenya*, Application 006/2012; Judgment dated 26th May, 2017. ACtHPR, Arusha, Tanzania

26. Five years later, on 23rd June 2022, the Court delivered another judgment in favour of the Ogiek people, setting out the reparations owed for the violations established in its judgment of 2017. The Court ordered the Kenyan government to, among others, pay the Ogiek community a sum of Kshs.157.85 million as collective compensation for material and moral damages suffered; and return the community's ancestral lands in the Mau Forest to collective title within two years through a delimiting, demarcation and titling exercise in consultation with the Ogiek. A copy of the decision is attached to this Report as ***Annex 6***.

27. Following the 2017 judgment of the African Court, the Cabinet Secretary for Environment and Natural Resources appointed a Taskforce on implementation of the African Court Decision on the Ogiek Community. The Taskforce was conferred a term of office of six months from the date of the Notice, subject to extension by the Cabinet Secretary. Among its terms of reference were to –

(i) study the African Court decision of the African Court on Human and People's rights issued against the Government of Kenya in respect of the rights of the Ogiek Community in issue and also other judgements issued by the local courts in relation to the Ogieks occupation of the Mau Forest;

(ii) recommend measures to provide redress to the Ogiek's claim, including restitution to their original land or compensation with case or alternative land; and

(iii) examine the effect of the Judgement on other similar cases in other areas in the country.

28. The Report of the Taskforce has never been made public. A copy of Gazette Notice No. 10944 of 23rd October, 2017 is attached to this Report as ***Annex 7***.

1.6 Indigenous communities and land rights

29. The Constitution of Kenya defines marginalized communities to include 'an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy'.[14] The communities that identify themselves as indigenous are predominantly pastoralists and hunter-gatherers, as well as some minority fisher communities.[15] While indigenous people are estimated to constitute 25% of the county's population, Kenya lacks

[14] Article 260, Constitution of Kenya (2010)

[15] International Working Group on Indigenous Affairs. (2016). "Indigenous Peoples in Kenya." Available at http://www.iwgia.org/regions/africa/kenya. Pastoralists include the Turkana, Rendille, Borana, Maasai, Samburu, Ilchamus, Somali, Gabra, Pokot, and Endorois. Hunter-gatherers include the Ogiek, Sengwer, Yaaku, Waata, El Molo, Boni (Bajuni), Malakote, Wagoshi and Sanya.

disaggregated census data on indigenous communities[16] that would then inform policy and action.

30. It has been observed that a major impediment to indigenous peoples' realization of land rights comes from the extreme political marginalization of indigenous communities[17], with Kenya indicated as having a poor record of providing access to elective and nominative positions for indigenous peoples.[18]

[16] OSJI (2017), *Strategic Litigation Impacts: Indigenous Peoples' Land Rights*, OSF, NY, USA
[17] OSJI (2017), Strategic Litigation Impacts: Indigenous Peoples' Land Rights, OSF, NY, USA
[18] National Gender and Equality Commission (2014), *Flares of Marginalization Among Selected Minority Communities of Kenya*, Nairobi

CHAPTER TWO: CONSIDERATION OF THE PETITION

2.1 Introduction

31. Pursuant to the Standing Orders, the Committee proceeded to consider the Petition and held meetings with key stakeholders as set out below.

2.2 Visit to Molo sub-County and meeting with the Petitioners

32. On Friday, 14th April, 2023, the Committee visited Molo sub-County in Nakuru County where it met with and received submissions from the petitioners.

33. The petitioners presented submissions to the Committee clustered in five thematic areas, namely introduction to the Torobeek community, where the community is found and its peoples, the past and present plights of the community, the past interventions sought by the community, and the remedies they seek from the Government and in particular the Senate. A copy of the submissions by the community is attached to this Report as ***Annex 8***.

2.2.1 Introduction to the Torobeek community

34. The petitioners submitted that the name '*Torobeek*' is derived from the name '*Dorobo*' which was a name associated with forest dwellers within the Kalenjin community. In Kenya they were found originally living together with the Ogiek community before the forceful displacement by the government.

35. The Torobeek people (commonly referred alongside the Ogieks' and Dhorobos) are largely drawn from the Mau Complex of Nakuru County. Other areas where members of the community are found are Mt. Londiani across to North Tindiret Forest, Serengonik Forest, Ceng'alo Forest and Kipkurere and Kapchorua forest areas of what is in Nandi, Baringo and Uasin Gishu counties. The other counties include Laikipia, Turkana, Elgeyo Marakwet, Kericho, Bomet, Trans Nzoia Kajiado, Narok, Bungoma, Kakamega, Kisumu, Nyamira, Migori, Nyandarua, Kiambu, Isiolo, Nairobi and Marsabit.

36. In pre-colonial, colonial and post-colonial Kenya, the Torobeek lived in close proximity to the forest environment drawing sustenance and livelihood from the forest. Later, the government began a process of mass evictions of the community and its members from their natural residence, which first started in April of 1981 and concluded in the year 2006, without taking into consideration the need to provide alternative residence for the Torobeek.

37. While some internally displaced persons from the Ogiek Community had been compensated and resettled by the National Government, the petitioners indicated that members of the Torobeek Community had neither been compensated nor resettled. They further stated that they were not considered for employment when opportunities arose and had therefore remained marginalized. To date, the community was yet to be settled and continues to reside in squatter villages around the forest as they await the Government's program to recognize their plight.

38. This community was the first to settle in Eastern Africa and its members were found inhabiting all Kenyan forests before 1800AD. Due to domination and assimilation, the community is slowly becoming extinct with figures showing about 20,000 members countrywide, and they are one of the most widely distributed communities in Kenya, inhabiting, now or in the recent past, virtually all of the high forest areas of Kenya.

39. They are a marginalized community who traditionally partake in hunting and gathering, though today virtually all of them now have added animal husbandry or cultivation, or both. They have been living in Mau Forest since pre-colonial times on communally held pieces of land, which were administered through customary law.

40. The community said they have been denied the right to their lands and that when the British carved out areas of Kenya into tribal reserves for the various communities, the Torobeek were excluded as they lived in small scattered groups over large areas and did not appear to have any property. This and many other agreements signed with other communities with the colonialists and poor government policies since independence has seen the loss and dispossession from their ancestral lands which in turn led them to becoming 'squatters' on their own land, who face eviction notices from their own government.

2.2.2 Where the community is found and its peoples

41. The petitioners submitted that a majority of the community members were found living alongside their Ogiek brothers in the Mau complex and Londiani, Nandi, Baringo and Uasin Gishu counties. After recent displacement from the forest, those who did not remain were scattered across the Rift Valley counties some ending in other counties such as Kiambu, Nyandarua, Migori Isiolo and Bungoma among others.

42. They said the Association leadership reached out to elected leaders and officers in the administrative offices, and in their engagements, the priority was the recognition of the plight of the community and direct intervention and assistance to the vulnerable members of the community.

2.2.3 The past and present plights of the community

43. The petition is premised on partial resettlement of the *forest dwellers* (generally referred to as Ogiek, Dorobos, Torobeek) by the Government in the years between 1993-1996 and some as late as the year 2015. The rest of the families who were not resettled remained in the forest until the year 2006 when they were finally evicted

44. Their eviction was done on the promise that they would be resettled elsewhere after identification of genuine forest dweller communities.

45. They stated that to resolve the eviction issue, the Government *vide* a letter through the then Permanent Secretary for Environment and Natural Resources, dated 4th August, 1993, authorized the excision of 1,500 hectares of land from Northern Tinderet Forest for purposes of settling members of the petitioners. The Chief Conservator of Forests vide letter dated 13th January, 1999, indicated that the District Surveyor, Kapsabet, had undertaken a cadastral survey of the area that was to be excised and was thus expected to submit his report for processing.

46. Further, that in the year 2001, the Government excised 788.30 hectares from the said forest vide Gazette Notice No. 898 of 16th February, 2001. It is unclear whether the intended resettlement was done on the excised land though the petitioner paid survey fees. They also claim that the excised portion was still vacant.

47. That in the foregoing, it seemed that the intent and purpose of excision of 788.30 hectares from the Northern Tinderet Forest was to settle members of the Torobeek community, a process which stalled, yet the petitioners paid the requisite fees.

48. They held that their generations had been left behind as the rest of the country developed. According to them, their plight had further been exacerbated by the directive on cessation of farming within government forests which was their source of livelihood.

2.2.4 The past interventions sought by the community

49. The petitioners submitted that they have sought interventions before from state and non-state actors, the central issue at the core of their plight being the question of justice and thus the Committee's determination of their Petition will cement their claim and obligate responses to some of their demands.

50. They further submitted that the common thread in the responses to their request for interventions has always been along the lines of: lack of mandate, transferred mandate, lack of resources and referral to other actors. They noted that the most painful sting has been the lack of response.

51. That they have made efforts to have this matter addressed by among others, the National Land Commission, the Ministry of Devolution and Planning, the Ministry of Interior and National Administration and various host county governments with no success.

2.2.5 The remedies they seek from the Government and in particular the Senate

52. They submitted that the remedies they seek can be granted by the Committee as far as its mandate is concerned and that where not possible, the Committee can go out of its way to enjoin relevant institution, state departments/agencies and in certain cases private sector actors to commit to a final solution.

53. They submitted that the issues raised within the body of their petition concern basic human rights and dignity, constitutional issues, the mandate of constitutional institutions such as NLC among others and the question of justice, which fall within the confine of the Committee's mandate.

2.3 Submissions by the National Land Commission

54. Upon invitation by the Committee, the National Land Commission (NLC) presented a written response to the Petition, a copy of which is attached to this Report as ***Annex 9***.

55. In the response, the National Land Commission submitted that –

(i) The Torobeek Community Association of Kenya made a formal complaint on 10th September, 2021 to the NLC concerning historical land injustices suffered by the community;

(ii) In their complaint, the Torobeek alleged that they are associated with the *Dorobo* who are forest dwellers within Kalenjin community in Kenya and were originally living together with Ogiek before they were forcefully evicted and displaced from the region of Mau Complex of Nakuru;

(iii) The Community was requesting the government to set aside funds for compensation and to resettle it in collaboration with the relevant National Government ministries and agencies;

(iv) The Torobeek claim was taken through the admissibility criteria set out at section 15 of the NLC Act, whereupon it was admitted as file reference number NLC/HLI/1117/2021; and

(v) The matter was currently under active investigation.

2.4 Submissions by the Kenya National Commission on Human Rights

56. Upon invitation by the Committee, the Kenya National Commission on Human Rights (KNCHR) presented a written response to the Petition, a copy of which is attached to this Report as ***Annex 10***.

57. In their submissions, KNCHR observed that indigenous people in Kenya continue to face a myriad of challenges, with lack of land tenure rights to their ancestral lands being a key concern. The Commission observed that indigenous people are so connected to their lands that the lands enable them to enjoy other rights such as the right to culture and religion. Eviction of indigenous people from their ancestral lands in effect made it impractical for them to enjoy those other rights.

58. KNCHR noted that, following the move by the government to evict members of the Ogiek community from their ancestral lands within Mau forest, the community approached the African Court on Human and Peoples Rights which issued its judgment, in May 2017, in favour of the community. While delivering its Judgment, the African Court Ordered the Republic of Kenya to take steps to remedy the violations disclosed and file its report within 6 months from the date of the Judgment.

59. In 2019, the then Cabinet Secretary, Ministry of Environment and Forestry appointed a Taskforce to advise on implementation of the African Court

Judgment. The KNCHR sat in the Taskforce whose report was never made public. Subsequently, in June 2022, the African Court gave its judgment on reparations, observing that there was no compliance with its earlier Judgment on merits.

60. The Commission observed that, given that the Torebeek community claims to be living with the Ogiek community in the Mau forest complex, the primary focus at the first instance would be implementation of the Ogiek Decision of the African Court, owing to its binding and final nature. The reliefs applied by the State would address the concerns of all Mau dwelling communities.

61. Additionally, KNCHR noted that Kenya had no specific legislation governing indigenous peoples and has not ratified the United Nations Declaration on the Rights of Indigenous People. There was need to have a specific legislation to enhance the protection of among others ancestral land rights, the freedom of religion and/or belief for indigenous communities, Free Prior and Informed Consent among other safeguards.

62. The KNCHR further observed that conservation efforts had oftentimes disadvantaged indigenous people who have since time immemorial conserved the forests that they assert ancestral land ownership rights. It therefore recommended that the State adopts and mainstreams a Human Rights Based Approach to conservation that appreciates the role and significant contribution of indigenous people to climate change, mitigation and adaptation.

63. Noting that the timelines within which certain orders in the Ogiek Judgment ought to have been implemented were running out, the Commission expressed concern that the continued non-implementation of the decisions put into question Kenya's commitment to ensure full implementation of the African Charter on Human and Peoples' Rights.

2.5 Submissions by National Gender and Equality Commission

64. On Thursday, 4th May, 2023, the Committee held a meeting with the National Gender and Equality Commission (NGEC) to deliberate on the Petition by the Torobeek community. The Committee was taken through the written response by the Commission (***Annex 11***), whereupon the Commission was directed to then undertake further background work and submit a more detailed report. This was subsequently submitted to the Committee on 11th May, 2023 (***Annex 12***).

65. In their submissions, the National Gender and Equality Commission addressed the prayers relating to marginalization of the Torobeek community, which fell within the mandate of the Commission. It observed that the community was affected by –

(a) the lack of recognition by the Government as an ethnic marginalized community by not having a unique identification code;
(b) lack of access to Government opportunities and services as a marginalized community;
(c) lack of representation in appointive and elective positions in Counties and National Government; and
(d) challenges in promoting their culture and ethnic language due to lack of recognition.

66. In view of the above issues, NGEC submitted that they would work with the Ministry of Interior and National Administration in facilitating the recognition and identification of the Torobeek community as an ethnic community in Kenya and for them to be issued with a unique identification code. This, they said, would help to halfway solve the issue of representation in appointive and elective positions for the community

67. NGEC further observed that the community was wrongly clustered and identified thus leading to lack of data of the number of Torobeeks in each county, lack of data on wrongly identified Torobeek members who have and those who don't have access to Government opportunities and services, lack of representation in appointive or elective positions in National and County Governments, lack of data on wrongly identified Torobeek members appointed or elected into Government offices, lack of access to affirmative action programs of Government and finally lack of data on wrongly identified Torobeek members who have had access to affirmative action programs of Government

68. To address this, the Commission had commenced an inquiry into lack of recognition of the Torobeek community and its impact on their right to access Government opportunities and services. This inquiry would delve into other marginalized communities such as the Sakuyes, Waata and Waayu community of Marsabit, Bongomek community of Bungoma, among others.

69. On the challenge of promoting their culture and ethnic language, the Commission said that once the Torobeeks are recognized and identified then

they'll be able to promote their culture and language. While acknowledging that culture, museums and heritage are devolved to counties, they held that they'll work closely with counties hosting Torobeek community and the State Department for Culture and Heritage to implore them to preserve and protect their culture, artifacts, ethno-science, documentation of language among other attributes of culture. Further, they encouraged the Torobeek community to continue practicing their culture in order to safeguard it.

70. Lastly, NGEC submitted that there was need for establishment of a state department or unit responsible for matters of minorities and marginalized groups that would have the responsibility of advising the Government on the implementation of the provisions of Article 56 of the Constitution.

2.6 Submissions by the Attorney General

71. Upon invitation by the Committee, the Attorney General presented a written response to the Petition, a copy of which is attached to this Report as ***Annex 13***.

72. In the said response, the Attorney General submitted that –

(i) The Constitution of Kenya established the National Land Commission as the manager of public land, articulator of the National Land Policy and investigator of historical land injustices;

(ii) Following the devastating post-election violence of 2007/2008, Kenya established a Truth, Justice and Reconciliation Commission (TJRC) the mandate of which included the investigation of historical land injustices. The TJRC Report was tabled in the National Assembly in July, 2013. However, pursuant to section 49 of the Truth, Justice and Reconciliation Act, implementation of the Report could only take place based on the recommendation of the National Assembly; and

(iii) The claim of historical land injustices by the Torobeek community could thus be addressed under the framework of the TJRC Report, which the Senate lacked the authority to discuss, or by the National Land Commission.

73. The Attorney General therefore submitted that the National Land Commission was the institution properly placed to investigate the matter and provide appropriate remedies to the Torobeek community.

CHAPTER THREE: COMMITTEE OBSERVATIONS

3.1 Resettlement and Compensation

74. The petitioners prayed that the Senate make recommendations for the setting aside of funds and a mechanism for compensation and resettlement of the Torobeek Community. While making the prayer, the petitioners informed the Committee that the Torobeek Community originally lived in the regions such as Mau Complex, Mt. Londiani, and Timboroa. They further stated that the community was evicted from their original habitat by the colonial government and thereafter by the Kenya Government after independence thereby rendering them internally displaced.

75. Article 67 of the Constitution establishes the National Land Commission (NLC). Pursuant to Article 67(2) and section 5 of the National Land Commission Act, 2012, one of the functions of NLC is to investigate land injustices and make recommendations for appropriate redress. Article 67(2)(e) states as follows –

(e) to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;

76. Section 15 of the National Land Commission Act sets out how NLC shall carry out the investigations and the remedies it can recommend. In terms of section 15(2), an historical land injustice means a grievance which was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement and resulted in displacement from their habitual place of residence. Further, such a violation must have occurred between 15th June 1895 when Kenya and 27th August, 2010, and that the grievance remains unresolved.

77. Additionally, section 15(3) and (4) provides, among others, that the violation resulted in displacement or other form of historical land injustice, has not or is not capable of being addressed through the ordinary court system, the claimant was either a proprietor or occupant of the land upon which the claim is based, is brought within five years from the date of commencement of this Act, and that the violation was as a result of colonial occupation, independence struggle, pre-independence treaty or agreement between a community and the Government, inequitable land adjudication process or resettlement scheme, politically motivated or conflict based eviction, corruption or other form of illegality, natural disaster or other cause approved by the Commission.

78. Upon the conclusion of investigations by the NLC, section 15(9) of the Act sets out the remedies the NLC may recommend. These remedies include restitution, compensation where it is impossible to restore the land, resettlement on an alternative land, as well as affirmative action programmes for marginalized groups and communities.

79. The NLC in its submissions informed the Committee that the Torobeek Community Association of Kenya made a formal complaint on 10th September, 2021 to the NLC concerning historical land injustices suffered by the community. In their complaint, the Torobeek Community requested the government to set aside fund for compensation and to resettle it in collaboration with the relevant National Government ministries and agencies. The claim was admitted for hearing in accordance with section 15 of the National Land Commission Act of 2012 and the matter is currently under active investigation.

80. Further, the Office of the Attorney-General and the National Gender and Equality Commission submitted that the historical injustices of Torobeek community can be addressed either by the National Assembly, under TJRC Report, or by National Land Commission. Additionally, KNCHR was of the view that the State should comply with the African Court ruling within the specified timelines and to guarantee its implementation. The reliefs applied by the State to the Ogiek should address the concerns of all Mau dwelling communities including the Torobeek

81. **The Committee observes that the issue of historical land injustices is provided for in the Constitution and the National Land Commission Act. The NLC has been given the responsibility to investigate claims concerning historical land injustices and make recommendations on addressing such injustices.**

3.2 Marginalization

82. The Petitioners prayed that the Senate recommends the identification and recognition of the Torobeek Community as marginalized so as to save the community from further marginalization. They are of the view that the community should be registered and issued with a code. Further, that the community should be considered on matters such employment and distribution of relief food by both the National and county governments, and awarding of scholarships.

83. Among the national values and principles of governance as provided for under Article 10(2)(b) of the Constitution are non-discrimination and protection of the marginalised. Further, Article 56 of the Constitution specifically provide for minorities and marginalised groups and obligates the State to take certain measure for the benefit of marginalised groups. Article 56 of the Constitution states as follows –

56. Minorities and marginalised groups

The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

(a) participate and are represented in governance and other spheres of life;

(b) are provided special opportunities in educational and economic fields;

(c) are provided special opportunities for access to employment;

(d) develop their cultural values, languages and practices; and

(e) have reasonable access to water, health services and infrastructure.

84. In terms of what marginalised community and marginalised group encompasses, Article 260 of the Constitution defines what the two terms mean as follows –

"marginalised community" means—

(a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;

(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;

(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or

(d) pastoral persons and communities, whether they are—

(i) nomadic; or

(ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole;

"marginalised group" *means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27(4);*

85. Article 59 of the Constitution establishes the Kenya National Human Rights and Equality Commission. Pursuant to Article 59(1), Kenya National Human Rights and Equality Commission is responsible for, amongst other, –

(i) promoting respect for human rights and developing a culture of human rights in the Republic;

(ii) promoting the protection, and observance of human rights in public and private institutions;

(iii) monitoring, investigating and reporting on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;

(iv) receiving and investigating complaints about alleged abuses of human rights and taking steps to secure appropriate redress where human rights have been violated; and

(v) investigating any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice.

86. Article 59(3) of the Constitution provides that any person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. Additionally, Article 59(4) of the Constitution requires Parliament to enact legislation to give full effect to the establishment of Kenya National Human Rights and Equality Commission. It is also provided that such a legislation may restructure the Commission into two or more separate commissions.

87. In the year 2011, Parliament enacted two legislations, the Kenya National Commission on Human Rights Act and the National Gender and Equality Commission Act as required under Article 59(4) of the Constitution. The Kenya National Commission on Human Rights Act establishes the Kenya National Commission on Human Rights (KNCHR). The mandate of KNCHR as set out under section 8 of this Act is similar to the functions set out in Article 59 of the Constitution with the exception of matters touching on special interest groups.

88. The National Gender and Equality Commission Act on the other hand establishes the National Gender and Equality Commission (NGEC). Pursuant to section 8 of the Act, the functions of NGEC include –

(i) monitoring, facilitating and advising on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions;

(ii) acting as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination and relating to special interest groups

including minorities and marginalised persons, women, persons with disabilities, and children;

(iii) coordinating and facilitating mainstreaming of issues of gender, persons with disability and other marginalised groups in national development and to advise the Government on all aspects thereof;

(iv) monitoring, facilitating and advising on the development of affirmative action implementation policies as contemplated in the Constitution;

(v) investigating on its own initiative or on the basis of complaints, any matter in respect of any violations of the principle of equality and freedom from discrimination and make recommendations for the improvement of the functioning of the institutions concerned; and

(vi) conducting audits on the status of special interest groups including minorities, marginalised groups, persons with disability, women, youth and children.

89. Therefore, NGEC has been established pursuant to the Constitution and the National Gender and Equality Commission Act to address human rights issues relating special interest groups which include minorities and marginalised groups. In its submissions, NGEC acknowledged this fact and undertook to work with the Ministry of Interior and Coordination of National Government with a view to recognition of the Torobeek community as an ethnic community and issue of an identification code. NGEC submitted that failure to identify the Torobeek as an ethnic community will continue to disadvantage the community on matters such as employment opportunities where affirmative action is required. This is because the Torobeek are normally identified with the dominant ethnic community wherever they reside.

90. **The Committee observes that matters touching on minorities and marginalised groups relate to human rights issues and the National Gender and Equality Commission has been established pursuant to the Constitution and the NGEC Act to specifically address such matters.**

3.3 Implementation of the Judgments of the African Court on Human and People's Rights on the *Ogiek* case

91. In a case filed at the African Court on Human and Peoples Rights, the Ogiek community successfully challenged their eviction from their ancestral land and territories in the Mau Forest and the systematic denial of associated rights. The African Court issued a landmark judgment on 26th May, 2017 recognizing the role of indigenous peoples and hunter–gatherers specifically in conservation,

and finding that the preservation of the Mau Forest could not justify the lack of recognition of the indigenous status of the Ogiek, nor the denial of the rights associated with that status.

92. Following the said Judgment of the African Court, the Cabinet Secretary for Environment and Natural Resources appointed a Taskforce on implementation of the African Court Decision on the Ogiek Community. Among its terms of reference were to –

(i) study the African Court decision of the African Court on Human and People's rights issued against the Government of Kenya in respect of the rights of the Ogiek Community in issue and also other judgements issued by the local courts in relation to the Ogieks occupation of the Mau Forest;

(ii) recommend measures to provide redress to the Ogiek's claim, including restitution to their original land or compensation with case or alternative land; and

(iii) examine the effect of the Judgement on other similar cases in other areas in the country.

The Report of the Taskforce has never been made public.

93. Arising from the failure of the government to implement the Judgment of May 2017, the African Court, in June 2022, issued a Judgment directing the Republic of Kenya to pay compensation to the Ogiek community for material and moral prejudice suffered, take measures to identify, delimit and grant collective land title to the community and assure them of unhindered use and enjoyment of their land, and take all steps to ensure the full recognition of the Ogiek as an Indigenous People, among others.

94. **The Committee observes that, while the case at the African Court was filed by the *Ogiek* community, the facts thereon are similar to those of the Torobeek community, who claim to have been residing alongside the Ogiek in the Mau Forest. Full implementation of the Judgment in the Ogiek case would thus address some of the grievances raised by the Torobeek community.**

3.4 Delays by Constitutional Commissions in executing their functions

95. The Committee noted that the Torobeek community submitted its claim for historical land injustices to the National Land Commission in September, 2021. Having met the criteria set out in the National Land Commission Act, 2012 and the National Land Commission (Investigation of Historical Land Injustices)

Regulations, 2017, the claim was admitted for investigation by the Commission. However, as at May, 2023, the matter was still pending investigation by the Commission.

96. **The Committee expresses concern at the inordinate delay by the National Land Commission in investigating the historical land injustices claim filed by the Torobeek community, in September, 2021.**

97. The Committee further noted that, while the National Gender and Equality Commission was mandated to deal with all matters relating to issues of equality and freedom from discrimination of special interest groups including minorities and marginalised persons, women, persons with disabilities, and children, the Commission was yet to document the minority and marginalized groups in the country or to set out a criteria for the determination of what qualifies a community to be considered a minority or marginalized group.

98. **The Committee expresses concern that, over ten years since NGEC was established, the Commission was yet to document the minority and marginalized groups in the country or to set out a criteria for the determination of what qualifies a community to be considered a minority or marginalized group.**

CHAPTER FOUR: COMMITTEE RECOMMENDATIONS

99. Arising from its observations as set out in the preceding Chapter, the Standing Committee on Justice, Legal Affairs and Human Rights recommends the following –

d) That, the National Land Commission expeditiously investigates the issue of historical land injustices against the Torobeek as submitted by the petitioners and admitted by the Commission under file reference number NLC/HLI/1117/2021, and the Commission to submit a status report to the Senate within **three months** of the tabling of this Report.

e) That, the National Gender and Equality Commission works with the Ministry of Interior and National Administration and other relevant government agencies to facilitate the recognition of the Torobeek community by being –
iii) issued with a unique identification code;
iv) recognized as an ethnic community in Kenya; and
to submit a status report to the Senate within **three months** of the tabling of this Report.

f) That, the National Gender and Equality Commission undertakes investigation on the complaints relating to human rights violations, discrimination and marginalization of the Torobeek community, and submit a report to the Senate within **three months** of the tabling of this Report.

LIST OF APPENDICES

Annex 1: Minutes of the Committee in Considering the Petition

Annex 2: Copy of the Petition

Annex 3: Extract of the Hansard for the Senate sitting of Wednesday, 22nd February, 2023

Annex 4: Judgment of the High Court of Kenya in *Joseph Letuya & 21 others v. Attorney General & 5 others* [2014] eKLR

Annex 5: Judgment of African Court on Human and Peoples Rights in Application 006/2012 ***(Merits)*** - *African Commission on Human and People's Rights v. Republic of Kenya*, delivered on 26th May, 2017

Annex 6: Judgment of African Court on Human and Peoples Rights in Application 006/2012 (***Reparations***) - *African Commission on Human and People's Rights v. Republic of Kenya*, delivered on 23rd June 2022

Annex 7: Copy of Gazette Notice No. 10944 dated 23rd October, 2017 on establishment of a Taskforce on implementation of the African Court Decision on the Ogiek Community

Annex 8: Submissions by the Torobeek Community

Annex 9: Submissions by the National Land Commission

Annex 10: Submissions by the Kenya National Commission on Human Rights

Annex 11: Submissions by the National Gender and Equality Commission

Annex 12: Supplementary Submissions by the National Gender and Equality Commission

Annex 13: Submissions by the Attorney General

Annex 1: Minutes of the Committee in Considering the Petition

13TH PARLIAMENT |2ND SESSION

MINUTES OF THE FIFTY SECOND SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON WEDNESDAY, 14TH JUNE, 2023 AT 8.00 A.M IN COMMITTEE ROOM 5, FLOOR, PARLIAMENT BUILDINGS AND ON THE ZOOM ONLINE MEETING PLATFORM

PRESENT

1. Sen. Wakili Hillary Kiprotich Sigei, MP - Chairperson ***(Chairing)***
2. Sen. Raphael Chimera Mwinzagu, MP - Vice-Chair
3. Sen. Catherine Muyeka Mumma, MP - Member
4. Sen. Veronica W. Maina, MP - Member
5. Sen. Andrew Omtatah Okoiti, MP - Member

ABSENT WITH APOLOGY

1. Sen. Fatuma Adan Dullo, CBS, MP - Member
2. Sen. William Cheptumo Kipkiror, CBS, MP - Member
3. Sen. Hamida Kibwana, MP - Member
4. Sen. Karen Njeri Nyamu, MP - Member

SECRETARIAT

1. Dr. Johnson Okello - Director, Legal Services
2. Ms. Mercy Thanji - Senior Legal Counsel
3. Mr. Charles Munyua - Senior Clerk Assistant
4. Mr. Moses Kenyanchui - Legal Counsel I
5. Ms. Lynn Aseka - Clerk Assistant III (*Taking Minutes*)
6. Ms. Ndindi Kibathi - Research Officer III

MIN. NO. 262/2023 PRELIMINARIES

The Chairperson called the meeting to order at twenty minutes past eight O'clock and opened with a word of prayer.

MIN. NO. 263/2023 ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Veronica W. Maina, MP.

MIN. NO. 264/2023 **CASES PENDING IN COURT RELATING TO THE MANDATE AND FUNCTIONS OF THE SENATE AND THE DEVOLVED SYSTEM OF GOVERNMENT**

The Committee was taken through the status of, noted and gave appropriate directions on key cases in Court relating to the mandate and functions of the Senate and the devolved system of government.

Noting the need to be kept abreast of the proceedings in the various cases and to make timely interventions, the Committee resolved that the briefing be made a standing agenda for the Committee every fortnight.

MIN. NO. 265/2023 **PETITION BY MR. PAULO MOSBEI AND OTHERS CONCERNING HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY**

The Committee considered the draft Report as revised to incorporate the observations and recommendations proposed by Members.

Thereupon, the Committee adopted the Report, having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Veronica W. Maina, MP.

MIN. NO. 266/2023 **ADJOURNMENT**

The Chair adjourned the meeting at fifteen minutes past nine O'clock. The next meeting was scheduled to be held on Thursday, 15th June, 2023 at nine O'clock.

SIGNED: .....

DATE: 30/06/2023

13TH PARLIAMENT |2ND SESSION

MINUTES OF THE FIFTY-FIRST SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON TUESDAY, 13TH JUNE, 2023 AT 8.00 A.M IN COMMITTEE ROOM 5, FIRST FLOOR, PARLIAMENT BUILDINGS AND ON THE ZOOM ONLINE MEETING PLATFORM

PRESENT

1.	Sen. Wakili Hillary Kiprotich Sigei, MP	- Chairperson ***(Chairing)***
2.	Sen. Fatuma Adan Dullo, CBS, MP	- Member
3.	Sen. Catherine Muyeka Mumma, MP	- Member
4.	Sen. Veronica W. Maina, MP	- Member
5.	Sen. Karen Njeri Nyamu, MP	- Member
6.	Sen. Andrew Omtatah Okoiti, MP	- Member

ABSENT WITH APOLOGY

1.	Sen. Raphael Chimera Mwinzagu, MP	- Vice-Chair
2.	Sen. William Cheptumo Kipkiror, CBS, MP	- Member
3.	Sen. Hamida Kibwana, MP	- Member

SECRETARIAT

1.	Mr. Charles Munyua	- Senior Clerk Assistant
2.	Ms. Lilian Waweru	- Legal Counsel II
3.	Ms. Lynn Aseka	- Clerk Assistant III (*Taking Minutes*)
4.	Mr. Constant Wamayuyi	- Research Officer III
5.	Ms. Ndindi Kibathi	- Research Officer III
6.	Mr. Josphat Ng'eno	- Media Relations Officer III
7.	Ms. Judith Aoka	- Audio Officer III
8.	Ms. Ngesa Rosebella	- Public Communications Officer III

MIN. NO. 258/2023 PRELIMINARIES

The Chairperson called the meeting to order at eleven minutes past eight O'clock and opened with a word of prayer.

MIN. NO. 259/2023 ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Fatuma Adan Dullo, CBS, MP.

MIN. NO. 260/2023 **PETITION BY MR. PAULO MOSBEI AND OTHERS CONCERNING HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY**

The Committee was taken through the draft Report on the Petition by Mr. Paulo Mosbei concerning historical injustices suffered by the Torobeek Community.

Thereupon, Members deliberated on the draft Report and made proposals to be incorporated as observations and recommendations at Chapters Three and Four of the Report, following which the report would be scheduled for adoption.

MIN. NO. 261/2023 **ADJOURNMENT**

The Chair adjourned the meeting at fifteen minutes past nine O'clock. The next meeting was scheduled to be held on Wednesday, 14th June, 2023 at eight O'clock.

SIGNED: .....

DATE: 30/06/2023

13TH PARLIAMENT |2ND SESSION

MINUTES OF THE FORTY-SIXTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON THURSDAY, 4TH MAY, 2023 AT 9.00 A.M IN THE SENATE CHAMBER, PARLIAMENT BUILDINGS

PRESENT

1.	Sen. Wakili Hillary Kiprotich Sigei, MP	- Chairperson ***(Chairing)***
2.	Sen. Fatuma Adan Dullo, CBS, MP	- Member
3.	Sen. Hamida Ali Kibwana, MP	- Member
4.	Sen. Catherine Muyeka Mumma, MP	- Member
5.	Sen. Veronica W. Maina, MP	- Member
6.	Sen. Andrew Omtatah Okoiti, MP	- Member

ABSENT WITH APOLOGY

1.	Sen. Raphael Chimera Mwinzagu, MP	- Vice-Chair
2.	Sen. William Cheptumo Kipkiror, CBS, MP	- Member
3.	Sen. Karen Njeri Nyamu, MP	- Member

SECRETARIAT

1.	Mr. Charles Munyua	- Senior Clerk Assistant
2.	Mr. Moses Kenyanchui	- Legal Counsel I
3.	Ms. Lilian Waweru	- Legal Counsel II
4.	Ms. Lynn Aseka	- Clerk Assistant III
5.	Mr. Constant Wamayuyi	- Research Officer III
6.	Ms. Ndindi Kibathi	- Research Officer III
7.	Mr. Josphat Ng'eno	- Media Relations Officer III
8.	Ms. Judith Aoka	- Audio Officer III
9.	Mr. David Barasa	- Assistant Serjeant at Arms

IN ATTENDANCE – NATIONAL GENDER AND EQUALITY COMMISSION

1.	Dr. Joyce Mutinda, EBS	- Chairperson
2.	Dr. Muriithi Chomba Munyi, MBS	- Vice Chairperson
3.	Ms. Betty Sungura-Nyabuto, MBS	- Secretary/ Chief Executive Officer
4.	Mr. Desire Njamwea	- Assistant Director, Legal and Investigation

IN ATTENDANCE – COUNTY ASSEMBLY OF KILIFI JUSTICE AND LEGAL AFFAIRS COMMITTEE

1.	Hon Brown Safari, MCA	- Chairperson
2.	Hon Kalama Mumba, MCA	- Vice Chairperson
3.	Hon Amina Sahara Bule, MCA	- Member
4.	Hon Oscar Wanje, MCA	- Member
5.	Hon Emmanuel Karisa Baya, MCA	- Member
6.	Hon Benson Karisa Ngirani, MCA	- Member
7.	Hon Phelister Messo, MCA	- Member
8.	Hon Mariam Mkumbi, MCA	- Member
9.	Hon Haron Tete Ndundi	- Member
10.	Hon Stephen Baya Mwaro, MCA	- Member
11.	Hon Kalama Mumba, MCA	- Member
12.	Mr. Silas Mlewa	- Deputy Clerk
13.	Mr. William Katana Nyanje	- Principal Clerk, Legislative Services
14.	Ms. Lilian Ngala	- Principal Clerk, Committee Services
15.	Ms. Linda Nyamwata	- Legal Counsel
16.	Mr. Shauri Nyule	- Second Clerk Assistant
17.	Ms. Charity Mwarumba	- Second Clerk Assistant
18.	Ms. Salome Kasichana Konde	- Serjeant at Arms
19.	Ms. Peris Kache Kibarua	- Hansard Reporter
20.	Ms. Rimba Mkuna	- Communication Officer

MIN. NO. 235/2023 PRELIMINARIES

The Chairperson called the meeting to order at twenty-seven minutes past nine O'clock and opened with a word of prayer. This was followed by a self-introductory session by Senators, Secretariat, invited guests from the National Gender and Equality Commission, and the visiting delegation from Kilifi County Assembly on a benchmarking visit at the Senate.

MIN. NO. 236/2023 ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Catherine Muyeka Mumma, MP and seconded by Sen. Hamida Ali Kibwana, MP.

MIN. NO. 237/2023 PETITION BY MR. PAULO MOSBEI REGARDING HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY.

Upon invitation by the Chairperson, the Committee was taken through the response by the National Gender and Equality Commission (NGEC) to the Petition by Mr. Paulo Mosbei regarding historical injustices suffered by the Torobeek Community.

In the response, the Commission submitted that –

1. The Commission holds quarterly coordination meetings with representatives of the minority and marginalized groups communities to discuss emerging issues in this population. However, they did not have in their records any representation of or from the Torobeek Community.
2. The Commission planned to undertake an anthropological study involving a multi-agency group of actors to study and document all ethnic minority and indigenous people in Kenya. This would include the identification of the criterion of inclusion and exclusion which must be guided largely by the Constitution of Kenya 2010, regional and international instruments.

During deliberations, the Committee observed that the response by the Commission was unsatisfactory and failed to address the specific matters raised in the Petition by the Torobeek Community.

Thereupon, the Committee directed the Commission to undertake a rapid assessment of the matter, including meeting with the Petitioners, and to submit a detailed response to the Committee within the next fourteen days.

Concerns were further raised on the execution by NGEC of its mandates relating to gender, minorities, and marginalized groups. The Committee resolved to schedule a meeting with the Commission at a later date to deliberate further on the same.

MIN. NO. 238/2023 **DELIBERATION WITH MEMBERS OF THE COUNTY ASSEMBLY OF KILIFI COMMITTEE ON JUSTICE AND LEGAL AFFAIRS ON THE MANDATE AND FUNCTIONS OF THE COMMITTEE**

The Committee held brief deliberations and exchange of views with Members of the County Assembly of Kilifi Committee on Justice and Legal Affairs who were on a benchmarking visit at the Senate.

MIN. NO. 239/2023 **ADJOURNMENT**

The Chairperson adjourned the meeting at eleven O'clock. The next meeting was scheduled to be held on notice.

SIGNED: .....

DATE: 30/06/2023

13TH PARLIAMENT |2ND SESSION

MINUTES OF THE THIRTY-FIFTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON FRIDAY, 14TH APRIL, 2023 AT 4.00 P.M AT GREENLAND HOTEL IN MOLO SUB-COUNTY, NAKURU COUNTY

PRESENT

1.	Sen. Wakili Hillary Kiprotich Sigei, MP	- Chairperson ***(Chairing)***
2.	Sen. Raphael Chimera Mwinzagu, MP	- Vice-Chair
3.	Sen. Andrew Omtatah Okoiti, MP	- Member

ABSENT WITH APOLOGY

1.	Sen. Fatuma Adan Dullo, CBS, MP	- Member
2.	Sen. William Cheptumo Kipkiror, CBS, MP	- Member
3.	Sen. Hamida Ali Kibwana, MP	- Member
4.	Sen. Catherine Muyeka Mumma, MP	- Member
5.	Sen. Veronica W. Maina, MP	- Member
6.	Sen. Karen Njeri Nyamu, MP	- Member

SECRETARIAT

1.	Mr. Charles Munyua	- Senior Clerk Assistant
2.	Ms. Lilian Waweru	- Legal Counsel II
3.	Ms. Lynn Aseka	- Clerk Assistant III (*Taking Minutes*)
4.	Mr. Constant Wamayuyi	- Research Officer III
5.	Mr. Josphat Ng'eno	- Media Relations Officer III
6.	Mr. Johnstone Simiyu	- Audio Officer III
7.	Mr. David Barasa	- Assistant Serjeant at Arms

IN ATTENDANCE – COUNTY ASSEMBLY OF NAKURU

1.	Hon. Peter Pawanga, MCA	- Chairperson, Committee on Land, Housing and Physical Planning
2.	Hon. Wesley Lang'at	- Vice Chair, Committee on Land, Housing and Physical Planning
3.	Hon. Evalyne Chepkirui, MCA	- Vice Chair, Committee on Justice and Legal Affairs
4.	Hon. Benard Maina, MCA	- Member
5.	Hon. Dorcas Gathere, MCA	- Member

6. Hon. Ann Wamaitha, MCA - Member
7. Ms. Judith Koech - Secretariat
8. Ms. Sharon Cherotich - Secretariat

IN ATTENDANCE – TOROBEEK COMMUNITY ASSOCIATION OF KENYA

1. Mr. Paulo Kiprotich Mosbei - Chairman
2. Mr. Timothy Chepsongol Yator - Vice Chairman
3. Mr. Erick Kiplangat Arap Bett - Secretary
4. Mr. Awi Kibet - Advocate/ Legal Advisor
5. Mrs. Joyce C. Cheruiyot - Treasurer
6. Mr. Bernard Kipngetich Cheruiyot - Coordinator
7. Ms. Emily Cheptoo Mosonik - Assistant Coordinator
8. Mr. Jonathan K. Misoi - Organizing Secretary
9. Ms. Joyline Chebii - Assistant Organizing Secretary
10. Mr. Francis Kiptai Sangula - Chief Whip

(And o*ther Members from the Community*)

MIN. NO. 190/2023 PRELIMINARIES

The Chairperson called the meeting to order at four O'clock, following which the Committee resumed the business interrupted earlier that afternoon.

MIN. NO. 191/2023 PETITION BY PAULO MOSBEI AND OTHERS ON HISTORICAL INJUSTICES AGAINST THE TOROBEEK COMMUNITY - *RESUMPTION*

The Committee resumed to hear the testimonies and submissions from members of the Torobeek Community in support of the Petition submitted to the Senate regarding historical injustices against the community.

Thereupon, the Committee was informed as follows –

a) The past and present plights of the community

The Petitioners submitted that the Petition to the Senate was premised on the partial resettlement of the *forest dwellers* (generally referred to as Ogiek, Dorobos, Torobeek) by the Government in the years between 1993-1996 and some as late as the year 2015. The rest of the families who were not resettled remained in the forest until the year 2006 when they were finally evicted

This eviction was done on the promise that they would be resettled elsewhere after identification of genuine forest dweller communities.

They stated that to resolve the eviction issue, the Government *vide* a letter through the then Permanent Secretary for Environment and Natural Resources, dated 4th August, 1993, authorized the excision of 1,500 hectares of land from Northern Tinderet Forest

for purposes of settling members of the petitioners. The Chief Conservator of Forests vide letter dated 13th January, 1999, indicated that the District Surveyor, Kapsabet, had undertaken a cadastral survey of the area that was to be excised and was thus expected to submit his report for processing.

Further, that in the year 2001, the Government excised 788.30 hectares from the said forest vide Gazette Notice No. 898 of 16th February, 2001. It was unclear whether the intended resettlement was done on the excised land though the petitioner paid survey fees. They also claim that the excised portion was still vacant.

That in the foregoing, it seemed that the intent and purpose of excision of 788.30 hectares from the Northern Tinderet Forest was to settle members of the Torobeek community, a process which stalled, yet the petitioners paid the requisite fees.

hey held that their generations had been left behind as the rest of the country developed. According to them, their plight had further been exacerbated by the directive on cessation of farming within government forests which was their source of livelihood.

b) The past interventions sought by the community

The petitioners submitted that they have sought interventions before from state and non-state actors, the central issue at the core of their plight being the question of justice and thus the Committee's determination of their Petition will cement their claim and obligate responses to some of their demands.

They further submitted that the common thread in the responses to their request for interventions has always been along the lines of lack of mandate, transferred mandate, lack of resources and referral to other actors. They noted that the most painful sting has been the lack of response.

That had made efforts to have the matter addressed by, among others, the National Land Commission, the Ministry of Devolution and Planning, the Ministry of Interior and National Administration and various host county governments with no success.

c) The remedies sought

The Petitioners submitted that the remedies they sought could be granted by the Committee as far as its mandate was concerned and that where that was not possible, the Committee could go out of its way to enjoin relevant institutions, state departments/agencies and in certain cases private sector actors to commit to a final solution.

They further submitted that the issues raised within the body of their petition concerned basic human rights and dignity, constitutional issues, the mandate of

constitutional institutions such as NLC among others and the question of justice, which fall within the confine of the Committee's mandate.

Interventions

Thereupon, Members made the following interventions and observations –

a) Members observed that, while the Ogiek community was well known within the government and had pursued their case both in the national and international courts, the plight of the Torobeek had not been given much attention;
b) Members advised the community to compile all the documents in support of the Petition and submit the same to the Committee for consideration;
c) Members observed that a key outcome of the Petition should be the formal recognition of the Torobeek as distinct from the Ogiek community, in which case the community could be taken into account during planning and in the allocation of resources and opportunities such as employment in the public service;
d) Members undertook to consider the Petition in a manner that would ensure the community accessed justice for its members; and
e) The Chairperson informed the Petitioners that the Committee would subsequently meet with other stakeholders to receive responses and submissions on the Petition, following which it would proceed to prepare and table its Report in the Senate.

MIN. NO. 192/2023 ADJOURNMENT

The Chairperson adjourned the meeting at twenty minutes past five O'clock. The next meeting was scheduled to be held on Friday, 15th April, 2023 at 9.00 am, in Kericho County.

SIGNED: .....

DATE: 30/06/2023

13TH PARLIAMENT |2ND SESSION

MINUTES OF THE THIRTY-FOURTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON FRIDAY, 14TH APRIL, 2023 AT 2.00 P.M AT GREENLAND HOTEL IN MOLO SUB-COUNTY, NAKURU COUNTY

PRESENT

1.	Sen. Wakili Hillary Kiprotich Sigei, MP	- Chairperson ***(Chairing)***
2.	Sen. Raphael Chimera Mwinzagu, MP	- Vice-Chair
3.	Sen. Andrew Omtatah Okoiti, MP	- Member

ABSENT WITH APOLOGY

1.	Sen. Fatuma Adan Dullo, CBS, MP	- Member
2.	Sen. William Cheptumo Kipkiror, CBS, MP	- Member
3.	Sen. Hamida Ali Kibwana, MP	- Member
4.	Sen. Catherine Muyeka Mumma, MP	- Member
5.	Sen. Veronica W. Maina, MP	- Member
6.	Sen. Karen Njeri Nyamu, MP	- Member

SECRETARIAT

1.	Mr. Charles Munyua	- Senior Clerk Assistant
2.	Ms. Lilian Waweru	- Legal Counsel II
3.	Ms. Lynn Aseka	- Clerk Assistant III (*Taking Minutes*)
4.	Mr. Constant Wamayuyi	- Research Officer III
5.	Mr. Josphat Ng'eno	- Media Relations Officer III
6.	Mr. Johnstone Simiyu	- Audio Officer III
7.	Mr. David Barasa	- Assistant Serjeant at Arms

IN ATTENDANCE – COUNTY ASSEMBLY OF NAKURU

1.	Hon. Peter Pawanga, MCA	- Chairperson, Committee on Land, Housing and Physical Planning
2.	Hon. Wesley Lang'at	- Vice Chair, Committee on Land, Housing and Physical Planning
3.	Hon. Evalyne Chepkirui, MCA	- Vice Chair, Committee on Justice and Legal Affairs
4.	Hon. Benard Maina, MCA	- Member
5.	Hon. Dorcas Gathere, MCA	- Member

6. Hon. Ann Wamaitha, MCA - Member
7. Ms. Judith Koech - Secretariat
8. Ms. Sharon Cherotich - Secretariat

IN ATTENDANCE – TOROBEEK COMMUNITY ASSOCIATION OF KENYA

1. Mr. Paulo Kiprotich Mosbei - Chairman
2. Mr. Timothy Chepsongol Yator - Vice Chairman
3. Mr. Erick Kiplangat Arap Bett - Secretary
4. Mr. Awi Kibet - Advocate/ Legal Advisor
5. Mrs. Joyce C. Cheruiyot - Treasurer
6. Mr. Bernard Kipngetich Cheruiyot - Coordinator
7. Ms. Emily Cheptoo Mosonik - Assistant Coordinator
8. Mr. Jonathan K. Misoi - Organizing Secretary
9. Ms. Joyline Chebii - Assistant Organizing Secretary
10. Mr. Francis Kiptai Sangula - Chief Whip

(And o*ther Members from the Community*)

MIN. NO. 186/2023 PRELIMINARIES

The Chairperson called the meeting to order at two O'clock and invited a religious leader present to open the meeting with a word of prayer. This was followed by a self-introductory session by Senators, Secretariat, Members and Secretariat from the County Assembly of Nakuru, and the members of the Torobeek Community.

MIN. NO. 187/2023 ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen Raphael Chimera Mwinzagu, MP.

MIN. NO. 188/2023 PETITION BY PAULO MOSBEI AND OTHERS ON HISTORICAL INJUSTICES AGAINST THE TOROBEEK COMMUNITY

The Committee proceeded to receive testimony and submissions from members of the Torobeek Community in support of the Petition submitted to the Senate regarding historical injustices against the community.

Thereupon, the Committee was informed as follows –

a) Introduction to the Torobeek community

The petitioners submitted that the name 'Torobeek' was derived from the name 'Dorobo' which was a name associated with forest dwellers within the Kalenjin community. In Kenya they were found originally living together with the Ogiek community before the forceful displacement by the government.

The Torobeek people (commonly referred alongside the Ogieks' and Dhorobos) were largely drawn from the Mau Complex of Nakuru County. Other areas where members of the community were found were Mt. Londiani across to North Tindiret Forest, Serengonik Forest, Ceng'alo Forest and Kipkurere and Kapchorua forest areas of what is in Nandi, Baringo and Uasin Gishu counties. The other counties include Laikipia, Turkana, Elgeyo Marakwet, Kericho, Bomet, Trans Nzoia Kajiado, Narok, Bungoma, Kakamega, Kisumu, Nyamira, Migori, Nyandarua, Kiambu, Isiolo, Nairobi and Marsabit.

In pre-colonial, colonial and post-colonial Kenya, the Torobeek lived in close proximity to the forest environment drawing sustenance and livelihood from the forest. Later, the government began a process of mass evictions of the community and its members from their natural residence, which first started in April of 1981 and concluded in the year 2006, without taking into consideration the need to provide alternative residence for the Torobeek.

While some internally displaced persons from the Ogiek Community had been compensated and resettled by the National Government, the petitioners indicated that members of the Torobeek Community had neither been compensated nor resettled. They further stated that they were not considered for employment when opportunities arose and had therefore remained marginalized. To date, the community was yet to be settled and continues to reside in squatter villages around the forest as they await the Government's program to recognize their plight.

They were a marginalized community who traditionally partook in hunting and gathering, though today virtually all of them had added animal husbandry or cultivation, or both. They had been living in Mau Forest since pre-colonial times on communally held pieces of land, which were administered through customary law.

The community said they have been denied the right to their lands and that when the British carved out areas of Kenya into tribal reserves for the various communities, the Torobeek were excluded as they lived in small, scattered groups over large areas and did not appear to have any property. This and many other agreements signed with other communities with the colonialists and poor government policies since independence has seen the loss and dispossession from their ancestral lands which in turn led them to becoming 'squatters' on their own land, who face eviction notices from their own government.

b) Where the community was found and its peoples

The petitioners submitted that a majority of the community members were found living alongside their Ogiek brothers in the Mau complex and Londiani, Nandi, Baringo and Uasin Gishu counties. After recent displacement from the forest, those who did not remain were scattered across the Rift Valley counties some ending in other counties such as Kiambu, Nyandarua, Migori Isiolo and Bungoma among others.

They further submitted that the Association leadership reached had out to elected leaders and officers in the administrative offices, and in their engagements, the priority was the recognition of the plight of the community and direct intervention and assistance to the vulnerable members of the community.

MIN. NO. 189/2023 **ADJOURNMENT**

The Chairperson adjourned the meeting at twenty minutes to four O'clock. The next meeting was scheduled to commence the same day at four O'clock.

SIGNED: .....

DATE: 30/06/2023

13TH PARLIAMENT |2ND SESSION

MINUTES OF THE TWENTY-FIFTH SITTING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS HELD ON WEDNESDAY, 1ST MARCH, 2023 AT 8.00 A.M. IN COMMITTEE ROOM 5, FIRST FLOOR, PARLIAMENT BUILDINGS AND ON THE ZOOM ONLINE MEETING PLATFORM

PRESENT

1.	Sen. Wakili Hillary Kiprotich Sigei, MP	- Chairperson ***(Chairing)***
2.	Sen. Raphael Chimera Mwinzagu, MP	- Vice Chairperson
3.	Sen. Fatuma Adan Dullo, CBS, MP	- Member
4.	Sen. William Cheptumo Kipkiror, MP	- Member
5.	Sen. Hamida Ali Kibwana, MP	- Member
6.	Sen. Catherine Muyeka Mumma, MP	- Member
7.	Sen. Veronica W. Maina, MP	- Member
8.	Sen. Karen Njeri Nyamu, MP	- Member
9.	Sen. Andrew Omtatah Okoiti, MP	- Member

SECRETARIAT

1.	Mr. Charles Munyua	- Senior Clerk Assistant
2.	Mr. Moses Kenyanchui	- Legal Counsel I
3.	Ms. Lilian Waweru	- Legal Counsel II
4.	Ms. Lynn Aseka	- Clerk Assistant III *(Taking Minutes)*
5.	Mr. Constant Wamayuyi	- Research Officer III
6.	Ms. Ndindi Kibathi	- Research Officer III
7.	Mr. Kennedy Owuoth	- Fiscal Officer III
8.	Ms. Judith Aoka	- Hansard/Audio Officer III
9.	Mr. Josphat Ng'eno	- Media Relations Officer III
10.	Ms. Rosebella Ngesa	- Public Communications Officer III

MIN. NO. 136/2023 PRELIMINARIES

The Chairperson called the meeting to order at fifteen minutes past eight O'clock and opened with a word of prayer.

MIN. NO. 137/2023 ADOPTION OF THE AGENDA

The agenda of the meeting was adopted having been proposed by Sen. Andrew Omtatah Okoiti, MP and seconded by Sen. William Cheptumo Kipkiror, MP as follows –

1. Prayer
2. Adoption of the Agenda
3. Consideration of –
   a) Petition by Mr. Paulo Mosbei concerning historical injustices suffered by the Torobeek community; and
   b) Statement sought by Sen. Crystal Asige, MP on the status of implementation of the Legal Aid Act (No. 6 of 2016).
4. Consideration of the Preservation of Human Dignity and Enforcement of Economic and Social Rights Bill (Senate Bills No. 7 of 2022) – *resumption.*
5. Any Other Business
6. Date of the Next Meeting and Adjournment

MIN. NO. 138/2023 PETITION BY MR. PAULO MOSBEI CONCERNING HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY

The Committee commenced consideration of the Petition and was informed that a similar Petition was considered by the Senate during the 12th Parliament but was left pending. Similar petitions had also been submitted to the County Assemblies of Nakuru and Kericho, and the Secretariat would liaise with the said Assemblies to find out what had been done so far.

Thereupon, the Committee resolved to consider the Petition substantively and to hold meetings with the petitioners, the Kenya National Commission on Human Rights, the National Gender and Equality Commission, the National Lands Commission, and the Office of the Attorney General and Department of Justice.

The Committee further directed that background research be undertaken on similar cases of historical and land injustices suffered by various communities in Kenya, as well as implementation of decisions of courts and tribunals on issues of historical injustices and human rights violations. This would include the case of the *Ogiek/Endorois* which was litigated up to the African Court on Human and Peoples Rights.

MIN. NO. 139/2023 STATEMENT SOUGHT BY SEN. CRYSTAL ASIGE, MP ON THE STATUS OF IMPLEMENTATION OF THE LEGAL AID ACT (NO. 6 OF 2016)

The Committee considered the request for Statement and resolved to hold a meeting with the National Legal Aid Service on Wednesday, 22nd March, 2023 to discuss the Statement.

MIN. NO. 140/2023 **THE PRESERVATION OF HUMAN DIGNITY AND ENFORCEMENT OF ECONOMIC AND SOCIAL RIGHTS BILL (SENATE BILLS NO. 7 OF 2022)**

The Committee resumed consideration of the Bill and noted concerns that had arisen on whether the Bill could be proceeded with as currently drafted. This was on the basis that –

i) some of the aspects the Bill sought to legislate on were already provided for in other pieces of legislation, and the provisions of the Bill conflicted with the said Acts without seeking to amend them;
ii) some of the functions it sought to assign to certain Commissions, Ministries or agencies were already assigned in law or practice or were being performed by other entities. The Bill, if enacted, would give rise to conflicts in mandates and functions of the affected entities;
iii) by seeking to address so many issues in one Bill, it was not clear what the main issue was that the Bill sought to address; and
iv) if all the offending provisions of the Bill were deleted, what would be left would be a shell. Conversely, if the said provisions were amended, then it would give rise to an almost entirely different Bill.

The Committee further noted that the timeline for the Committee to consider and table its Report on the Bill had been exceeded by a period of two months.

In the circumstances, the Committee resolved to hold an informal meeting with the Sponsor of the Bill with a view to having the Sponsor step down or withdraw the Bill. This would pave way for the drafting of a fresh Bill that incorporated stakeholder submissions as well as comments and recommendations by the Committee.

Thereupon, the Committee directed that a draft Report in this regard be prepared for consideration.

MIN. NO. 141/2023 **ADJOURNMENT**

The Chairperson adjourned the meeting at fifty-three minutes past eight O'clock. The next meeting was scheduled to be held on Thursday, 2nd March, 2023 at eight O'clock.

SIGNED: .....

DATE: 30/06/2023

Annex 2: Copy of the Petition

Please read
JM
13.12.22

TOROBEEK COMMUNITY ASSOCIATION OF KENYA
P.o Box 461 - 20100 Nakuru
Cell Phone: 0721 233 375
Email: paulomosbei55@gmail.com

2) Ms. Nadiana. Kindly review our petition. This is coming up again. D. Ouanica. 13/12/2022.

5th December 2022

The Clerk of The Senate
Parliament buildings,
P.O BOX 41842-00100
NAIROBI. KENYA
EMAIL: csenate@parliament.go.ke

Mr. Mogere Cobbaisi
PS proress.
dw2Nc
8/12/22

08 DEC 2022

RE: PETITION TO THE SENATE CONCERNING HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY

I **Paulo Kiprotich Mosbei**, on behalf of the Torobeek Community, citizen of the Republic of Kenya wish to draw to the attention of the senate once again. This is following the advice from the clerk of the senate (kindly find the attached clerks letter)

THAT, the name Torobeek is derived from the name "Dorobo" who are forest dwellers within the Kalenjin Community. In Kenya, the Dorobos were found originally living together with OGIEK Community before forceful eviction and displacement from the regions of Mau complex of Nakuru and Narok counties, Mt. Londian across to the forests of the northern Tindiret in Nandi county, Timboroa (Tim-boroa) from Maji Mazuri, part of Koibatek forest, Tugen hills, Mt. Elgon forest and Cherangani hills), etc.

THAT, the Community was evicted from their original forest habitat, was forceful displaced by the colonialist and thereafter by the Kenya government after independence.

THAT, most of Torobeek Community lived with Ogiek Community in Mau Complex before displacement, while the rest are scattered across the Rift Valley Counties, some as far as Kiambu, Nyandarua, Migori, Isiolo, Bungoma Counties etc.

THAT, there has been delayed resettlement and neglect of Torobeek Community by the Government of Kenya. Therefore the Community has suffered from marginalization and abuse of their human rights and have not been recognized by the Government of Kenya, thus are living in abject poverty and undignified life, across the county

THAT, the Community deserves to live a dignified life, hence the Government has a responsibility towards the Community, to fulfill their rights expounded in the Constitution of Kenya under the Chapter on the Bill of Rights.

THAT, the community association of Kenya has compiled a list of members of the community scattered across the counties in the Great Rift Valley region and beyond. The said list has been verified by the community leaders, elders and provisional administration

THE SENATE
RECEIVED
08 DEC 2022
DIRECTOR LEGISLATIVE AND PROCEDURAL SERVICES

CamScanner

THAT, currently some IDPs and squatters from the Ogiek Community are in the process of being compensated or re-settled across the country by the National government. However, the Torobeek Community has not been given such considerations.

THAT, the Torobeek community members are not being considered when employment opportunities arises despite being a marginalized community

THAT, the torobeek community through their leaders have engaged a number of relevant government agencies such as the National Land Commission, ministry of interior and co-ordination of National Government and its agencies, ministry of lands, environment and Natural Resources, the Kenya national commission on human rights amongst others, in vain.

THAT, the issues in respect to which this petition is made are not pending before any court of law, or constitutional or legal body.

THAT we humbly request that the senate of the Republic of Kenya assist the Torobeek community to:

(i) Addresses our grievances expeditiously hence saving the Community from further marginalization and neglect by the Government

(ii) Recommends a mechanism framework, with timelines, to resettle/ compensate the Torobeek Community Members in their respective counties

(iii) Set aside funds to compensate and re-settle the community.

(iv) Consider the community members during relief food distribution in counties and when employment opportunities occurs.

Kindly, below find the undersigned list of Torobeek Community Leaders and Members, on behalf of others:

NO.	NAME	DESIGNATION	ID NO.	SIGNATURE
1.	[illegible]		[illegible]	
2.	[illegible]		[illegible]	
3.	[illegible]		[illegible]	
4.	[illegible]		[illegible]	
5.	[illegible]		[illegible]	
6.	[illegible]		[illegible]	
7.	[illegible]		[illegible]	
8.	[illegible]		[illegible]	
9.	[illegible]		[illegible]	
10.	[illegible]		[illegible]	
11.	[illegible]		[illegible]	
12.	[illegible]		[illegible]	
13.	[illegible]		[illegible]	
14.	[illegible]		[illegible]	
15.	[illegible]		[illegible]	
16.	[illegible]		[illegible]	
17.	[illegible]		[illegible]	
18.	[illegible]		[illegible]	
19.	[illegible]		[illegible]	
20.	[illegible]		[illegible]	

TOROBEEK COMMUNITY ASSOCIATION OF KENYA P.O. Box [illegible] NAKURU

Organizational official rubber stamp

Annex 3: Extract of the Hansard for the Senate sitting of Wednesday, 22nd February, 2023

Let us continue with the normal business of this honourable House.

I thank you.

About the Communication I was making, I was almost halfway. Had you given me three more minutes, one of the Senators today would be the Deputy Minority Whip. However, you have postponed.

(Laughter)

Therefore, my Communication has been rescinded until we sit with the leadership of both sides of the House and agree on the way forward.

Let us go to the next Order.

PETITION

HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY

The Deputy Speaker (Sen. Kathuri): Hon. Senators, I have a Petition by Mr. Paulo Mosbei concerning the historical injustices suffered by the Torobeek Community.

Hon. Senators, I hereby report to the Senate that a Petition has been submitted to the Senate by Mr. Paulo Mosbei concerning the historical injustices suffered by the Torobeek Community.

As you are aware, under Article 119(1) of the Constitution, and I quote:

> "Every person has a right to petition Parliament to consider any matter within its authority, including to enact, amend or repeal any legislation".

Hon. Senators, the salient issues raised by this Petition are-

(a) that a majority of persons from the Torobeek Community, originally lived together with the Ogiek Community in the regions of Mau Complex of Nakuru and Narok counties, Mt. Londiani across to the forest to the northern Tinderet in Nandi County, Timboroa from Maji Mazuri across Rift Valley, with some going as far as Kiambu, Nyandarua, Migori, Isiolo and Bungoma counties.

(A Senator spoke off record)

What is it Senator?

You are also forgiven.

(Laughter)

(b) That, the community was evicted from their original habitat by the colonialist and thereafter by the Kenya Government after independence rendering them internally displaced;

(c)That, while some internally displaced persons from the Ogiek Community have been compensated and resettled by the national Government, the Torobeek Community have neither been compensated nor resettled. Additionally, the Torobeek Community

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members are not considered for employment when opportunities arise and therefore, they have remained marginalized;

(d)That, the Torobeek community, through their leaders have made efforts to have the matter addressed by the relevant Government agencies, all of which have not borne fruits.

The Petitioner therefore prays that the Senate intervenes in this matter with a view to recommending that the Torobeek Community members be compensated, resettled and considered for employment when opportunities arise.

Hon. Senators, pursuant to Standing Order No.238(1), the Petition should be committed to the relevant Standing Committee for its consideration.

(The Petition was committed to the Committee on Justice, Legal affairs and Human Rights)

In terms of Standing Order No.238 (2), the Committee is required in not more than 60 calendar days from the time of reading the prayer, to respond to the Petitioner by way of a Report addressed to the Petitioner, and laid on the Table of the Senate

I thank you.

Next order.

I am not sure whether the requests are comments.

I have committed the petition to a Committee already but since, I forgave other things, I could allow a few comments.

Sen. Chute, please proceed.

Sen. Chute: Not on this one, Mr. Deputy Speaker, Sir.

The Deputy Speaker (Sen. Kathuri): Senate Majority Leader, do you want to make comments on this Petition?

The Senate Majority Leader (Sen. Cheruiyot): Mr. Deputy Speaker, Sir, it is because of what you had said earlier. I request you to guide the House. There are Members who, maybe, for whatever they wanted to say earlier, are still on the queue. They need to first opt out so that if there are Members who want to comment on this Petition, they are given a chance.

The Deputy Speaker (Sen. Kathuri): I can see one request from Sen. Cherarkey.

Sen. Cherarkey: Thank you Mr. Deputy Speaker, Sir. I congratulate the petitioner who has brought that Petition to the Senate. When these people are being disenfranchised, it is a human right issue where they must be compensated. The role of National Land Commission (NLC) under Article 67 (2)(e) of the Constitution, it says-

> "To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress."

Mr. Deputy Speaker, Sir, the National Land Commission (NLC) is supposed to assist. I believe the Committee on Justice, Legal Affairs and Human Rights is that these people have been disfranchised for long. You are aware Maumau were compensated at some point. There was a case that we were listening to at London Inns in the United States of America (USA).

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In the last Parliament, we also adopted a report on the historical injustices against the Talai community. From where you sit, even your behavior, you are looking like a Talai. So, all those issues in that report were adopted and---.

Sen. Kinyua: On a point of order, Mr. Deputy Speaker, Sir.

The Deputy Speaker (Sen. Kathuri): Yes, what is out of order?

Sen. Kinyua: Mr. Deputy Speaker, Sir, did you hear what Sen. Cherarkey said? He said you look like a Talai. Unless he describes who those people are. He should clarify so that it can be on record that he said Maumau were compensated.

Mr. Deputy Speaker, Sir, it will be better if he said 'some of them.' There are some who have not been compensated to date. By him saying that---

The Deputy Speaker (Sen. Kathuri): What did he say I look like? That was the point of order.

Sen. Kinyua: He said you look like a Talai. I wanted him to explain what that is.

The Deputy Speaker (Sen. Kathuri): Is he also one? I can see he also has a round face and he is stout like me. Is he also one?

Sen. Kinyua: He must first describe who those people are so that at least we would know so that we can draw a dichotomous key and tell whether he is one of them or whether you are one of them.

The Deputy Speaker (Sen. Kathuri): He lacks only the wisdom from the grey hair.

Sen. Cherarkey, please proceed and conclude.

Sen. Cherarkey: Mr. Deputy Speaker, Sir, to my brother Sen. Kinyua, Talai, in our community are feared people and they are very Solomonic. What you have done today by forgiving the four colleagues needed Solomonic wisdom and patience that you exercised today. I believe that is what I meant. I said 'look like' that is the use of euphemism.

Some of the *Mau Mau* have been compensated so this is not a unique issue. The issue of land is emotive. Sen. (Prof.) Tom Ojienda, SC, who is the Senator for Kisumu County, is not here today but he wrote a book called principles of conveyancing. In his opening remarks, he says, In Africa, land is a very emotive issue.

This is a very dicey issue that we need to handle carefully. These people are being chased out of forests. They are living on the pathways and roads within the forest. That is the worst human indignity. The Talai Community has never been compensated. Some of the Maumau were compensated while others were left out.

I appeal to President William Ruto. During the last Parliament, at the State of the Nation Address, I do not know which year, the former President committed Kshs10 billion for compensation of historical injustices be it in Ukambani, the Coast and everywhere else.

I appeal to the Government that the Kshs10 billion should be re-budgeted. The Committee on Justice, Legal Affairs and Human Rights and Committee on Lands, Environmental and Natural Resources as well as other sectors should have a kitty that can compensate these people that have suffered including but not limited to buying land,

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giving them cash to resettle and compensating them. These are the people that have suffered.

Mr. Deputy Speaker, Sir, in conclusion, most of our people in Nandi County suffered especially in Tinderet and parts of Nandi Hills. I saw an expose by British Broadcasting Corporation (BBC) about sex for work in some of the multinational estates in Kericho County - Finlay and others. That is just part of the greatest authorities that multinationals have committed.

Mr. Deputy Speaker, Sir, when you go to Nyamira County or any other part of this country, talking about sex for work is a small atrocity that multinationals have committed. The worst is that they were able to dispossess, uproot and kill people to create space to plant some of that tea.

As people across the world take their tea be it Lipton or any other form of Kenyan tea, it is tainted with blood. The earlier those multinationals compensate our people, the better.

The issue of sex for work is something that should be investigated. The police should arrest the culprits because this is a violation.

It was sad that international media station ran a documentary that was heart-wrenching.

I therefore appeal that this matter is resolved as soon as possible. The Committee on Justice Legal Affairs and Human Right which also handles land historical injustices should look at it. The Committee is chaired by Commissioner, Sen. Omogeni, who today is very humble. I do not know which medicine you gave him. The point I want to make is that there is a tradition that should be followed.

With those many remarks, I thank you and congratulate the petitioner.

The Deputy Speaker (Sen. Kathuri): I thank you.

Next Order.

PAPERS LAID

The Deputy Speaker (Sen. Kathuri): Senate Majority Whip, do you have instructions to lay any Papers?

Sen. (Dr.) Khalwale: Thank you, Mr. Deputy Speaker, Sir. I am sorry. I did not realize that the Senate Majority Leader had stepped out of the House.

FINANCIAL REPORTS ON VARIOUS COUNTY FUNDS

I beg to lay the following Papers on the Table of the Senate, today the 22nd February, 2023-

(i)Report of the Auditor-General on the County Revenue Fund for the County Government of Murangá for the year ended 30th June, 2022.

(ii)Report of the Auditor-General on the Kirinyaga County Assembly Car Loan (Members) Fund for the year ended 30th June, 2022.

(ii)Report of the Auditor-General on the Nyeri County Enterprise Development Fund for the year ended 30th June, 2022.

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Annex 4: Judgment of the High Court of Kenya in *Joseph Letuya & 21 others v. Attorney General & 5 others* [2014] eKLR



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 821 OF 2012 (OS)

JOSEPH LETUYA .....1ST APPLICANT

PATRICK KIBET KIRESOY.....2ND APPLICANT

JAMES RANA.....3RD APPLICANT

NAHASHON K. KIPTO.....4TH APPLICANT

ELASCO RONO.....5TH APPLICANT

STEPHEN PANDUMUNYE.....6TH APPLICANT

WILLIAM KIPLANGAT KALEGU.....7TH APPLICANT

JOSEPH K. SANG.....8TH APPLICANT

PARSOLOI SAITOTI.....9TH APPLICANT

KIPRONO SIGILAI.....10TH APPLICANT

ZAKAYO LESINGO.....11TH APPLICANT

JULIAS SITONIK.....12TH APPLICANT

ISAIAH SANET.....13TH APPLICANT

JOHNSON NAMUNGE.....14TH APPLICANT

SAMSON KIPKURUI MURENO.....15TH APPLICANT

CHARLES K. NDARAYA.....16TH APPLICANT

DANIEL KIBET CHESOT.....17TH APPLICANT

WILLIAM SERONEI TIWAS.....18TH APPLICANT

JOSEPH KIMAIYO TOWETT.....19TH APPLICANT

STARON MAITUBUNY.....20TH APPLICANT

SEMBUI ORIS.....21ST APPLICANT

SIMON RANA.....22ND APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE PROVINCIAL COMMISSIONER

RIFT VALLEY PROVINCE.....2ND RESPONDENT

RIFT VALLEY PROVINCE FOREST OFFICER....3RD RESPONDENT

DISTRICT COMMISSIONER NAKURU.....4TH RESPONDENT

WILSON CHEPKWONY.....5TH RESPONDENT

THE DIRECTOR OF FORESTRY.....6TH RESPONDENT

JUDGMENT

Introduction

The suit herein was commenced by way of an originating summons dated 25th June 1997 filed by the Applicants, who are representatives of members the Ogiek community living in East Mau Forest. The Applicants are seeking the following orders from this court:-

1. A declaration that the right to life protection by section 71 of the previous Constitution of every member of the Ogiek Community in Mau Forest including the Applicants has been contravened, and is being contravened by forcible eviction from their parcels of land in the Mau Forest and settlement by the Rift Valley Provincial Administration of other persons from the Kericho, Bomet and Baringo Districts to the exclusion of the Applicants, in that such members are being deprived of their means of livelihood.
2. A declaration that the eviction of the Applicants and other members of the Ogiek Community from their land in Mau Forest and settlement of other people on their land by the Rift Valley Provincial Administration is a contravention of their right to protection of law, and their right not to be discriminated against under section 77, 81 and 82 respectively of the constitution, and their right to reside in any part of Kenya.
3. A declaration that the settlement scheme under which the Rift Valley Provincial Commissioner, Rift Valley Provincial Forest Officer and Nakuru District Commissioner are allocating to persons from Kericho, Bomet, Transmara and Baringo Districts the Applicants' land in the Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru District occupied by the Applicants is *ultra vires* the Agriculture Act and the Forest Act and is null and void.
4. An order restraining the second, third and fourth Respondents from allocating the Applicants' land to other persons to the exclusion of the Applicants.
5. An order restraining the fifth Respondent from interfering with the first, second and third Applicants' user of their parcels of land in Marioshoni Location, Elburgon Division.

6. An order that the first, second, third, fourth and sixth Respondents do remove forthwith from Sururu, Likia, Teret and Sigotik Forests and Marioshioni and Nessuit all person who have been purportedly allocated the land belonging to the applicants.
7. An order that the first Respondent do pay compensation to the Applicants.
8. That the Respondents do pay the costs of this suit.

The orders were sought relying on the provisions of the previous Constitution that has since been replaced by the Constitution of 2010. The Originating Summons was supported by an affidavit sworn by the 1st Applicant, Joseph Letuya, on 24th June 1997, and further affidavits sworn by the 19th Applicant, Joseph Kimaiyo Towett, on 30th October 1997 and 22nd April 2005, as well as a supplementary affidavit sworn by the said 19th Applicant on 8th March 2012.

The 1st, 2nd , 3rd, 4th and 6th Respondents' response is in a replying affidavit sworn on 21st October 1997 by Kinuthia Mbugua, the then District Commissioner of Nakuru . The 5th Respondent also filed a replying affidavit he swore on 6th November 1997.

The parties were directed to file and exchange written submissions, and the Applicants' counsel filed submissions dated 30th October 2012. The submissions filed by the 1st, 2nd, 3rd, 4th and 6th Respondents' counsel are dated 24th June 2013. The 5th Respondent did not file any submissions.

The Applicants' Case:

The Facts

The Applicants claim that they are members of the Ogiek community who are also known as the Dorobo, which has been living in East Mau Forest which is their ancestral land. Mau forest is one of the country's gazetted forests. They state that about 10% of members of the Ogiek Community derive their livelihood from food gathering and hunting whilst the others practice peasant farming.

According to the Applicants, their ancestors were living in the Mau Forest as food gatherers and hunters. However, upon the introduction of the colonial rule, their ancestral land was declared a forest. The Applicants claim that since that declaration, members of this community have led a very precarious life which has been deteriorating over the years. Further, that when land for other African communities was set aside as Trust Land between 1919 and 1939, no land was set aside for them, with the consequence that no titles to land have been issued to its members as no adjudicating rights and registration of titles could take place. This suit was thus filed by the members of the Ogiek community after their lives started being threatened by the actions of the Respondents aimed at evicting them from their said ancestral land.

The Applicants originate from Marioshoni Location of Elburgon Division and Nessuit Location of Njoro Division. They claim that these two locations now serve as the "reserves or reservations of the members of the Ogiek Community". According to the Applicants, their problems date back to 1991 when the Government through Mr. Yusuf Haji, the then Provincial Commissioner for Rift Valley, informed them that the government had finally decided to establish a settlement scheme using a part of the forest land, which the Ogiek Community understood would be de – gazetted. They state that they were shown the part of Marioshoni Location where the settlement scheme was to be, which was part of their ancestral land which the colonial government had set aside as a forest. They further stated that subsequently the said community, which is organized on the basis of clans, formed clan committees through which land was allocated to individuals.

The Applicants contend that in 1993, the 2nd to 6th Respondents started allocating the land which the Ogiek community was occupying to other persons, and examples of such allocation of land occupied by the Applicants was given in paragraphs 13 to 26 of the supporting affidavit sworn by Joseph Letuya on 24th June, 1997, and also as described by Joseph Kimaiyo Towett, , in his affidavit sworn on 30th October, 1997. Further, that between 1993 and January 1997 people from Bomet, Kericho, Trans-Mara, Chepalungu and Baringo Districts were mainly the ones who were being allocated land in the Mau-Che Settlement Scheme in Eastern Mau Forest, which was originally occupied by the Ogiek Community. The Applicants averred that the continued harassment and eviction of the Ogiek Community from their ancestral land prompted the filing of this suit, and they attached a memorandum which the members of the community submitted to members of Parliament in July 1996 in this regard.

The 19th Applicant in his affidavit sworn on 22nd April 2005 stated that the report by the Presidential Commission of Enquiry into the Irregular Allocation of Public Land was favourable to the Applicants, and he attached a copy of the said report. Further. The said Applicant in his supplementary affidavit sworn on 8th March, 2012 deponed that when this suit was pending, the Minister for Natural Resources set out to alter the boundaries of the Eastern Mau Forest in which the Applicants live. The object of the Minister's gazettement was to reduce the area of the forest cover and settle people on the land to be created.

Furthermore, that following the Minister's actions, the Applicants and many other stakeholders objected to that move, and that the Applicants herein filed a judicial review application in High Court Miscellaneous Civil Application No. 228 of 2001, partly to protect the eco-system of the Mau Forest Complex and partly to protect their means of livelihood. The deponent stated on 15th March 2001 this Court prohibited the Minister of Environment from acting on, or implementing the gazette notice, but that the Applicants later withdrew the said application so as to proceed with the suit herein. He attached the pleadings and order given in the said application.

The deponent also stated that various developments have occurred since the filing of this suit that has confirmed the need to conserve the Mau Forest Complex, and in which the Government has acknowledged that the Applicants have a right to continue living in the Mau Forest in the area they have occupied for years as their ancestral land. These developments include the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** published in March, 2009; The National Land Policy published in June 2009, the Interim Coordinating Secretariat established on 4th September 2009 by the then Office of the Prime Minister to assist in implementation of the recommendations of the Mau Task Force Report; the establishment of the Ogiek Council of Elders and Interim Coordinating Secretariat Committee on Ogiek Matters (ICS-Com) on 1st April 2010, and the enactment of the new Constitution of 2010.

He attached copies of the Mau Forest Task Force Report, the Programme Document on Rehabilitation of the Mau Forest Ecosystem and the National Land Policy.

The Submissions

The Applicants' counsel Kamau Kuria and Kiraitu Advocates, filed submissions dated 30th October 2012, and argued that they are seeking, among others, redress for contravention of their rights under section 70, 71, 78 and 84 of the old Constitution. The counsel submitted that under section 84 of the old Constitution which is similar to Article 23 of the new Constitution, this court has the jurisdiction to grant the prayers that have been sought by the Applicants. Further that a declaration is a common redress where fundamental rights have been contravened as held in **Nadhwa –vs- City Council of Nairobi (1968) EA 406.**

It was submitted on behalf of the Applicants that section 71 of the old Constitution and now Article 26 of the Constitution guarantees everyone the enjoyment of right to life, which includes protection of one's means of livelihood, and reliance was placed on **Peter K. Waweru –v- Republic, High Court Misc. Civil Application No. 118 of 2004**, in this regard. Further, that the Applicants herein are seeking protection of the right to continue living in their ancestral land. The Applicants submitted that the right to have a home or is a basic need which falls within the meaning of the right to life .

It was further submitted that the right to own land is also protected under Article 40 of the new Constitution, and that although the Applicants herein do not hold titles to the land they are occupying, having lived there for all their lives and having established their homes there, they have an interest in the land which the court can protect by way of granting injunctions or other available remedies. Further, that section 75 of the old Constitution was clear that protection should be granted for not just title but also interest in or right over property.

The Applicants also stated that sections 78 and 82 of the old Constitution protect each community's right to live in accordance with its culture, and section 82 prohibits discrimination against any Kenyan because of ethnicity or local connection. They contended that this suit has been brought by the Applicants on their behalf and on behalf of other members of the Ogiek Community, and is properly before the court because under the old and the new Constitution, an individual or a group of individuals with a common grievance can move the court in one suit and allege that their fundamental rights and freedoms have been infringed.

The Applicants' relied on the decision in **Rangal Lemeiguran & Others Attorney General & Others High Court Misc. Civil Application 305 of 2004** where it was held that it would be a violation of an group of individual's rights if they are denied a right to be heard whether individually or through representatives. Further, that under Article 22 of the new Constitution, a person can institute a suit on behalf of another person, group or class of persons. The Applicants averred that due to their small population, the Ogiek people have not been able for years to have their grievances addressed, and that it is not practically possible for them to elect any leader to represent them in Parliament or any other Government forum due to their numbers.

The Applicants further submitted that they qualify as an indigenous and minority group within the definition of the two terms given in **Rangal Lemeiguran & Others Attorney General & Others (supra).** Further, that the new Constitution has specifically recognized the rights of the minorities in the society under Article 56, and that from the evidence produced by the Applicants, the Government has also acknowledged that the Ogiek people are a minority group whose interest should be considered by giving them an exception to continue living in Mau Forest.

The Applicants submitted that this court has jurisdiction under Article 23 of the Constitution to grant the prayers they seek of injunctions and relied on the decision in **Methodist Church in Kenya Trustees Registered –vs- The A. G., High Court Petition No. 4 of 2010** where the court granted injunction orders and mandatory orders in a constitutional petition. It was also submitted that they are also entitled to the costs of this suit for reason that in constitutional litigation, the court applies the general rule that the costs follows the event. Lastly, the Applicants submitted that they have proved their case on a balance of probabilities and are entitled to the reliefs which they have claimed.

The 1st, 2nd , 3rd, 4th and 6th Respondents' Case

The Facts

The 1st, 2nd, 3rd, 4th and 6th Respondents filed Grounds of Opposition to the Applicants' suit, in which they argued that the Applicants have no cause of action and are not entitled to any of the remedies sought as they have not established any legal right over the property in question, and have also failed to demonstrate what actions of the Respondents have violated on their constitutional rights. The 4th Respondent in addition also filed a replying affidavit wherein he contended that the Eastern Mau Forest is a Government Gazetted Forest and not a reservation of the Ogiek Community as an ancestral land, and that the members of the Ogiek Community who have been occupying Marioshoni and Nessuit Forests have been doing so as illegal squatters contrary to the Forest Act (Cap 385 of the Laws of Kenya)

Further, that due to this illegal occupation of the Forest by the squatters, the Government decided to provide a scheme of settling some of these random destruction of the Forest, and that the settlement only covers the plantation forest land and does not affect the indigenous forest land. The 4th Respondent averred that the settlement scheme does not involve indigenous forest land from which the community if it so desired, are still able to gather herbs, honey and fruits in the traditional manner.

He also stated that the Applicants would be treated for the purposes of the settlement as any landless Kenyan without discrimination on account of clan, tribe, religion, place of origin or any other local connection, and that some of the Applicants had already been allocated land from the settlement scheme. Further, that the Government allocated the 5th Respondent the piece of land before the 1st Applicant went to occupy it illegally.

The Submissions

The 1st, 2nd, 3rd, 4th and 6th Respondents' counsel, G.K. Oenga, a litigation counsel in the Attorney General's Office filed submissions dated 24th June 2013. The said Respondents submitted that the Applicants' claim to ownership of the land in question based on alleged pre-colonial occupation by their ancestors and clan allocation is misplaced, as the said actions do not confer any legal rights upon the Applicants. Hence there is no legal recognized right for this court to protect.

The 1st, 2nd, 3rd, 4th and 6th Respondents averred that settlement schemes have been crucial to Government in its efforts to settle landless Kenyans displaced from their lands, either through discriminatory colonial policies of land alienation, or through ethnic or communal tensions culminating in clashes, and that such settlement schemes are established as public lands. Further, that it is not in contest that the land in question forms parts of forest land which belongs to the government, and that the Applicants' claim to exclusive right of allocation of land in the settlement schemes to the exclusion of all other deserving Kenyans is without merit.

The 1st, 2nd, 3rd, 4th and 6th Respondents further argued that before granting the declaratory orders sought by the Applicants, the court must ensure that all the prerequisites for the grant of declaratory orders have been satisfied by the Applicants. The Respondents relied on the principles that govern the grant of declaratory orders as laid down in various academic texts and in the decision in the case of **Matalinga and Others v. Attorney General (1972) E.A 518,** to the effect that the question before the Court must be real and justiciable and not a theoretical question, and that the person raising it must have a real interest to raise it. The Respondents' counsel also relied on the decisions in **Re Barnato (Deceased), Joel and Another v. Sanges and Others, (I949) 1 All E.R. 515**

It was the 1st, 2nd, 3rd, 4th and 6th Respondents' further submission that the declarations sought in the present suit are contrary to the accepted principles on which the court exercises its jurisdiction to make a declaration of rights as a declaratory judgment cannot confer a right where no such right exists, and that

before a court can declare the violation of a right it must confirm and ascertain the existence of the said right and that the actions that allegedly constitute the violation of rights have already occurred.

It was also the 1st, 2nd, 3rd, 4th and 6th Respondents' contention that Article 67(2) (e) preserves the issues which constitute the cause of action in the present suit to be dealt with the National Land Commission, and that the dispute before the court is therefore not justiciable. It was the said Respondent's submission in this respect that although the Constitution confers upon the High Court unlimited jurisdiction for redress of rights and freedoms guaranteed by it, the same Constitution also establishes other specialized commissions and independent offices which are clothed with authority in regard to certain spheres, and that in exercising its general jurisdiction the court should take heed not to intrude into matters preserved for these commissions.

The 1st, 2nd, 3rd, 4th and 6th Respondents relied on the decision in **Patrick Ouma Onyango & 12 Others vs. The Attorney General & Others (2005) e KLR** in this regard. It was their view that the dispute before this court in as as far as it seeks to agitate historical land injustices and to seek the setting aside of a special land reserve specifically for members of the Applicants' community, is one that the court is ill equipped to adjudicated upon and as such is not justiciable.

It was lastly submitted by the 1st, 2nd, 3rd, 4th and 6th Respondents that it is a firmly established principle that a party who seeks redress for infringement of his or her fundamental rights is duty bound to demonstrate to the court in the clearest way possible which the manner in which the rights have been violated as held in **Matiba vs. The Attorney General, HCC Misc. Application of 666 of 1990**. The Respondents submitted that the instant application fails to meet the threshold laid out in the above case, as the Applicants have listed a number of constitutional provisions allegedly contravened in respect to them, but they have failed to draw a correlation between the said infringements with the action of the Respondents. It was the 1st, 2nd, 3rd, 4th and 6th Respondents' view that the Applicants have failed to make out a case that warrants the issuance of the orders sought in their application, and that the same ought to be dismissed as it amounts to an abuse of the court process.

The 5th Respondent's Case

The 5th Respondent in his replying affidavit stated that he had not been allocated land in his capacity as a Provincial Commissioner for Central Province nor had he been allocated land belonging to the Applicants. Further, that the Applicants have not identified precisely which parcel(s) of land they are referring to, so that he could be in a position to respond. The 5th Respondent further stated that the allocations and settlement of the allottees has nothing to do with him and he was not able to respond.

The 5th Respondent did not file any submissions.

The Issues and Determination

Arising from the pleadings and submissions made in the foregoing, it is not disputed that there has been allocation of land occupied by the Applicants in the East Mau forest by the 2nd, 4th and 6th Respondents. The Respondents' actions therefore that are alleged to infringe the Applicants' rights are the eviction or threatened eviction of the Applicants from the land they occupy, and the allocation of the said land to other persons. The court finds that there are various issues arising for determination as follows:

1. Whether the members of the Ogiek Community have recognisable rights arising from their occupation of parts of East Mau Forest.
2. If so, whether in the circumstances of the instant case the rights of the Ogiek Community have

been infringed by their eviction and allocations of land in East Mau Forest to other persons.
3. Whether in the circumstances of the instant case, the settlement schemes in East Mau Forest by the Respondents were ultra vires and null and void.
4. Whether the Applicants are entitled to the reliefs sought.

Whether the members of the Ogiek Community have recognisable rights arising from their occupation of East Mau Forest.

The Applicants in this suit are claiming relief as, and on behalf of members of the Ogiek community. They claim that East Mau Forest is the ancestral land of the Ogiek community, and that derive their livelihood from food gathering and hunting whilst others practice peasant farming. Further, that this livelihood is now threatened by their eviction from the said forest, and will infringe on their right to life.

Although this suit was filed in 1997 when the old constitution was in place, the infringements alleged by the Applicants are of a continuing nature and have not been resolved as seen by the affidavits filed by the Applicants since the promulgation of the new constitution. The provisions of the 2010 Constitution are therefore also applicable to this suit.

The first right relied upon by the Applicants was the right to life. The enjoyment of the right to life is guaranteed under section 71 of the old Constitution and Article 26 of the current Constitution. Section 71 of the old Constitution provided as follows:

"No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted."

Article 26 of the 2010 Constitution provides as follows with regard to the right to life:

"(1) Every person has the right to life.

(2) The life of a person begins at conception.

(3) A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.

(4) Abortion is not permitted unless, in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law."

The Applicants have argued that the right to life includes the right to livelihood and have relied on the definition of the right to life given in **Peter K. Waweru –v- Republic, High Court Misc. Civil Application No. 118 of 2004**, reported in **(2006) 1 KLR (E&L) 677 at 691**. Honourable Justices Nyamu J. (as he then was), Ibrahim J. (as he then was) and Emukule J. found as follows with regard to the meaning of the right to life under section 71 of the Constitution,

"We have added the dictionary meaning of life which gives life a wider meaning, including its attachment to the environment. Thus a development that threatens life is not a sustainable and ought to be halted. In Environmental law, life must have this expanded meaning.

The UN Conference on the Human Environment, 1972, that is the seminal Stockholm Declaration noted that the environment was 'essential to... the enjoyment of basic rights – even the right to

life itself'

Principle 1 asserts that:

'Man has the fundamental right to freedom equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'

Closer home- Article 24 of the African Charter of Human and Peoples Rights 1981 provided as under:

'All peoples shall have the right to a general satisfactory environment favourable to their development'

Finally the UN Conference on Environment and Development in 1992 ie The Rio Declaration principle 1 has a declaration in these terms:

'... human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.' "

The applicants also relied on the expansive definition given to the right to life by the Supreme Court of Pakistan in its decision in **Zia –v- Wapda PLD (1994) SC 693** that was cited in **Peter K. Waweru –v- Republic** (**supra**). The Supreme Court of Pakistan stated as follows with respect to the provisions of section 9 of the Pakistan Constitution that no person shall be deprived of life or liberty except in accordance with the law:

"The Constitution guarantees dignity of man and also right to 'life' under Article 9, and if both are read together, the question will arise whether a person can be said to have dignity of man if his right to life is below bare necessity line without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment."

In addition, the United Nations Human Rights Committee in its General Comment 6 on the right to life adopted on 27 July 1982 observed that the right to life enunciated in the first paragraph of Article 6 of the International Covenant on Civil and Political Rights has been too often narrowly interpreted. It stated that the expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

This court recognizes that the right to livelihood neither has an established definition nor recognition as a human right at the national or international level. However, the right to a livelihood is a concept that is increasingly being discussed in the context of human rights. This concept has mention in various international human rights treaties which are now part of Kenyan law by virtue of Article 2(6) of the Kenyan Constitution. Article 25 of the Universal Declaration of Human Rights (UHDR) does mention livelihood in relation to social security and states that:

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food...and the right to security in the event of unemployment, sickness, disability widowhood, old age or other lack of livelihood in circumstances beyond his control."

In addition, Article 6(1) of the International Covenant on Economic, Social and Cultural Right (ICESCR)

states that the States Parties "recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts." The right to adequate standard of living as defined under Article 11 of ICESCR includes right to food, clothing, right to adequate housing, right to water and sanitation with an obligation to progressively improve living conditions.

These rights are also now expressly provided in the directive principles and Bill of Rights in the Kenyan Constitution. The Preamble to the Constitution, which directs this court as to the considerations to be taken into account when interpreting this Constitution, proclaims that the people of Kenya, when making the Constitution were committed to nurturing and protecting the well-being of the individual, the family, communities and the nation. Likewise, the national values and principles that bind this Court when interpreting the Constitution under Article 10 of the Constitution include human dignity, equity, social justice, human rights, non-discrimination, protection of the marginalized and sustainable development.

Article 28 provides for the right of inherent dignity of every person and the right to have that dignity respected and protected. Lastly, Article 43(1) of the Constitution expressly provides for economic and social rights as follows:

"(1) Every person has the right—

(*a*) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(*b*) to accessible and adequate housing, and to reasonable standards of sanitation;

(*c*) to be free from hunger, and to have adequate food of acceptable quality;

(*d*) to clean and safe water in adequate quantities;

(e) to social security; and

(*f*) to education."

It is therefore evident from the foregoing provisions that their purpose is to ensure that persons to whom they apply attain a reasonable livelihood. The Applicants in this regard relied on a memorandum dated July 15, 1996 titled "**Help Us Live in Our Ancestral Land and Retain both our Human and Cultural Identities as Kenyans of Ogiek Origin**" that was presented to the Kenyan Parliament by representatives of the Ogiek living in Nessuit and Marioshoni parts of Mau Forest. They describe their way of life therein as follows at page 9 :

"At times, governments before and after independence have treated us as lawless poachers. That is why we do not live as we used to in pre-colonial Kenya. Each clan had a number of families. Each family could have as many as five parcels of forests which were identified with it and regarded as its own. Rivers, valleys, swamps, ridges, hills and vegetation served as boundaries. Each clan carried on hunting and honey collecting in this land. Even today Ogiek clans can identify their land in the Mau Forest. So can the suit Ogiek. In the past, we made hunting expeditions to the Savannah and grasslands outside forests for big game such as elephant and buffalo. That is no longer possible. The forests are the only hunting grounds.

Today, our economy is weak one. Our social life has been destroyed by a lack of a permanent

home. Colonial and Independence governments have adopted contradictory policies towards us. As stated above, about 10% of us live on honey and game meat. They hunt the antelope, the gazelle and rock-hyrax, and collect honey. Honey is sold in market today. It is a major source of money. Cow milk and sheep are the other sources. The majority of the men work as labourers in saw mills. The average daily pay is Kshs.30/=. A few work with the civil service as clerks, forest guards, administrative police men, patrol men, assistant chiefs and chiefs. Illiteracy is very high. The majority of the children do not go to school. They look after cows and sheep. Majority of the women make homes and have got markets to sell honey and milk. A few women grow maize beans, potatoes and cabbages. It is only in early 1960s that growing of crops started among a few Ogiek. Guy Yeoman has described the changes in our fortunes as follows,

'The above description of the essential of the Dorobo, whilst still valid, must be modified by the severely damaging effects of the (to them) cataclysmic political, social and above all, ecological areas of the past century. These have combined to restrict their traditional sources of food and compel an increasing dependence on arable cultivation and cattle keeping. The limited areas at their disposal, the absence of secure land tenure, and their own tradition have prevented them from becoming very successful arable farmers.' ..."

These assertions were not contested by the Respondents, and this Court finds that the Applicants' livelihood is directly dependent on forest resources and the health of forest ecosystems for their livelihoods, and to this extent that they depend on the Mau forest to sustain their ways of life as well as their cultural and ethnic identity. The Applicants' right to life and socio-economic rights are consequently defined and dependant upon their continued access to the Mau Forest and should be protected to this extent.

It is also noteworthy in this respect that the Forest Act (Chapter 395 of the Laws of Kenya) recognizes the customary rights of forest dwellers in forests and provides as follows in this regard:

"**Nothing in this Act shall be deemed to prevent any member of a forest community from taking, subject to such conditions as may be prescribed, such forest produce as it has been the custom of that community to take from such forest otherwise than for the purpose of sale."**

Secondly, the Applicants also argued that they have a right to property under Article 40 of the Constitution and section 75 of the old Constitution by virtue of their interest in the Mau Forest, having lived there for all their lives and having established their homes there. The 1st, 2nd, 3rd, 4th and 6th Respondents on the other hand contend that Mau Forest is a Government gazetted forest and not a reservation, and that the members of the Ogiek Community have been occupying it as illegal squatters contrary to the Forest Act. Further, that the Applicants' allegations of clan allocations of the land cannot confer on them any recognized right in land. The said Respondents relied on the following passage in **Halsbury's Laws of England, 4th Edition (Re-issue) Vol. 8(2)** at paragraph 165:

"The protection under the Constitution of the right to property does not obtain until it is possible to lay claim in the property concerned.....an applicant must establish the nature of his property right and his right to enjoy it as a matter of domestic law."

I find that I must agree with the 1st, 2nd, 3rd, 4th and 6th Respondents' arguments. The process of conferring legal and equitable property rights in land under Kenyan law is settled, and is dependant upon formal processes of allocation or transfer and consequent registration of title, or of certain transactions that confer beneficial interests in land in the absence of a legal title of ownership. The process of allocation of forest land is further governed by the Forest Act that requires a process of excision of forest

land before such land can be allocated. The Applicants did not bring evidence of such processes of allocation of title to land located in the Mau Forest and solely relied on their long occupation of the same. In addition under law, forest land being government land, cannot be subject to prescriptive rights arising from adverse possession. This court cannot therefore in the circumstances find that they have accrued any property rights in the Mau Forest that can be the subject of the application of section 75 of the old Constitution or Article 40 of the current Constitution.

Notwithstanding the finding of this Court that no property rights are yet to accrue to the Applicants, it is noted that the Constitution now provides for community land under Article 63 of the Constitution, which shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Community land under Article 63 (2) (d) includes:

"(*d*) land that is—

(i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines;

(ii) ancestral lands and lands traditionally occupied by hunter-gatherer communities; or

(iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the county government under Article 62 (2). "

These provisions of the Constitution are to be given effect to in and by an Act of Parliament which is yet to be enacted, and once enacted this is the law that will probably eventually settle the issue of the property rights of the Ogiek community in the Mau and other forests in which they claim ancestral rights. In addition, the National Land Commission which is established under Article 67 of the Constitution is mandated to initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress. The Applicants claim for property rights is therefore not ripe for determination by this court, and should be pursued through the necessary legislative processes on the community land legislation, and with the National Land Commission.

The third set of rights relied upon by the Applicants were their rights as a minority group, and they contend that that have been discriminated against, because of their ethnicity and local connection contrary to section 82 of the old Constitution. Article 27(4) of the Constitution also now provides that the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth. The Applicants relied on the definition of minorities in **Lemeiguran & 3 Others vs Attorney General & 2 Others (2006) 2 KLR 819 at 856- 857**, in which Nyamu J. (as he then was) and Emukule J. found the Il Chamus community to be a minority group.

The court in that case considered and applied the definition of minority groups in the society as defined by international covenants as follows:-

"To reinforce the above, we adopt the definition of minority proposes by the UN Special Rapporteur Fransesco Capotorti in the context of Article 27of the International Covenant of Civil and Political Rights (CCPR) in the following words:

'A group numerically inferior to the rest of the population of a state, and in a non-dominated position whose members – being nationals of the state – posses ethnic, religious or linguistic characteristic differing from those of the rest of the population and show, if only implicitly, a

sense of solidarity, directed towards preserving their culture, traditions religious and language.'

An equally eloquent definition is that of Jubs Deschenes also recommended to the UN in 1985, (Doc E/CN 4/Sub 2/1985/31) as follows:

'A group of citizens of a State, constituting a numerical minority and in a non dominant position in that State, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.' "

This court therefore notes from the above definitions that the minority status of a community therefore is determined by the numerical disadvantage of a community that has distinct ethnic, religious or linguistic characteristics.

An indigenous community on the other hand has been defined in Article 1 of ILO Convention No. 169 on The Rights of Indigenous and Tribal Peoples, 1989 as :

"a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;

"b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions."

This court adopts the said definition for the purposes of this case, and It is apparent from the definition that the distinguishing factor for indigenous communities is their historical ties to a particular territory, and their cultural or historical distinctiveness from other populations that are often politically dominant.

The memorandum dated July 15, 1996 titled "**Help Us Live in Our Ancestral Land and Retain both our Human and Cultural Identities as Kenyans of Ogiek Origin** relied upon by the Applicants estimates at page 5 that the total population of the Ogiek community at the time was 20,000 in number. It is also indicated at page 35 of the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** that when the resettlement of the Ogiek started in 1996 in the South Western Mau Forest Reserve there were 9,000 Ogiek families. This court therefore finds that these figures are indicative of a significant minority community. In addition it is also acknowledged in the memorandum and task force report that the Ogiek traditionally lived in the Mau Forest and depended on the forest for their livelihood, and to this extent this court also finds that they are an indigenous community. Being a minority and indigenous group, the Ogiek therefore merit rights that apply to them as a special group, over and above the rights applicable to other persons.

The rights of the minorities and marginalized groups are now provided for in Article 56 of the 2010 Constitution as follows:

"The State shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups—

(*a*) participate and are represented in governance and other spheres of life;

(*b*) are provided special opportunities in educational and economic fields;

(*c*) are provided special opportunities for access to employment;

(*d*) develop their cultural values, languages and practices; and

(*e*) have reasonable access to water, health services and infrastructure."

The need for this affirmative action for, and special consideration of minority and indigenous groups arises from the fact that indirect indiscrimination of these groups may result from certain actions or policies which on their face look neutral and fair, but which will have a differential effect on these groups because of their special characteristics. In the present case the action that is being complained of being discriminatory is the Applicants' eviction from, and the allocation of their land in the forests to other persons by the 2nd, 4th and 6th Respondents. It is therefore the finding of this Court that to the extent that the Applicants as an indigenous and minority group are prevented by the said eviction and allocations of from continuing to live in accordance with their culture as farmers, hunters and gatherers in the forest, they are specially and differently affected and discriminated against on account of their ethnic origin and culture.

Whether the rights of the Ogiek Community have been infringed by their eviction from East Mau Forest and the settlement of other people on said land.

This court has found that the rights to life, dignity and the economic and social rights guaranteed by the Constitution in reality exist to ensure that that the livelihood of the Applicants and apply in relation to the Applicants' access to the forest lands they occupy. It is also not disputed that there have been allocations of land occupied by the Applicants in the Mau Forest to other persons by the 2nd, 4th and 6th Respondents.

The 1st, 2nd, 3rd, 4th and 6th Respondents argue in this respect that the Applicants do not have any exclusive rights to be allocated land in settlement schemes excised from the Mau forest, and that the Applicants should be treated for the purposes of the settlement as any landless Kenyan without discrimination on account of clan, tribe, religion, place of origin or any other local connection.

Quite apart from the special consideration that needs to be given to the Ogiek community as a minority and indigenous group when allocating forest land that this court has enunciated on in the foregoing, this court also recognizes the unique and central role of indigenous forest dwellers in the management of forests. This role is recognized by various international and national laws. The Convention on Biological Diversity which Kenya has ratified and which is now part of Kenyan law by virtue of Article 2(6) of the Constitution recognizes the importance of traditional knowledge, innovations and practices of indigenous and local communities for the conservation and sustainable use of biodiversity and that such traditional knowledge should be respected, preserved and promoted. Article 8 (j) of the Convention places an obligation on State Parties in this respect to:

"Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge,

innovations and practices."

This court is also guided in this respect by several multilateral environmental agreements which now shape the strategies and approaches by governments in relation to the environment and development, including forest policy. These include the Rio Declaration on Environment and Development and Agenda 21 which are widely accepted sources of international customary environmental law. Principle 22 of the Rio Declaration on Environment and Development provides that indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States are encouraged to recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development. Chapter 26 of Agenda 21 is likewise dedicated to strengthening the role of indigenous communities in sustainable development.

The participation of indigenous forest dwellers in management of forests is also specifically provided for in the Kenyan Forest Act at section 45 which provides as follows:

"(1) A member of a forest community may, together with other members or persons resident in the same area, register a community forest association under the Societies Act.

(2) An association registered under subsection (1) may apply to the Director for Permission to participate in the conservation and management of a state forest or local authority forest in accordance with the provisions of this Act."

The above provisions therefore provide a justification for priority to be given to the Ogiek community in the allocation of the excisions of Mau Forest. Indeed in the **Report of the Government Task Force on the Conservation of the Mau Forest Complex, March 2009** at page 35 states that one of the main objectives of the excision of forestland in the Mau Forests Complex was the settlement of the Ogiek people who were scattered across the forest, so as to secure the long-term conservation of the biodiversity and water catchments of the Mau Forest. A key finding in the Task Force report in this regard in the executive summary at pages 10 -11 of the report was that beneficiaries of the excisions included non -deserving people, and it recommended that the Ogiek who were to be settled in the excised areas and have not been given land, be settled outside the critical catchment and biodiversity areas.

More fundamentally, the infringement of the rights of the Ogiek community has now been officially admitted in a key government policy document. It is indicated in the **The Sessional Paper No 3 of 2009 on the National Land Policy, August 2009** by the Ministry of Lands that one of the policy interventions under Chapter 3.6 is to address land issues requiring special intervention. One such issue is the rights of minorities, and the policy states as follows in this regard at paragraphs 198-199 thereof:

"198. Minority communities are culturally dependent on specific geographical habitats. Over the years, they have lost access to land and land-based resources that are key to their livelihoods. For example, such loss of access follows the gazettement of these habitats as forests or national reserves or their excision and allocation to individuals and institutions, who subsequently obtain titles to the land.

199. These communities are not represented adequately in governmental decision making at all levels since they are relatively few in number. Their political and economic marginalization has also been attributed to the fact that colonial policies assimilated them into neighbouring communities. In addition, the colonial Government alienated their lands through forest

preservation policies, which effectively rendered them landless as they were denied the right to live in the forests. Colonial administration also led to the marginalization of other minority communities both urban and rural, such as hunter-gatherers. To protect and sustain the land rights of minority communities, the Government shall:

(a) Undertake an inventory of the existing minority communities to obtain a clear assessment of their status and land rights;

(b) Develop a legislative framework to secure their rights to individually or collectively access and use land and land based resources."

This court has already found that the Ogiek community is one such minority group, and the Applicants' pleadings herein also correspond with and mirror the findings and policy statements made in the National Land Policy. The Ogiek community are therefore one of the minority groups whom the Government of Kenya admits and recognizes have through successive policies lost their access to land and their right to live in forests which are key to their livelihoods.

Arising from the foregoing reasons, it is the finding of this Court that the right to life, dignity and economic and social rights of the Ogiek Community have been infringed as a result of the allocation to other persons of forest land in Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru District on which they were dependent for their livelihoods, and which allocation was contrary to the express purpose of the excision of the said forest land.

Whether in the circumstances of the instant case, the settlement schemes in East Mau Forest by the Respondents were ultra vires and null and void

The Applicants extensively relied on the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** in their pleading that the allocations by the 2nd, 4th and 6th Respondents of land in the Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru District be stopped, and that the persons allocated the said land be removed therefrom.. The 1st, 2nd, 3rd, 4th and 6th Respondents on the other hand argued that the allocations were properly undertaken as part of the settlement scheme by the Government to settle landless persons. The Respondents however did not provide any evidence of compliance with the required procedure of excision of the said forest land under the then Forest Act particularly the gazettement of the said excision, or of the details of the said allocations.

I have perused the **Report of the Government Task Force on the Conservation of the Mau Forest Complex, March 2009** and note that the Task Force undertook an extensive audit of the settlements made by the government through excisions of forests since independence in 1963, and also more particularly of the 2001 excisions of the Mau Forest Complex whose purpose was to settle the Ogiek communities and 1990's clash victims. The court notes in this regard that the Nessuit and Marioshoni Schemes were two of the schemes considered in the report with respect to the 2001 excisions, and that while the Marioshoni scheme was intended to benefit the Ogiek families and had started in 1996 but was put on hold in 1997 due to a court injunction, the beneficiaries of the Nessuit scheme were not stated, and it was indicated that they were already resident on the land.

The task force in its report analysed the correspondence on the land allocation in the 2001 forest excisions and the green cards on the settlements established after the said excisions, and made the following key findings at pages 44 -45 of the report:

a. Some of the allocation of land was carried out by unauthorized persons.
b. The allocation of land benefited non-deserving people, such as senior Government officials, political and companies.
c. Ecologically sensitive areas, including water catchments areas were also allocated.
d. The allocation of land was carried out in breach of the Law of Kenya governing land, including the Government Land Act, Forest Act, Physical Planning Act, Agricultural Control Act and the Environmental Management and Coordination Act.
e. The allocation of the foresaid excised in 2001 was not in line with the Government's stated intention to establish settlement schemes for the Ogiek and the 1990s clashes victims by which each of the intended beneficiaries should receive one parcel of approximately 2.02 hectares (5 acres).
f. Allocations of multiple parcels of land to the same beneficiaries affected some 6,500.5 hectares. In addition, the size of may land parcels in well in excess to the normal land size of 2.02 hectares (5 acres).
g. Over 99% of the title deeds (18,516) were affected by irregularities. They were issued before the excision date when the land was not available, or issued in disregard of High Court orders restraining the Government and its officials and agents from jointly or severally alienating the whole or any portions of forestland as proposed in the 2001 excisions Legal Notices.
h. In two areas, Nessult and Kiptagich, the settlement schemes were established in the gazette forest reserves beyond the 2001 forest excisions boundaries.

In the light of these findings it is apparent that there were significant irregularities committed during the allocations made after the 2001 forest excisions of Mau Forest, which included the allocations made with respect to the land occupied by the Applicants. This court cannot therefore uphold the legality of the said allocations. This Court also in this regard adopts the findings and recommendations made in the **Report of the Government Task Force on the Conservation of the Mau Forest Complex**, and particularly the recommendations that all titles that were issued irregularly and not in line with the sated purposes of the settlement scheme be revoked, and that members of the Ogiek community who were to be settled in the excised area and have not yet been given land should be settled outside the critical catchment areas and biodiversity hotspots.

Whether the Applicants are entitled to the reliefs sought.

The 1st, 2nd, 3rd, 4th and 6th Respondents have argued that the Applicants are not entitled to the declaratory reliefs sought, for the reason that they have not established a real question or cause of action capable of being determined by the Court, and that the dispute herein is not justiciable. However, this court has in this regard already found that various existing rights of the Applicants that were violated by the 2nd, 3rd, 4th and 6th Respondents by their action of removing them from the land they occupied and allocating the said to other persons. The Applicants are therefore entitled to the declaratory relief sought in this respect.

Conversely, it is the view of this Court that the additional reliefs sought by the Applicants on the illegality of the allocations made by the Respondents and the nullification of the same, as well as the stoppage of further allocations and removal of persons allocated the land illegally have been overtaken by the events. This is for various reasons. Firstly the processes leading to the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** resulted in specific findings and recommendations made in the said report, which also affect the Applicants and which have been adopted by this court. The reliefs granted to the Applicants should therefore be in consonance with the recommendations made by the task force.

Secondly, consequent to the enactment of the 2010 Constitution a new institutional framework have been put in place that has taken over the functions previously performed by the 2nd, 3rd, 4th and 6th Respondents. The National Land Commission is the only body that is now constitutionally mandated to manage, alienate and allocate public land, and to monitor the registration of all rights and interests in land in accordance with the principle laid down in the Land Act of 2012. In addition under the Land Act it is only the said Commission that shall implement settlement programmes to provide access to land for shelter and livelihood. Granting the reliefs sought as against the 2nd, 3rd, 4th and 6th Respondents would therefore not provide an effective remedy to the Applicants.

Thirdly, it is also noted that it was a specific recommendation of the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** that the members of the Ogiek community need to be first identified and a register of the Ogiek community developed with the support of the Ogiek Council of Elders for them to benefit from the recommendations made therein. This o necessity also applies in this suit, as will clarify the deserving members of the Ogiek Community that are to benefit from the orders made herein. In addition the Applicants in their pleadings confirm the establishment of the Ogiek Council of Elders. This Court also notes in this regard the pleading by the 1st 2nd, 3rd , 4th and 6th Respondents that there were some Applicants who were allocated the excised forest land, and who may therefore not be deserving of any relief, and they therefore need also to be identified.

The above observations notwithstanding, this Court is now empowered by Article 23(3) of the Constitution to grant appropriate relief in proceedings seeking to enforce fundamental rights and freedoms. In addressing the question of appropriate relief to give in the circumstances of this case, I am guided by the decision of the South African Constitutional Court in the case of **Minister of Health and Others vs. Treatment Action Campaign and Others (2002) 5 LRC 216** wherein it was stated at page 249 as follows:

"Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of s 172(1)(a) a court may also 'make any other order that is just and equitable' (s 172(1)(b))...Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...The courts have a particular responsibility in this regards and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal..."

Any effective and appropriate remedy in the circumstances of this case will require the participation of the National Land Commission, which although not a party in this case, is the body that is constitutionally mandated to now perform the functions and remedies sought as against the 2nd 3rd 4th and 6th Respondents.

As regards the relief sought against the 5th Respondent, the Applicants failed to bring any evidence of the participation of the 5th Respondent who was sued in his personal capacity in the said allocations of the land in Mau Forest, or of the allocations of land they allege were made to him. This Court therefore finds that the Applicants have not proved their claim against the 5th Respondent and are thus not entitled to any relief against the said Respondent.

In conclusion and for the record, this Court was aware in reaching the findings herein and consideration

of the necessary reliefs of the decision made in **Kemai & Others vs Attorney General & 3 Others (2006) 1 KLR (E&L) 326**. The applicants therein were also members of the Ogiek community who had been evicted from Tinet forest, and who had sought similar relief as the Applicants herein. Oguk and Kuloba JJ in the said case declined to grant the relief sought on the ground that the Applicants therein were no longer forest dependant; had not complied with the provisions of the Forest Act with regards to the requirement of a licence to occupy land in the forest; and that they had not been deprived of their means of livelihood nor discriminated against.

The said judgment by Oguk and Kuloba JJ was delivered on March 23, 2000, and their decision is distinguished on the ground that the law and circumstances since then have significantly changed in light of the enactment of a new Forests Act of 2005, the development of the land policy in August 2009, the promulgation of the current Constitution in 2010 and the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** in March 2009. These developments have all influenced my findings herein as shown in the foregoing.

The Orders

Arising from the above-stated reasons, this Court enters judgment for the Applicants only to the extent of the following orders:

1. This Court hereby declares that that the right to life protected by section 71 of the previous Constitution and Article of 26 the 2010 Constitution, right to dignity under Article 28 of the 2010 Constitution and the economic and social rights under Article 43 of the Constitution of the affected members of the Ogiek Community in Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru in the Mau Forest Complex including the Applicants has been contravened, and is being contravened by their forcible eviction from the said locations without resettlement and that the said members of the Ogiek community have been deprived of their means of livelihood.
2. This Court hereby declares that the eviction of the Applicants and other members of the Ogiek Community from Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru in the Mau Forest Complex is a contravention of their right not to be discriminated against under section 82 of the previous constitution, and Article 27 and 56 of the 2010 Constitution as it has resulted in the Applicants being unfairly prevented from living in accordance with their culture as farmers, hunters and gatherers in the forests.
3. The National Land Commission is hereby directed to within one (1) year of the date of this judgment identify and open a register of members the Ogiek Community in consultation with the Ogiek Council of Elders, and identify land for the settlement of the said Ogiek members and the Applicants who were to be settled in the excised area in Marioshioni Location, Elburgon Division and Nessuit Location, Njoro Division, Nakuru and have not yet been given land in line with the recommendations in the **Report of the Government Task Force on the Conservation of the Mau Forest Complex** published in March 2009.
4. The Applicants shall serve a copy of the judgment and orders herein on the Chairman of the National Land Commission within 30 days of the date of this judgment.
5. The 1st, 2nd, 3rd 4th 6th Respondents shall meet the costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____17th____ day of

_____March____, 2014.

P. NYAMWEYA

JUDGE

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Annex 5: Judgment of African Court on Human and Peoples Rights in Application 006/2012 ***(Merits)*** - *African Commission on Human and People's Rights v. Republic of Kenya*, delivered on 26th May, 2017

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

V.

REPUBLIC OF KENYA

APPLICATION No. 006/2012

JUDGMENT

26 MAY 2017

The Court composed of: Sylvain ORÉ, President, Gérard NIYUNGEKO, Augustino S.L. RAMADHANI, Duncan TAMBALA, Elsie N. THOMPSON, El Hadji GUISSE, Rafâa Ben ACHOUR, Solomy B. BOSSA, Angelo V. MATUSSE: Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 8 (2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Ben KIOKO, Vice President and a national of Kenya, did not hear the Application.

In the Matter of:

African Commission on Human and Peoples' Rights

represented by:

1. Hon. Professor Pacifique MANIRAKIZA - Commissionner
2. Mr. Bahame Tom NYANDUGA - Counsel
3. Mr. Donald DEYA - Counsel
4. Mr. Selemani KINYUNYU - Counsel

v.

Republic of Kenya

represented by

1. Ms. Muthoni KIMANI - Senior Deputy Solicitor General
2. Mr. Emmanuel BITTA - Principal Litigation Counsel
3. Mr. Peter NGUMI - Litigation Counsel

After deliberation,

delivers the following judgment:

I. THE PARTIES

1. The Applicant is the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Applicant" or "the Commission"). The Applicant filed this Application pursuant to Article 5 (1) (a) of the Protocol.

2. The Respondent is the Republic of Kenya (hereinafter referred to as "the Respondent"). The Respondent became a Party to the African Charter on Human and Peoples` Rights (hereinafter referred to as "the Charter") on 25 July 2000, to the Protocol on 4 February 2004, and to both the International Covenant on Civil and Political Rights (hereinafter referred to as "the ICCPR") and the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as "the ICESCR") on 23 March 1976.

II. SUBJECT MATTER OF THE APPLICATION

3. On 14 November 2009, the Commission received a Communication from the Centre for Minority Rights Development (CEMIRIDE) joined by Minority Rights Group International (MRGI), both acting on behalf of the Ogiek Community of the Mau Forest. The Communication concerned the eviction notice issued by the Kenya Forestry Service in October 2009, which required the Ogiek Community and other settlers of the Mau Forest to leave the area within 30 days.

4. On 23 November 2009, the Commission, citing the far-reaching implications on the political, social and economic survival of the Ogiek Community and its potential irreparable harm if the eviction notice was carried out, issued an Order for Provisional Measures requesting the Respondent to suspend implementation of the eviction notice.

5. On 12 July 2012, following the lack of response from the Respondent, the Commission seised this Court with the present Application pursuant to Article 5(1) (a) of the Protocol.

A) Facts of the Matter

6. The Application relates to the Ogiek Community of the Mau Forest. The Applicant alleges that the Ogieks are an indigenous minority ethnic group in Kenya comprising about 20,000 members, about 15,000 of whom inhabit the greater Mau Forest Complex, a land mass of about 400,000 hectares straddling about seven administrative districts in the Respondent's territory.

7. According to the Applicant, in October 2009, through the Kenya Forestry Service, the Respondent issued a 30-day eviction notice to the Ogieks and other settlers of the Mau Forest, demanding that they leave the forest.

8. The Applicant states that the eviction notice was issued on the grounds that the forest constitutes a reserved water catchment zone, and was in any event part of government land under Section 4 of the Government Land Act. The Applicant states further that the Forestry Service's action failed to take into account the importance of the Mau Forest for the survival of the Ogieks, and that the latter were not involved in the decision leading to their eviction. The Applicant contends that the Ogieks have been subjected to several eviction measures since the colonial period, which continued after the independence of the Respondent. According to the Applicant, the October 2009 eviction notice is a perpetuation of the historical injustices suffered by the Ogieks.

9. The Applicant further avers that the Ogieks have consistently raised objections to these evictions with local and national administrations, task forces and commissions and have instituted judicial proceedings, to no avail.

B) Alleged Violations

10. On the basis of the foregoing, the Applicant alleges violation of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the Charter.

III. PROCEDURE

11. The Application was filed before the Court on 12 July 2012 and served on the Respondent by a notice dated 25 September 2012.

12. On 14 December 2012, the Respondent filed its Response to the Application in which it raised several Preliminary Objections and this was transmitted to the Applicant by a letter dated 16 January 2013.

13. On 28 December 2012, the Applicant requested the Court to issue an Order for Provisional Measures to forestall the implementation of the directive issued by the Respondent`s Ministry of Lands on 9 November 2012 limiting the restrictions on transactions for land measuring not more than five acres within the Mau Forest Complex Area.

14. By a letter dated 23 January 2013, Ms. Lucy Claridge, Head of Law, MRGI, Mr. Korir Sing'oei, Strategy and Legal Advisor, CEMIRIDE, and Mr. Daniel Kobei, Executive Director of Ogiek People's Development Programme (OPDP) sought leave to intervene, and be heard in the case as original complainants before the Commission in accordance with Rule 29 (3) (c) of the Rules.

15. On 15 March 2013, the Applicant filed its Response to the Preliminary Objections raised by the Respondent and this was transmitted to the Respondent by a letter dated 18 March 2013.

16. On 15 March 2013, the Court issued an Order for Provisional Measures directed at the Respondent on the basis that there was a situation of extreme gravity and urgency as well as a risk of irreparable harm to the Ogieks. The Order contained the following measures:

> "1). The Respondent shall immediately reinstate the restrictions it had imposed on land transactions in the Mau

Forest Complex and refrain from any act or thing that would or might irreparably prejudice the main application before the Court, until the final determination of the said application;

2) The Respondent shall report to the Court within a period of fifteen (15) days from the date of receipt hereof, on the measures taken to implement this Order."

17. By a letter dated 30 April 2013, the Respondent reported on the measures it had taken to comply with the Order for Provisional Measures.

18. By a letter dated 14 May 2013, the Registry transmitted to the Applicant, the Respondent's report on its compliance with the Order for Provisional Measures.

19. At its 29th Ordinary Session held from 3 to 21 June 2013, the Court ordered that pleadings be closed and decided to hold a Public Hearing in March 2014.

20. By a letter received at the Registry on 31 July 2013, the Applicant requested leave to file further arguments and evidence and to be granted a 5-month extension of time to do so. By a notice dated 2 September 2013, the Applicant's request was granted with an order to file by 11 December 2013.

21. By letters dated 20 and 26 September 2013 and 3 February 2014, the Applicant notified the Court of alleged acts of non-compliance by the Respondent with the Order for Provisional Measures issued on 15 March 2013.

22. By a letter dated 26 September 2013, the Registry transmitted the allegations of non-compliance with the Order for Provisional Measures to the Respondent. To date, the Respondent has not responded to the allegations.

23. The Applicant's Supplementary Submissions on Admissibility and the Merits were filed on 11 December 2013 and were served on the Respondent by a notice dated 12 December 2013, granting the latter sixty (60) days to respond thereto.

24. By a notice dated 21 January 2014, the Parties were informed that the Public Hearing on preliminary objections and the merits would be held on 13 and 14 March 2014.

25. By a letter dated 17 February 2014, pursuant to Rule 50 of the Rules, the Respondent applied for leave to file arguments and evidence on the merits of the case, requesting to be granted a 5-month extension of time to do so. By a letter dated 4 March, 2014, the Respondent was informed that the said leave had been granted and was directed to file its submissions within 60 days.

26. On 12 May 2014, the Respondent filed the additional submissions on the Merits which were served on the Applicant by a letter dated 15 May 2014, and inviting the Applicant to file any observations thereon within 30 days of receipt of the letter. On 30 June 2014, the Applicant filed its Reply to the Respondent's additional submissions on the Merits.

27. On 24 September 2014, in response to the Application made on 23 January 2013, the Registry wrote a letter to Ms. Lucy Claridge, Head of Law, MRGI, informing her that the Court has granted her leave to intervene.

28. During its 35th Ordinary Session, held from 24 November -5 December 2014 in Addis Ababa, Ethiopia, the Court held a public hearing on 27 and 28 November 2014. All Parties were represented, and their witnesses appeared, as follows:

Applicant's Representatives

1. Hon. Professor Pacifique MANIRAKIZA - Commissionner
2. Mr. Bahame Tom NYANDUGA - Counsel
3. Mr. Donald DEYA - Counsel
4. Mr. Selemani KINYUNYU - Counsel

Applicant's Witnesses

1. Mrs. Mary JEPKEMEI - Member of the Ogiek Community
2. Mr. Patrick KURESOI - Member of the Ogeik Community

Applicant's Expert Witness

1. Dr. Liz Alden WILY - International Land Tenure Specialist

Respondent's Representatives

1. Ms. Muthoni KIMANI - Senior Deputy Solicitor General
2. Mr. Emmanuel BITTA - Principal Litigation Counsel
3. Mr. Peter NGUMI - Litigation Counsel

29. Pursuant to Rule 45(1) and Rule 29 (1) (c) of the Rules, during the public hearing, the Court heard Ms. Lucy Claridge, Head of Law, MRGI, one of the original complainants in the Communication filed before the Commission.

30. The Court put questions to the Parties to which they responded.

31. At its 36th Ordinary Session held from 9 to 27 March 2015, the Court decided to propose to the Parties that they engage in amicable settlement pursuant to Article 9 of the Protocol and Rule 57 of its Rules.

32. A letter dated 28 April 2015 was sent to the Parties requesting them to respond to the proposal for an amicable settlement by 27 May 2015 and to identify the issues to be discussed, which would then be exchanged between them.

33. By a letter dated 27 May 2015, the Applicant indicated that it was amenable to an amicable settlement.

34. By a notice dated 27 May 2015, the Respondent set out the issues to be discussed and these were transmitted to the Applicant by a notice dated 28 May 2015.

35. By a notice dated 17 June 2015, the parties were informed that the Court has granted the Applicant a 60-day extension to file the issues for the amicable settlement.

36. On 18 August 2015, the Registry received the Applicant's conditions for amicable settlement and these were transmitted to the Respondent on 21 September 2015. The Respondent was invited to file its response thereto no later than 31 October 2015.

37. On 10 November 2015, the Respondent submitted its response on the conditions and issues for an amicable settlement and these were transmitted to the Applicant by a notice dated 20 November 2015.

38. On 13 January 2016, the Applicant wrote to the Court in response to the conditions proposed by the Respondent. The Applicant indicated that it was not satisfied with the proposal and asked the Court to proceed with the matter and deliver a judgment. The Applicant's request was transmitted to the Respondent by a notice dated 14 January 2016. The Respondent did not react to this notification.

39. Since the attempt to settle the matter amicably did not succeed, at its 40th Ordinary Session held from 29 February to 18 March, 2016, the Court decided to proceed with consideration of the Application and issue the present judgment.

40. By a letter dated 7 March 2016, the Parties were informed of the Court's continuance of judicial proceedings.

IV. PRAYERS OF THE PARTIES

A. Prayers of the Applicant

41. In the Application, the Applicant prays the Court to order the Respondent to:

> "1. Halt the eviction from the East Mau Forest and refrain from harassing, intimidating or interfering with the community's traditional livelihoods;
>
> 2. Recognise the Ogieks' historic land, and issue it with legal title that is preceded by consultative demarcation of the land by the Government and the Ogiek Community, and for the Respondent to revise its laws to accommodate communal ownership of property; and
>
> 3. Pay compensation to the Ogiek Community for all the loss they have suffered through the loss of their property, development, natural resources and also freedom to practice their religion and culture."

42. In its Supplementary Submissions on Admissibility, the Applicant made the following specific prayer:

> "The Applicant submits that the Application satisfies Article 56 of the African Charter in relation to the requirements for Admissibility, and therefore prays the Court to declare the same Admissible."

43. In its Submissions on the Merits, the Applicant prays the Court to make the following Orders:

> "A. To adjudge and declare that the Respondent State is in violation of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights.

B. Declare that the Mau Forest has, since time immemorial, been the ancestral home of the Ogiek people, and that its occupation by the Ogiek people is paramount for their survival and the exercise of their culture, customs, traditions, religion and for the well-being of their community.

C. Declare that the occupation of the Mau Forest through time immemorial by the Ogiek people and their use of the various natural resources therein, including the flora and fauna, such as honey, plants, trees and wild game of the Mau Forest, for food, clothing, medicines, shelter and other needs, was sustainable and did not lead to the rampant destruction or deforestation of the Mau Forest.

D. Find that the granting by the Respondent State, of rights such as land titles and concessions in the Mau Forest, at different periods to non-Ogiek persons, individuals and corporate bodies, contributed to the destruction of the Mau Forest, and did not benefit the Ogiek people, thus amounting to a violation of Article 21(2) of the African Charter.

E. That further to the Orders (A), (B), (C), and (D) hereinabove and by way of a separate judgment of the Court pursuant to Rule 63 of the Rules of Court, that the Honourable Court order the Respondent State to undertake and implement the necessary legislative, administrative and other measures to provide reparation to the Ogieks, through the following measures[1]:

(i) Restitution of Ogiek ancestral land, through:

(a) the adoption in its domestic law, and through well informed consultations with the Ogieks, of the legislative, administrative and any other measures necessary to delimit, demarcate and title or otherwise clarify and protect the territory in which the Ogieks have a communal property right, in accordance with their customary land use practices, and without detriment to other indigenous communities;

[1] The Applicant asserts that this list is non-exhaustive and the Court is respectfully invited to supplement these methods of reparation with additional requirements.

(b) implement measures to: (i) delimit, demarcate and title or otherwise clarify and protect the corresponding lands of the Ogieks without detriment to other indigenous communities; and (ii) until those measures have been carried out, abstain from any acts that might lead the agents of the State, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Ogieks; and

(c) the rescission of all such titles and concessions found to have been illegally granted with respect to Ogiek ancestral land; such land to be returned to the Ogieks with common title within each location, for them to use as they deem fit;

(ii) Compensation of the Ogieks for all the damage suffered as a result of the violations, including through:

(a) the appointment of an independent assessor to decide upon the appropriate level of compensation, and to determine the manner in which and to whom such compensation should be paid, such appointment to be mutually agreed upon by the parties;

(b) the payment of pecuniary damages to reflect the loss of their property, development and natural resources;

(c) the payment of non-pecuniary damages, to include the loss of their freedom to practise their religion and culture, and the threat to their livelihood;

(d) the establishment of a community development fund for the benefit of the Ogieks, directed to health, housing, educational, agricultural and other relevant purposes;

(e) the payment of royalties from existing economic activities in the Mau Forest; and

(f) ensuring that the Ogieks benefit from any employment opportunities within the Mau Forest;

(iii) Adoption of legislative, administrative and other measures to recognise and ensure the right of the Ogieks to be effectively

consulted, in accordance with their traditions and customs, and/or with the right to give or withhold their free, prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land within the Mau Forest and implement adequate safeguards to minimize the damaging effects that such projects may have upon the social, economic and cultural survival of the Ogieks;

(iv) An apology to be issued publicly by the Respondent State to the Ogieks for all the violations;

(v) A public monument acknowledging the violation of Ogiek rights to be erected within the Mau Forest by the Respondent State, in a place of significant importance to the Ogieks and chosen by them;

(vi) Full recognition of the Ogieks as an indigenous people of Kenya, including but not limited to the recognition of the Ogiek language and Ogiek cultural and religious practices; provision of health, social and education services for the Ogieks; and the enacting of positive steps to ensure national and local political representation of the Ogieks;

(vii) The legislative process specified in (i) and (iii) above to be completed within one year of the date of the judgment;

(viii) The demarcation process specified in (i) above to be completed within three years of the date of the judgment;

(ix) The independent assessor on compensation to be appointed within three months of the judgment; the amount of compensation, royalties and the community development fund to be agreed upon within one year of the date of the judgment, and payment to be effected within eighteen months of the date of the judgment;

(x) The apology to be issued within three months of the date of the judgment;

(xi) The monument to be erected within six months of the date of judgment;

F. To make any further orders as the Court deems fit to grant in the circumstances.

44. That further to the Orders A, B, C, D, E and F, hereinabove, that the Court order the Respondent State to report to the Court on the implementation of these remedies, including by submitting a quarterly report on the process of implementation - such report to be provided to and commented upon by the Commission - until the Orders as provided in the judgment are fully enforced to the satisfaction of the Court, the Commission, the Executive Council and any other organ of the African Union which the Court and Commission shall deem appropriate."

45. The Applicant reiterated these prayers during the Public Hearing.

B. Prayers of the Respondent

46. In its Response, the Respondent prays the Court to rule that the Application is inadmissible and to order that it be referred back to the Respondent for resolution, notably, through an amicable settlement for a peaceful and lasting solution. The Respondent also made submissions on the merits elaborating on its position thereon and prayed the Court to put the Applicant to strict proof and find that there has been no violations of the rights of the Ogeiks, as alleged by the Applicant. The Respondent did not make any additional prayers.

V. JURISDICTION

47. In accordance with Rule 39 (1) of the Rules, the Court shall conduct a preliminary examination of its jurisdiction before dealing with the merits of the Application.

A. Material jurisdiction

Respondent's Objection

48. The Respondent contends that rather than filing the Application before the Court, the Commission ought to have drawn the attention of the Assembly of Heads of State and Government of the African Union (AU) once it was convinced that the communication before it relates to a special case which reveals the existence of "a series of serious or massive violations of human and peoples' rights" as provided under Article 58 of the Charter.

49. The Respondent further submits that the Court failed to conduct a preliminary examination of its jurisdiction by virtue of Rule 39 of its Rules in accordance with Article 50 of the Charter, and that it has not complied with the above cited provision of the Charter.

Applicant's Submission

50. The Applicant submits that bringing to the attention of the Assembly of Heads of State and Government of the AU, a special case which reveals the existence of a series of serious or massive violations of human rights, is not a prerequisite for referring a matter to the Court and is only one avenue provided under Article 58 of the Charter. In this regard, the Applicant argues that with the establishment of the Court, it now has the additional option of referring matters to the Court, as the Court complements the Commission's protective mandate pursuant to Article 2 of the Protocol. On the contention by the Respondent that the Court ought to have conducted a preliminary examination of its jurisdiction in respect of the Application in line with Article 50 of the Charter, the Applicant notes that the rule relating to the preliminary examination of the jurisdiction of the Court is Rule 39, not Rule 40 of the Rules, as cited by the Respondent.

The Court's Assessment

51. The Court notes that Article 3 (1) of the Protocol and Rule 26 (1) (a) of its Rules govern its material jurisdiction regardless of whether an Application is filed by individuals, the Commission or States. Pursuant to these provisions, the material jurisdiction of the Court extends "to all cases and disputes submitted to it concerning the interpretation and application of the Charter, [its] Protocol and any other relevant human rights instrument ratified by the States concerned". The only pertinent consideration for the Court in ascertaining its material jurisdiction in accordance with both Article 3(1) of the Protocol and Rule 26 (1) (a) of its Rules is thus whether an Application relates to an alleged violation of the rights protected by the Charter or other human rights instruments to which the Respondent is a Party. In this vein, the Court has held that "as long as the rights allegedly violated are protected by the Charter or any other human rights instruments ratified by the State concerned, the Court will have jurisdiction over the matter".[2]

52. In the instant Application, the Applicant alleges the violation of several rights and freedoms guaranteed under the Charter and other international human rights instruments ratified by the Respondent, especially , the ICCPR and the ICESR. Accordingly, the Application satisfies the requirements of Article 3(1) of the Protocol.

53. In circumstances where the Commission files a case before the Court pursuant to Article 5 (1) (a) of the Protocol, Article 3 (1) of the same provides no additional requirements to be fulfilled before this Court exercises its jurisdiction. Article 58 of the Charter mandates the Commission to draw the attention of the Assembly of Heads of State and Government where communications lodged before it reveal cases of series of serious or massive violations of human and peoples' rights. With the establishment of the Court, and in application of the principle of complementarity enshrined under Article 2 of the Protocol, the Commission now has the power to refer

[2] See *Alex Thomas v United Republic of Tanzania* (Judgment on Merits) 20 November 2015 (hereinafter referred to as Alex Thomas Case) paragraph 45 and *Mohamed Abubakari v United Republic of Tanzania* (Judgment on Merits) 3 June 2016 (hereinafter referred to as *Mohamed Abubakari* Case) paragraphs 28 and 35.

any matter to the Court, including matters which reveal a series of serious or massive violations of human rights.[3] The Respondent's preliminary objection that the Commission did not comply with Article 58 of the Charter is thus not relevant as far as the material jurisdiction of the Court is concerned.

54. Regarding the preliminary examination of its jurisdiction in accordance with Rule 40 of the Rules and Article 50 of the Charter, the Court notes that these two provisions do not deal with the jurisdiction of the Court but concern issues of admissibility, in particular, the issue of exhaustion of local remedies, which the Court will address at a later stage in this judgment. In any event and in keeping with its Rules, the final decision of the Court on the question of jurisdiction can only be taken after receiving and analysing submissions from the parties. The Respondent's objection in this regard is therefore dismissed.

55. From the foregoing, the Court finds that it has material jurisdiction to hear the Application.

B. Personal Jurisdiction

Respondent's Objection

56. The Respondent contends that the original complainants before the Commission lacked standing to invoke the jurisdiction of the Commission as they did not have authority to represent the Ogieks, nor were they acting on their behalf.

Applicant's Submission

57. The Applicant, citing its own jurisprudence, submits that it has adopted the *actio popularis* doctrine which allows anyone to file a complaint before it on behalf of victims without necessarily getting the consent of the victims. For this reason, the Commission was seised with the Communication in November 2009 by two of the complainants: CEMIRIDE and OPDP, which are Non-Governmental Organizations

[3] See also Rule 118 (3) of the Rules of Procedure of the African Commission on Human and Peoples' Rights.

(NGOs) registered in Kenya. The Applicant states that the latter works specifically to promote the rights of the Ogieks while the former has Observer Status with the Commission, and therefore both were competent to invoke the jurisdiction of the Commission.

The Court's Assessment

58. The personal jurisdiction of the Court is governed by Article 5 (1) of the Protocol which lists the entities, including the Applicant, entitled to submit cases before it. By virtue of this provision, the Court has personal jurisdiction with respect to this Application. The argument adduced by the Respondent according to which the original complainants had no standing to file the matter before the Commission and to act on behalf of the Ogieks is not relevant in the determination of the personal jurisdiction of the Court because the original complainants before the Commission are not the parties in the Application before this Court. The Court does not have to make a determination on the jurisdiction of the Commission.

59. With regard to its jurisdiction over the Respondent, the Court recalls that the Respondent is a State Party to the Charter and to the Protocol. Accordingly, the Court finds that it has personal jurisdiction over the Respondent.

60. It is also important for this Court to restate that, because the Application before it is filed by the Commission, pursuant to Articles 2 and 5(1)(a) of the Protocol, the question as to whether or not the Respondent has made the declaration under Article 34(6) of the Protocol does not arise. This is because, unlike for individuals and NGOs, the Protocol does not require the Respondent to have made the declaration under Article 34(6) for the Commission to file Applications before the Court.[4]

61. Therefore, the Court holds that it has personal jurisdiction to hear this Application.

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[4] See *African Commission on Human and Peoples' Rights v Libya* (Judgment on Merits) 3 June 2016 paragraph 51.

C. Temporal Jurisdiction

Respondent`s Objection

62. The Respondent submits that the Charter as well as any other treaty cannot be applied retrospectively to situations and circumstances that occurred before its entry into force. The Respondent cites Article 28 of the Vienna Convention on the Law of Treaties of 1969 which provides that: "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to the party". The Respondent further submits that it became a Party to the Charter on 10 February 1992, and that it is from 10 February 1992 that the Respondent's obligations under the Charter become enforceable. The Respondent adds that some of the Applicant's allegations of violations relate to activities that occurred prior to the Respondent ratifying the Charter and therefore the Court cannot adjudicate on those issues but only on issues that occurred after 1992.

Applicant's Submission

63. The Applicant submits that it recognises the principle of non-retroactivity of international treaties. The Applicant argues, however, that, it also relies on the established principle of international human rights law, that the Respondent is liable for violations which occurred prior to the ratification of the Charter, where the effects of such violations have continued after its ratification, or where the Respondent either continued the perpetration of the said violations, or did not remedy them, as is the case with the Ogieks.

The Court's Assessment

64. The Court has held that the relevant dates concerning its temporal jurisdiction are the dates when the Respondent became a Party to the Charter and the Protocol, as well as, where applicable, the date of deposit of the declaration accepting the

jurisdiction of the Court to receive Applications from individuals and NGOs, with respect to the Respondent.[5]

65. The Court notes that the Respondent became a Party to the Charter on 10 February 1992 and a Party to the Protocol on 4 February 2004. The Court also notes that, though the evictions by the Respondent leading to the alleged violations began before the aforementioned dates, these evictions are continuing. In this regard, the Court notes in particular, the threats of eviction issued in 2005 and the notice to vacate the South Western Mau Forest Reserve issued on 26 October 2009 by the Director of Kenya Forestry Service. It is the Court's view that the Respondent's alleged violations of its international obligations under the Charter are continuing, and as such, the matter falls within the temporal jurisdiction of the Court.

66. In view of the foregoing, the Court finds that it has temporal jurisdiction to hear the Application.

D. Territorial jurisdiction

67. The territorial jurisdiction of the Court has not been challenged by the Respondent, however it should be stated that since the alleged violations occurred within the territory of the Respondent, a Member State of the African Union that has ratified the Protocol, the Court has territorial jurisdiction in this regard.

68. Based on the foregoing, the Court finds that it has jurisdiction to examine this Application.

VI. ADMISSIBILITY

69. The Respondent raised two sets of objections to the admissibility of the Application. The first set deals with objections relating to the preliminary procedures before the African Commission and the Court, while the second set deals with objections based

[5] See *The Beneficiaries of the Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples' Rights v Burkina Faso* (hereinafter referred to as *Norbert Zongo* Case) (Ruling on Preliminary Objections) 21 June 2013 paragraphs 61 to 64.

on non-compliance with the requirements of admissibility enshrined in the Charter and the Rules.

A. Objections relating to some preliminary procedures.

70. The Respondent raised two objections under this head, namely that the Application is still pending before the Commission and that the Court did not undertake a preliminary examination of its admissibility in accordance with Rule 39 of it Rules.

i. Objection based on the contention that the Application is pending before the Commission

Respondent's Objection

71. The Respondent contends that there are pending proceedings before the Commission between the Ogieks and the Respondent on the same facts and issues as those in the present Application. The Respondent maintains that the Application before the Court is seeking substantive orders whereas the same case is before the Commission, and therefore the jurisdiction of the Court cannot be invoked by the Applicant.

Applicant`s Submission

72. The Applicant argues that the Court's jurisdiction was properly invoked and avers that the case was referred to the Court by the Commission pursuant to Article 5(1) (a) of the Protocol, Rule 33(1) (a) of the Rules and Rule 118(2) and (3) of the Rules of Procedure of the Commission. According to the Applicant, having seised the Court, it can no longer be argued that the matter is pending before the Commission.

The Court's Assessment

73. With regard to the objection by the Respondent that the matter is pending before the Commission, the Court notes that the Applicant in the present matter is the Commission, which seised the Court in conformity with Article 5(1) of the Protocol.

74. Having seised the Court, the Commission decided not to examine the matter itself. The seisure of the Court by the Commission signifies in effect that the matter is no longer pending before the Commission, and there is therefore no parallel procedure before the Commission on the one hand and the Court on the other.

75. The Respondent's objection to the admissibility on the grounds that this matter is pending before the Commission is thus dismissed.

ii. Objection with respect to the failure to undertake preliminary examination of its Admissibility

Respondent's Objection

76. The Respondent submits that the Court has failed to conduct a preliminary examination of the admissibility of the Application by virtue of Articles 50 and 56 of the Charter and Rule 40 of the Rules, and that adverse orders should not have been issued against it without being given an opportunity to be heard.

Applicant's Submission

77. The Applicant submits that the Application meets all the admissibility requirements provided under Article 56 of the Charter, as it was filed before the Court pursuant to Article 5(1) (a) of the Protocol against a State Party both to the Protocol and the Charter, for alleged violations that occurred within the Respondent's territory. The Applicant further states that Article 50 of the Charter does not apply to this Application since it relates to admissibility procedures for "Communications from States", whereas the instant Application is not such an Application. The Applicant maintains that the Respondent has been accorded an opportunity to be heard at the

Commission, when the Commission served the original complaint before it on the Respondent and the latter filed submissions on admissibility thereof.

The Court's Assessment

78. The Court observes that even though the rules of admissibility applied by the Commission and this Court are substantially similar, the admissibility procedures with respect to an Application filed before the Commission and this court are distinct and shall not be conflated. Accordingly, the Court is of the view that admissibility and other procedures relating to a complaint before the Commission are not necessarily relevant in determining the admissibility of an Application before this Court.

79. In any event, as is the case with its jurisdiction, the Court can decide on the admissibility of an Application before it, only after having heard from the parties.

80. The Respondent's objection is therefore dismissed.

B. Objections on Admissibility based on the Requirements of the Charter and the Rules

81. Under this head, the Respondent raised two objections, namely, the failure to identify the Applicant and failure to exhaust local remedies.

82. In determining the admissibility of an application, the Court is guided by Article 6(2) of the Protocol, which provides that, the Court shall take into account the provisions of Article 56 of the Charter. The provisions of this Article are restated in Rule 40 of the Rules as follows:

"Pursuant to the provisions of Article 56 of the Charter to which Article 6(2) of the Protocol refers, applications to the Court shall comply with the following conditions:

1. Disclose the identity of the Applicant notwithstanding the latter's request for anonymity;
2. Comply with the Constitutive Act of the Union and the Charter ;
3. Not contain any disparaging or insulting language;

4. Not be based exclusively on news disseminated through the mass media;
5. Be filed after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;

6. Be filed within a reasonable time from the date local remedies were exhausted or from the date set by the Court as being the commencement of the time limit within which it shall be seised with the matter; and
7. Not raise any mater or issues previously settled by the parties in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union, the provisions of the Charter or of any legal instrument of the African Union."

83. The Respondent has raised objections with respect to the conditions of admissibility pursuant to Rule 40(1) and Rule 40(5) of the Rules. The Court will proceed to examine the admissibility of the Application starting with the conditions of admissibility that are in dispute.

i. Objection on Non-Compliance with Rule 40(1) of the Rules (Identity of the Applicant)

Respondent`s Objection

84. The Respondent argues that the original complainants before the Commission did not submit a list of aggrieved members of the Ogiek Community on whose behalf they filed the Communication and did not produce documents authorizing them to represent the Ogiek Community as required by Rule 40 (1) of the Rules. The Respondent also submits that CEMIRIDE has not provided evidence of its Observer Status before the Commission.

85. The Respondent further submits that the original complainants before the Commission have not demonstrated that they are victims of an alleged violation as has been established by the Commission's jurisprudence.

Applicant's Submission

86. The Applicant submits that the Communication filed before it clearly indicates the authors as CEMIRIDE, MRGI and OPDP, on behalf of the Ogiek Community, and that their contact details are clearly provided.

87. The Applicant further submits that it filed the Application before the Court pursuant to Article 5(1) (a) of the Protocol, which entitles it to do so against a State which has ratified the Charter and the Protocol. The Rules of Procedure of the Commission (2010) provide, *inter alia*, that it may seise the Court "on grounds of serious and massive violations of human rights". The Applicant also argues that seizure of the Court by the Commission may occur at any stage of the examination of a Communication if the Commission deems it necessary.

The Court's Assessment

88. The Court reiterates that pursuant to Article 5(1) (a) of the Protocol, the Commission is the legal entity recognised before this Court as an Applicant and is entitled to bring this Application. Since the Commission, rather than the original complainants before the Commission, is the Applicant before this Court, the latter need not concern itself with the identity of the original complainants before the Commission in determining the admissibility of the application. Accordingly, the contention that the original complainants did not disclose the identity of aggrieved members of the Ogieks lacks merit. Therefore, the original complainants' observer status and whether or not they were mandated to represent the Ogiek population before the Commission are also immaterial to the Court's determination of the Applicant's standing to file this Application before this Court.

89. The Court consequently concludes that the Respondent`s objection on this point lacks merit and is dismissed.

ii. Objection on Non-Compliance with Rule 40(5) of the Rules (Exhaustion of local remedies)

Respondent`s Objection

90. The Respondent objects to the admissibility of the Application on the grounds that it does not comply with Rule 40 (5) of the Rules, which requires Applicants before the Court to exhaust local remedies before invoking its jurisdiction. The Respondent states that its national courts are competent to deal with any violations alleged by the Ogieks as the said local remedies are available, effective and adequate to accomplish the intended results and that they can be pursued without impediments. The Respondent submits that judicial procedures in Kenya are adversarial in nature and the length of the proceedings depends on the parties, which are responsible to move the Courts for hearing dates and relief. The Respondent contends that though some orders issued by the Respondent's courts have not been complied with, the said non-compliance was by a particular Municipal Council and should not be attributed to the Respondent. The Respondent asserts that neither the Applicant nor the original complainants before the Commission filed any case in the Respondent's courts in this regard. The Respondent maintains that the cases that the Applicant claims have been filed before its courts were filed by other entities. Further, the Respondent states that, apart from submitting their case to the national courts, the complainants could have seised its national human rights commission to get redress for the alleged violations before bringing this Application to this Court.

Applicant's Submission

91. The Applicant submits that, the rule of exhaustion of local remedies is applicable only with respect to remedies which are "available," "effective" and "adequate" and if the local remedies do not meet these criteria, this admissibility requirement is dispensed with. The Applicant argues that the rule does not also apply when local remedies are unduly prolonged or there are a large number of victims of alleged serious human rights violations. ∓

92. The Applicant contends that the Respondent has been aware of the alleged violation of the rights of the Ogieks since the 1960s, and despite the continuing resistance against their eviction from their ancestral home, the Respondent has failed to address their grievances and rather chose the use of force to quell their protest and adopted actions to frustrate the attempts of the Ogieks to seek domestic redress. In this vein, the Applicant submits that the Ogieks have been repeatedly arrested and detained on falsified charges; and political pressure has been exerted on them by the Office of the President to drop the legal cases challenging the dispossession of their land. In spite of all these, when they get decisions in their favour from domestic courts, the Respondent failed to comply with such decisions: thus, advancing the point that domestic remedies are in fact unavailable, or, their procedure would probably be unduly prolonged. The Applicant maintains that in such cases the requirement of exhaustion of local remedies must be dispensed with.

The Court's Assessment

93. Any application filed before this Court must comply with the requirement of exhaustion of local remedies. The rule of exhaustion of domestic remedies reinforces and maintains the primacy of the domestic system in the protection of human rights *vis-à-vis* the Court. The Court notes that Article 56 (5) of the Charter and Rule 40(5) of the Rules require that for local remedies to be exhausted, they must be available and should not be unduly prolonged. In its earlier judgments, the Court has decided that domestic remedies to be exhausted must be available, effective and sufficient and must not be unduly prolonged.[6]

94. The Court also emphasises that the rule of exhaustion of local remedies does not in principle require that a matter brought before the Court must also have been brought before the domestic courts by the same Applicant. What must rather be demonstrated is that, before a matter is filed before an international human rights body, like this

[6] See in this regard *Lohé Issa Konaté v. Burkina Faso* (Judgment on Merits) 5 December 2014 (hereinafter referred to as *Issa Konate* Case) paragraphs 96 to 115; *Norbert Zongo* Case (Judgment on Merits) 28 March 2014 paragraphs 56 to 106.

Court, the Respondent has had an opportunity to deal with such matter through the appropriate domestic proceedings. Once an Applicant proves that a matter has passed through the appropriate domestic judicial proceedings, the requirement of exhaustion of local remedies shall be presumed to be satisfied even though the same Applicant before this Court did not itself file the matter before the domestic courts.

95. In the instant Application, the Court notes that the Applicant has provided evidence that members of the Ogiek community have litigated several cases before the national courts of the Respondent, some have been concluded against the Ogiek and some are still pending.[7] In the circumstance, the Respondent can thus reasonably be considered to have had the opportunity to address the matter before it was brought before this Court.

96. Furthermore, from available records, the Court notes that some cases filed before national courts were unduly prolonged, some taking 10 to 17 years before being completed or were still pending at the time this Application was filed.[8] In this regard, the Court observes that the nature of the judicial procedures and the role played by the Parties therein in the domestic system could affect the pace at which proceedings may be completed. In the instant Application, the records before this Court show that the prolonged proceedings before the domestic courts were largely occasioned by the actions of the Respondent, including numerous absences during Court proceedings and failure to timely defend its case.[9] In view of this, the Court holds that the Respondent`s contention imputing the inordinate delays in the domestic system to the adversarial nature of its judicial procedures is not plausible.

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[7] See case of *Francis Kemai and 9 Others v Attorney General and 3 Others*, High Court Civil Application No 238 of 1999 ; case of *Joseph Letuya and 21 Others v Attorney General and 2 Others*, Miscellaneous Application No 635 of 1997 High Court of Kenya at Nairobi.

[8] See case of *Joseph Letuya & 210 Others v Attorney General & 2 Others*, Miscellneous Application No. 635 of 1997 before the High Court at Nairobi, (completed after 17years of procedure);case of *Joseph Letuya & 21 Others v Minister of Environment*, Miscellaneous Application No. 228 of 2001 before the High Court at Nairobi,(instituted in 2001 and still pending at the time the Application was filed beforethis Court);case of *Stephen Kipruto Tigerer v Attorney General & 5 Others*, No. 25 of 2006 before the High Court at Nakuru, (instituted in 2006 and was still pending at the time the Application was filed before this Court).

[9] For a detailed account, see Complaints' Submissions on Admissibility, CEMIRIDE, Minority Rights Group International and Ogiek Peoples Development Programme (On behalf of the Ogiek Community), pages 15-24.

97. Regarding the possibility for the original complainants to have seised the Respondent's National Human Rights Commission with the alleged violations, the Court notes that, the said Commission does not have any judicial powers. The functions of its national human rights commission are to resolve conflicts by fostering reconciliation and issuing recommendations to appropriate state organs.[10] This Court has consistently held that for purpose of exhaustion of local remedies, available domestic remedies shall be judicial.[11] In the instant case, the remedy the Respondent is requesting the Applicant to exhaust, that is, procedures before the National Human Rights Commission, is not judicial.[12]

98. In view of the above, the Court rules that the Application meets the requirements under Article 56(5) of the Charter and Rule 40(5) of the Rules.

C. Compliance with Rule 40(2), 40 (3), 40 (4), 40 (6) and 40 (7) of the Rules

99. The Court notes that the issue of compliance with the above-mentioned Rules is not in contention and nothing in the Parties' submissions indicates that they have not been complied with. The Court therefore holds that the requirements in those provisions have been met.

100. In light of the foregoing, the Court finds that this Application fulfils all admissibility requirements in terms of Article 56 of the Charter and Rule 40 of the Rules and declares the Application admissible.

VII. ON THE MERITS

101. In its Application, the Applicant alleges violation of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21 and 22 of the Charter. Given the nature of the subject matter of the application, the Court will commence with the alleged violation of Article 14, then examine articles 2, 4, 8, 14, 17(2) and (3), 21, 22 and 1.

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[10] See Section 3 of the Kenya National Human Rights Commission Act.
[11] See *Mohamed Abubakari* Case paragraphs. 66 to70.
[12] *Mohamed Abubakari* Case paragraph 64; *Alex Thomas* Case, paragraph 64 and *Christopher Mtikila* Case, paragraph 82.3.

102. However, having noted that most of the allegations made by the Applicant hinge on the question as to whether or not the Ogieks constitute an indigenous population. This issue is central to the determination of the merits of the alleged violations and shall be dealt with from the onset.

A. The Ogieks as an Indigenous Population

Applicant's Submission

103. The Applicant argues that the Ogiek are an "indigenous people" and should enjoy the rights recognised by the Charter and international human rights law including the recognition of their status as an "indigenous people". The Applicant substantiates its contention by stating that the Ogieks have been living in the Mau Forest for generations since time immemorial and that their way of life and survival as a hunter-gatherer community is inextricably linked to the forest which is their ancestral land.

Respondent's Submission

104. The Respondent's position is that the Ogieks are not a distinct ethnic group but rather a mixture of various ethnic communities. During the Public Hearing however, the Respondent admitted that the Ogieks constitute an indigenous population in Kenya but that the Ogieks of today are different from those of the 1930s and 1990s having transformed their way of life through time and adapted themselves to modern life and are currently like all other Kenyans.

The Court's Assessment

105. The Court notes that the concept of indigenous population is not defined in the Charter. For that matter, there is no universally accepted definition

of "indigenous population" in other international human rights instruments. There have, however, been efforts to define indigenous populations.[13] In this regard, the Court draws inspiration from the work of the Commission through its Working Group on Indigenous Populations/Communities. The Working Group has adopted the following criteria to identify indigenous populations:

"

i. Self-identification;
ii. A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and
iii. A state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model."[14]

106. The Court also draws inspiration from the work of the United Nations Special Rapporteur on Minorities, which specifies the criteria to identify indigenous populations as follows:

i. That indigenous people can be appropriately considered as "Indigenous communities, peoples and nations which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations, their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems";[15]

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[13] See Article 1 of the International Labour Organisation Indigenous and Tribal Peoples Convention No 169 adopted by the 76th Session of the International Labour Conference on 27 June 1989.
[14] *Advisory Opinion Of The African Commission On Human And Peoples' Rights On The United Nations Declaration On The Rights Of Indigenous Peoples*, adopted by The African Commission On Human And Peoples' Rights At Its 41st Ordinary Session Held In May 2007 In Accra, Ghana, at page 4.
[15] Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/1986/7/Add.4, paragraph 379.

ii. That an indigenous individual for the same purposes is "... one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognised and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference".[16]

107. From the foregoing, the Court deduces that for the identification and understanding of the concept of indigenous populations, the relevant factors to consider are the presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.[17]

108. These criteria generally reflect the current normative standards to identify indigenous populations in international law. The Court deems it appropriate, by virtue of Article 60 and 61 of the Charter, which allows it to draw inspiration from other human rights instruments to apply these criteria to this Application.

109. With respect to the issue of priority in time, different reports and submissions by the parties filed before the Court reveal that the Ogieks have priority in time, with respect to the occupation and use of the Mau Forest.[18] These reports affirm the Applicant's assertion that the Mau Forest is the Ogieks'

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[16] As above paragraphs 381 to 382.
[17] See E/CN.4/Sub.2/AC.4/1996/2, paragraph 69.
[18] *Report of the African Commission's Working Group on Indigenous Populations/Communities Research and Information Visit to Kenya*, 1-19 March 2010 pages 41 to 42; United Nations Human Rights Committee (UNHRC), '*Cases examined by the Special Rapporteur (June 2009 – July 2010), Human Rights Committee, 15th Session*' (15 September 2010) UN Doc A/HRC/15/37/Add.1, paragraph 268, available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.1.pdf; UNHRC, '*Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples' (26 February 2007)* UN Doc A/HRC/4/32/Add.3, paragraph 37, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/110/43/PDF/G0711043.pdf?OpenElement.

ancestral home.[19] The most salient feature of most indigenous populations is their strong attachment with nature, particularly, land and the natural environment. Their survival in a particular way depends on unhindered access to and use of their traditional land and the natural resources thereon. In this regard, the Ogieks, as a hunter-gatherer community, have for centuries depended on the Mau Forest for their residence and as a source of their livelihood.

110. The Ogieks also exhibit a voluntary perpetuation of cultural distinctiveness, which includes aspects of language, social organisation, religious, cultural and spiritual values, modes of production, laws and institutions[20] through self-identification and recognition by other groups and by State authorities[21], as a distinct group. Despite the fact that the Ogieks are divided into clans made up of patrilineal lineages each with its own name and area of habitation, they have their own language, albeit currently spoken by very few and more importantly, social norms and forms of subsistence, which make them distinct from other neighbouring tribes.[22] They are also identified by these neighbouring tribes, such as the Maasai, Kipsigis and Nandi, with whom they have had regular interaction, as distinct 'neighbours' and as a distinct group.[23]

111. The records before this Court show that the Ogieks have suffered from continued subjugation, and marginalisation.[24] Their suffering as a result of evictions from their

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[19] See the Presidential Commission of Inquiry into the Illegal/Irregular Allocation of Public Land or the Ndung'u Report June 2004 (hereinafter referred to as the Ndung'u Report) page 154 and the Report of the Prime Minister's Task Force on the Conservation of the Mau Forests Complex March 2009 (hereinafter referred to as the Mau Task Force Report) page 36.

[20] Corinne A Kratz, 'Are the Okiek Really Masai? Or Kipsigis? Or Kikuyu?' 1980 *Cahiers d'Etudes Africaines* Vol 20, (hereinafter referred to as Kratz, Corinne A) page 357.

[21] Affidavit of Samuel Kipkorir Sungura, Affidavit of Elijah Kiptanui Tuei, Affidavit of Patrick Kuresoi filed by the Applicant; The Final Report of the Truth, Justice and Reconciliation Commission of Kenya 3 May 2013 (hereinafter referred to as the TJRC Report) Volume IIC paragraphs 204 and 240; and UNHRC, '*Cases examined by the Special Rapporteur (June 2009 – July 2010)* available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.1.pdf, at paragraph 268.

[22] Kratz, Corinne A, pages 355 to 368.

[23] Kratz, Corinne A. (1980) pages 357 to 358.

[24] See Verbatim Record of Public Hearing 27 November 2014 page 137; the TJRC Report (2013), paragraphs 32-47 (including other minority and indigenous people in Kenya); UNCESCR '*Concluding*

ancestral lands and forced assimilation and the very lack of recognition of their status as a tribe or indigenous population attest to the persistent marginalisation that the Ogieks have experienced for decades.[25]

112. In view of the above, the Court recognises the Ogieks as an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability.

113. The Court will now proceed to examine the articles alleged to have been violated by the Respondent.

B. Alleged violation of Article 14 of the Charter

Applicant's Submission

114. The Applicant contends that the failure of the Respondent to recognise the Ogieks as an indigenous community denies them the right to communal ownership of land as provided in Article 14 of the Charter. The Applicant also argues that the Ogieks' eviction and dispossession of their land without their consent and without adequate compensation, and the granting of concessions of their land to third parties, mean that their land has been encroached upon and they have been denied benefits deriving therefrom.

115. The Applicant avers that the Constitution of Kenya takes away land rights from the communities concerned and vests it in government institutions like the Forestry Department, adding that for the laws relating to community land rights to be effective, the Constitution and the Land Act of 2012 must be reconciled

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Observations of the Committee on Economic, Social and Cultural Rights: Kenya' (1 December 2008) UN Doc. E/C.12/KEN/CO/1 page 3 paragraph 12; UNHRC, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples'* available at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.1.pdf at paragraphs 41 and 65 to 77.

[25] See also *Kimaiyo, Towett J (2004) Ogiek Land Cases and Historical Injustices — 1902–2004.*

and community land rights in particular, must be identified and given effect. According to the Applicant, the Forest Act 2005 does not provide for community-owned forests and the Forest Conservation Bill unfortunately does not provide for the procedure of identifying community-owned forests and does not give effect to community land rights.

116. On the Respondent's claim that other communities such as the Kipsigis, Tugen and the Keiyo also lay claim to the Mau Forest, the Applicant submits that the report of the Mau Forest Task Force did not recognise or mention any such rights of these other communities and clearly recommended that the Ogieks who were to be settled in the excised areas of the forest had not yet been resettled.

117. While reiterating the Ogieks' ancestral property rights to the Mau Forest, the Applicant submits that the Respondent did not state whether the evictions were in the public interest as required by Article 14 of the Charter. The Applicant maintains that excisions and allocations made by the Respondent were illegal and done purely to pursue private interests and therefore, are in violation of the Charter.

118. On the Respondent's assertion that the Ogieks were not forcefully evicted but regularly consulted before every eviction and that they have been given alternative land, the Applicant avers that the Ndung'u Report,[26] the Truth, Justice and Reconciliation Commission Report, the Mau Forest Task Force Report indicate the contrary. Hence, the Applicant requests that the Respondent is put to strict proof of this assertion.

119. According to the expert witness called by the Applicant, the Land Act 2012, inspired by the Constitution "is not perfect but is sound". She submitted that this law has very clear provisions that ancestral land and hunter-gatherer lands are community lands; yet the Constitution

[26] Report of the Presidential Commission of Inquiry into the Illegal/Irregular Allocation of Public Land.

stipulates that gazetted forests are public lands, which therefore makes the Land Act 2012 contradictory.

Respondent's Submission

120. The Respondent contends that the Ogieks are not the only tribe indigenous to the Mau Forest and as such, they cannot claim exclusive ownership of the Mau Forest. The Respondent states that the title for all forest in Kenya (including the Mau Forest), other than private and local authority forest is vested in the State. The Respondent avers that since the colonial administration it was communicated to the Ogieks that the Mau Forest was a protected conservation area on which they were encroaching upon and that they were required to move out of the forest. The Respondent also argues that the Ogieks were consulted and notified before every eviction was carried out and that these were carried out in accordance with the law.

121. The Respondent states that its land laws recognise community ownership of land and provide for mechanisms by which communities can participate in forest conservation and management. The Respondent contends that under its laws, community forest users are granted rights which include collection of medicinal herbs and harvesting of honey among others. The Respondent argues that in any event, the Court should look at the matter from the point of view of proportionality.

The Court's Assessment

122. Article 14 of the Charter provides as follows:

> "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

123. The Court observes that, although addressed in the part of the Charter which enshrines the rights recognised for individuals, the right to property as guaranteed by Article 14 may also apply to groups or communities; in effect, the right can be individual or collective.

124. The Court is also of the view that, in its classical conception, the right to property usually refers to three elements namely: the right to use the thing that is the subject of the right (*usus*), the right to enjoy the fruit thereof (*fructus*) and the right to dispose of the thing, that is, the right to transfer it (*abusus*).

125. However, to determine the extent of the rights recognised for indigenous communities in their ancestral lands as in the instant case, the Court holds that Article 14 of the Charter must be interpreted in light of the applicable principles especially by the United Nations.

126. In this regard, Article 26 of the United Nations General Assembly Declaration 61/295 on the Rights of Indigenous Peoples adopted by the General Assembly on 13 September 2007, provides as follows:

> "1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
>
> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
>
> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

127. It follows in particular from Article 26 (2) of the Declaration that the rights that can be recognised for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof (*abusus*). Without excluding the right to property in the traditional sense, this provision places greater emphasis on the rights of possession, occupation, use/utilization of land.

128. In the instant case, the Respondent does not dispute that the Ogiek Community has occupied lands in the Mau Forest since time immemorial. In the circumstances, since the Court has already held that the Ogieks constitute an indigenous community (supra paragraph 112), it holds, on the basis of Article 14 of the Charter read in light of the above-mentioned United Nations Declaration, that they have the right to occupy their ancestral lands, as well as use and enjoy the said lands.

129. . However, Article 14 envisages the possibility where a right to property including land may be restricted provided that such restriction is in the public interest and is also necessary and proportional[27]

130. In the instant case, the Respondent's public interest justification for evicting the Ogieks from the Mau Forest has been the preservation of the natural ecosystem. Nevertheless, it has not provided any evidence to the effect that the Ogieks' continued presence in the area is the main cause for the depletion of natural environment in the area. Different reports prepared by or in collaboration with the Respondent on the situation of the Mau Forest also reveal that the main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions.[28] In its pleadings, the Respondent also concedes that "the Mau Forest degradation cannot entirely be associated or is not associable to the Ogiek people".[29] In this circumstance, the Court is of the view that the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest.

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[27] See *Issa Konate* Case paragraphs 145 to154.
[28] Report of Mau Complex and Marmanet Forests, Environmental and Economic Contributions Current State and Trends, Briefing Notes Compiled by the team that participated in the reconnaissance flight on 7 May 2008, in consultation with relevant Government departments, 20 May 2008; See also Verbatim Record of Public Hearing 27 November 2014 page 111, Ndung'u Report (Annexure 82) and the Mau Task Force Report pages 6, 9, 18 and 22.
[29] See also Respondent's Submission on Merits page 23.

131. In view of the foregoing considerations, the Court holds that by expelling the Ogieks from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land as defined above and as guaranteed by Article 14 of the Charter read in light of the United Nations Declaration on the Rights of Indigenous Peoples of 2007.

C. Alleged violation of Article 2 of the Charter

Applicant`s Submission

132. The Applicant submits that Article 2 of the Charter provides a non-exhaustive list of prohibited grounds of discrimination and that the expression "or other status", widens the list to include statuses not expressly noted. The Applicant notes that any discrimination against the Ogiek Community would fall within the definition of "race", "ethnic group", "religion" and "social origin" referred to in Article 2. The Applicant urges the Court to act in line with the jurisprudence of other regional human rights bodies and maintains that discrimination on grounds of ethnic origin is not capable of objective justification.

133. According to the Applicant, the differential treatment of the Ogieks and other similar indigenous and minority groups within Kenya, in relation to the lack of respect for their property rights, religious and cultural rights, and right to life, natural resources and development under the relevant laws, constitutes unlawful discrimination and is a violation of Article 2 of the Charter. The Applicant stresses that the Respondent has, since independence, been pursuing a policy of assimilation and marginalisation, presumably in an attempt to ensure national unity and, in the case of land and natural resource rights, in the name of conservation of the Mau Forest. According to the Applicant, while such aims of national unity or conservation may be legitimate and serve the common interest, the means employed, including the non-recognition of the tribal and ethnic identity of the Ogieks and their corresponding rights is entirely

disproportionate to such an aim and, is ultimately counterproductive to its achievement. The Applicant is of the view that the Respondent has failed to show that the reasons for such difference in treatment are strictly proportionate to or absolutely necessary for the aims being pursued, and concludes that as a result, the laws which permit this discrimination are in violation of Article 2 of the Charter.[30]

Respondent's Submission

134. The Respondent submits that there has been no discrimination against the Ogieks and that the alleged discrimination in education, health, access to justice and employment is baseless, and lacks justification and documentary evidence. The Respondent submits that the complainants have not demonstrated, as is required, how the Respondent discriminated against the Ogieks. The Respondent calls on the Applicant to prove the discrimination alleged and to establish facts from which the discrimination occurred.

135. The Respondent contends that, in any event, the alleged discrimination would be contrary to its Constitution which provides safeguards against such discrimination. The Respondent cites Articles 10 (National values and principles of governance) and Article 24 of its Constitution, which provide inter alia that, every person is equal before the law and has equal protection and benefit of the law. The Respondent also cites Article 27(4) thereof which prohibits the State from discriminating "directly or indirectly any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth".

[30] These include the Constitution of Kenya, 1969 (as Amended in 1997), the Government Lands Act Chapter 280 of the Laws of Kenya, Registered Land Act Chapter 300 of the Laws of Kenya, Trust Land Act Chapter 285 of the Laws of Kenya and the Forest Act Chapter 385 of the Laws of Kenya.

The Court's Assessment

136. Article 2 of the Charter provides that:

> "Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, birth or any status."

137. Article 2 of the Charter is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter. The provision strictly proscribes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment.

138. The right not to be discriminated against is related to the right to equality before the law and equal protection of the law as guaranteed by Article 3 of the Charter.[31] The scope of the right to non-discrimination extends beyond the right to equal treatment by the law and also has practical dimension in that individuals should in fact be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status. The expression 'any other status' under Article 2 encompasses those cases of discrimination, which could not have been foreseen during the adoption of the Charter. In determining whether a ground falls under this category, the Court shall take into account the general spirit of the Charter.

139. In terms of Article 2 of the Charter, while distinctions or differential treatment on grounds specified therein are generally proscribed, it should be pointed out that not all forms of distinction can be considered as discrimination. A distinction or differential treatment becomes discrimination, and hence, contrary to Article 2, when it does not have

[31] *Christopher Mtikila* Case paragraphs 105.1 and 105.2.

objective and reasonable justification and, in the circumstances where it is not necessary and proportional.[32]

140. In the instant case, the Court notes that the Respondent's national laws as they were before 2010, including the Constitution of Kenya 1969 (as Amended in 1997), the Government Lands Act Chapter 280, Registered Land Act Chapter 300, Trust Land Act Chapter 285 and the Forest Act Chapter 385, recognised only the concept of ethnic groups or tribes. While some of these laws were enacted during the colonial era, the Respondent maintained them with few amendments or their effect persisted to date even after independence in 1963.

141. In so far as the Ogieks are concerned, the Court notes from the records available before it that their request for recognition as a tribe goes back to the colonial period, where their request was rejected by the then Kenya Land Commission in 1933, asserting that "they [the Ogieks] were a savage and barbaric people who deserved no tribal status" and consequently, the Commission proposed that "they should become members of and be absorbed into the tribe in which they have the most affinity".[33] The denial of their request for recognition as a tribe also denied them access to their own land as, at the time, only those who had tribal status were given land as "special reserves" or "communal reserves". This has been the case since independence and is still continuing.[34] In contrast, other ethnic groups such as the Maasai, have been recognised as tribes and consequently, been able to enjoy all related rights derived from such recognition, thus proving differential treatment.[35]

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[32] As above.

[33] See also Verbatim Record of Public Hearing 27 November 2014 pages 15 to 16 on the Respondent's Opening Statement.

[34] See Ndung'u Report page 154, Mau Task Force Report page 36 and TJRC Report Vol IIC paragraphs 204 and 240.

[35] For instance, Maasai Mau Trust Land Forest, which forms part of the Mau Forest Complex is managed by the Narok County Council rather than the Kenya Forest Service as it is the only Trust Land out of the 22 forest blocks in the complex, thereby, recognising a special designated area for the Maasai; See in this regard, Mau Forest Task Force Report page 9.

142. The Court accordingly finds that, if other groups which are in the same category of communities, which lead a traditional way of life and with cultural distinctiveness highly dependent on the natural environment as the Ogieks, were granted recognition of their status and the resultant rights, the refusal of the Respondent to recognise and grant the same rights to the Ogieks, due to their way of life as a hunter-gatherer community amounts to `distinction` based on ethnicity and/or 'other status' in terms of Article 2 of the Charter.

143. With regard to the Respondent's submission that, following the adoption of a new Constitution in 2010, all Kenyans enjoy equal opportunities in terms of education, health, employment, and access to justice and there is no discrimination among different tribes in Kenya including the Ogieks, the Court notes that indeed the 2010 Constitution of Kenya recognises and accords special protection to indigenous populations as part of "marginalised community" and the Ogieks could theoretically fit into that category and benefit from the protection of such constitutional safeguards. All the same, this does not diminish the responsibility of the Respondent with respect to the violations of the rights of the Ogieks not to be discriminated against between the time the Respondent became a Party to the Charter and when the Respondent's new Constitution was enacted.

144. In addition, as stated above, the prohibition of discrimination may not be fully guaranteed with the enactment of laws which condemn discrimination; the right can be effective only when it is actually respected and, in this vein, the persisting eviction of the Ogieks, the failure of the authorities of the Respondent to stop such evictions and to comply with the decisions of the national courts demonstrate that the new Constitution and the institutions which the Respondent has set up to remedy past or on-going injustices are not fully effective.

145. On the Respondent's purported justification that the evictions of the Ogieks were prompted by the need to preserve the natural ecosystem of the Mau Forest, the Court considers that this cannot, by any standard, serve as a reasonable and objective justification for the lack of recognition of the Ogieks' indigenous or tribal status and denying them the associated rights derived from such status. Moreover, the Court recalls its earlier finding that contrary to what the Respondent is asserting, the Mau Forest has been allocated to other people in a manner which cannot be considered as compatible with the preservation of the natural environment and that the Respondent itself concedes that the depletion of the natural ecosystem cannot be entirely imputed to the Ogieks.[36]

146. In light of the foregoing, the Court finds that the Respondent, by failing to recognise the Ogieks' status as a distinct tribe like other similar groups and thereby denying them the rights available to other tribes, violated Article 2 of the Charter.

D. Alleged violation of Article 4 of the Charter

Applicant's Submission

147. The Applicant submits that the right to life is the first human right, the one on which the enjoyment of all other rights depend and that it imposes both a negative duty on States to refrain from interfering with its exercise and the positive obligation to fulfil the basic necessities for a decent survival.[37] The Applicant contends that forced evictions may violate the right to life when they generate conditions that impede or obstruct access to a decent existence.[38]

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[36] See paragraph 130 above.

[37] See African Commission on Human and Peoples' Rights (ACHPR/Commission) Communication No 223/98 *Forum of Conscience v Sierra Leone* 6 November 2000 paragraph 20 *14th Annual Activity Report* 2000 to 2001.

[38] Citing the *General Comment of the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) on the Right to Adequate Housing: Forced Eviction,* UNCESCR General Comment No 7 20 May 1997; the Commission's jurisprudence in the *Endorois* Case Communication No 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya* 25 November 2009 paragraph 216 27th Annual Activity Report: June to November 2009; and the decision of the Inter-American Court of Human Rights (IACtHR)

According to the Applicant, given their special relationship with and dependence on land for their livelihood, when indigenous populations are forcefully evicted from their ancestral land, they become exposed to conditions affecting their decent way of life.

148. The Applicant argues that, similar to other hunter-gatherer communities, the Ogieks relied on their ancestral land in the Mau Forest to support their livelihood, their specific way of life and their very existence. The Applicant contends further that the Ogieks' ancestral land in the Mau Forest provided them with, a constant supply of food, in the form of game and honey, shelter, traditional medicines and an area for cultural rituals and religious ceremonies and social organisation. The Applicant argues that, the Respondent acknowledges this intimate relationship that the Ogieks have with their ancestral land.

149. The Applicant submits therefore that the Respondent's removal of the Ogieks from their ancestral and cultural home, and subsequent limiting access to these lands, threatens to destroy the community's way of life and that their hunter-gatherer livelihood has been severely affected by relegation to unsuitable lands. According to the Applicant, their forced eviction means that the Ogieks no longer have a decent survival and consequently, their right to life under Article 4 of the Charter is imperilled.

Respondent's Submission

150. The Respondent submits that the Mau Forest Complex is important for all Kenyans, and the government is entitled to develop it for the benefit of all citizens. While the government engages in economic activity for the benefit of all Kenyans in areas where indigenous people live, the Respondent indicates that

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decision in *Yakye Axa Indigenous Community v Paraguay* Judgment of 17 June 2005 (Merits, Reparations and Costs) Ser C No 125 paragraphs 160 to 163.

it may affect the indigenous people and reiterates that this should be seen in the light of the principle of proportionality.

The Court's Assessment

151. Article 4 of the Charter stipulates that:

> "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right"

152. The right to life is the cornerstone on which the realisation of all other rights and freedoms depend. The deprivation of someone`s life amounts to eliminating the very holder of these rights and freedoms. Article 4 of the Charter strictly prohibits the arbitrary privation of life. Contrary to other human rights instruments, the Charter establishes the link between the right to life and the inviolable nature and integrity of the human being. The Court finds that this formulation reflects the indispensable correlation between these two rights.

153. The Court notes that the right to life under Article 4 of the Charter is a right to be enjoyed by an individual irrespective of the group to which he or she belongs. The Court also understands that the violation of economic, social and cultural rights (including through forced evictions) may generally engender conditions unfavourable to a decent life.[39] However, the Court is of the view that the sole fact of eviction and deprivation of economic, social and cultural rights may not necessarily result in the violation of the right to life under Article 4 of the Charter.

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[39] In *Yakye Axa Indigenous Community v Paraguay* Judgment of 17 June 2005 (Merits, Reparations and Costs) Ser C No 125 paragraph 161, the IACtHR found a violation to the right to life by reasoning that: " *....when the right to life is not respected, all the other rights disappear, because the person entitled to them ceases to exist... Essentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated*" and further that "*the fallout from forcibly dispossessing indigenous peoples from their ancestral land could amount to an Article 4 violation (right to life) if the living conditions of the community are incompatible with the principles of human dignity*". The Commission adopted a similar reasoning in the *Endorois Case-see paragraph 216*.

154. The Court considers that it is necessary to make a distinction between the classical meaning of the right to life and the right to decent existence of a group. Article 4 of the Charter relates to the physical rather than the existential understanding of the right to life.

155. In the instant case, it is not in dispute between the Parties that that the Mau Forest has, for generations, been the environment in which the Ogiek population has always lived and that their livelihood depends on it. As a hunter-gatherer population, the Ogieks have established their homes, collected and produced food, medicine and ensured other means of survival in the Mau Forest. There is no doubt that their eviction has adversely affected their decent existence in the forest. According to the Applicant, some members of the Ogiek population died at different times, due to lack of basic necessities such as food, water, shelter, medicine, exposure to the elements, and diseases, subsequent to their forced evictions. The Court notes however that the Applicant has not established the causal connection between the evictions of the Ogieks by the Respondent and the deaths alleged to have occurred as a result. The Applicant has not adduced evidence to this effect.

156. In view of the above, the Court finds that there is no violation of Article 4 of the Charter.

E. Alleged violation of Article 8 of the Charter

Applicant's Submission

157. The Applicant contends that the Ogieks practise a monotheistic religion closely tied to their environment and that their beliefs and spiritual practices are protected by Article 8 of the Charter and constitute a religion under international law. The Applicant refutes the claim that the Ogieks' religious practices are a threat to law and order, which has been the Respondent's basis for the unjustifiable interference with the Ogieks' right to freely practice their religion. In this regard, the Applicant

submits that the Ogieks' traditional burial practices of putting the dead in the forest have evolved such that now they do bury their dead.

158. Further, the Applicant asserts that the sacred places in the Mau Forest, caves, hills, specific trees areas within the forest[40] were either destroyed during the evictions which took place during the 1980s, or knowledge about them has not been passed on by the elders to younger members of their community, as they can no longer access them. The Applicant avers that it is only through unfettered access to the Mau Forest that the Ogieks will be able to protect, maintain, and use their sacred sites in accordance with their religious beliefs. The Applicant adds that the Respondent has failed to demarcate and protect the religious sites of the Ogieks.

159. The Applicant also maintains that though some of the Ogieks have adopted Christianity, this does not extinguish the religious rites they practise in the forest. The Applicant adds that, under the Forest Act, the Ogieks are required to apply annually and pay for forest licences in order to access their religious sites situated on their ancestral lands, contrary to the provisions of the Charter.

160. During the public hearing, Dr. Liz Alden Wily, the expert witness called by the Applicant asserted that the livelihoods of hunter-gatherer communities are dependent on a social ecology whereby their spiritual life and whole existence depends on the forest and that there is a big misunderstanding about the hunter-gatherer culture. She emphasised that for such communities, culture and religion are intertwined and therefore cannot be separated. According to her, it is usually perceived that their culture can be easily dissolved or disbanded in situations where the hunter -gatherers have been assimilated by modernism. She stated that many forest dwellers like the Ogieks do the hunting and gathering, not just for their livelihood, but

[40] See Applicant's Reply to the Respondent's Submissions on Merits pages 22 to 23.

rather, their whole spiritual life and their entire existence depends on the forest and its intactness. She stated that whether or not their livelihood is derived from the forest (as is the case of the Ogieks), people tend to erroneously think that because today the Ogieks have not turned up in skins or hides, then they do not need to hunt or that they have given up their culture.

Respondent's Submission

161. The Respondent contends that the Applicant has failed to adduce evidence to show the exact places where the alleged ceremonies for the religious sites of the Ogieks are located. They argue that the Ogieks have abandoned their religion as they have converted to Christianity and that the religious practices of the Ogieks are a threat to law and order, thereby necessitating the Respondent's interference, to protect and preserve law and order. The Respondent contends that the Ogieks are free to access the Mau Forest, except between 6 p.m. and 9 a.m. and that they are prohibited from carrying out certain activities, unless they have a licence permitting them to do so.

The Court's Assessment

162. Article 8 of the Charter provides:

> "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

163. The above provision requires State Parties to fully guarantee freedom of conscience, the profession and free practice of religion.[41] The right to freedom of worship offers protection to all forms of beliefs regardless of denominations: theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.[42] The right to manifest and practice religion includes the right

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[41] See also Article 18, ICCPR.
[42] UNHRC , *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: http://www.refworld.org/docid/453883fb22.html paragraph 2.

to worship, engage in rituals, observe days of rest, and wear religious garb, allow individuals or groups to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes, as well as to celebrate ceremonies in accordance with the precepts of one's religion or belief.[43]

164. The Court notes that, in the context of traditional societies, where formal religious institutions often do not exist, the practice and profession of religion are usually inextricably linked with land and the environment. In indigenous societies in particular, the freedom to worship and to engage in religious ceremonies depends on access to land and the natural environment. Any impediment to, or interference with accessing the natural environment, including land, severely constrains their ability to conduct or engage in religious rituals with considerable repercussion on the enjoyment of their freedom of worship.

165. In the instant case, the Court notes from the records before it[44] that the Ogieks' religious sites are in the Mau Forest and they perform their religious practices there. The Mau Forest constitutes their spiritual home and is central to the practice of their religion. It is where they bury the dead according to their traditional rituals[45], where certain types of trees are found for use to worship and it is where they have kept their sacred sites for generations.

166. The records also show that the Ogiek population can no longer undertake their religious practices due to their eviction from the Mau Forest. In addition, they must annually apply and pay for a license for them to have access to the Forest. In the opinion of the Court, the eviction measures and these regulatory requirements interfere with the freedom of worship of the Ogiek population.

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[43] Article 6 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (Thirty-Sixth session, 1981), U.N. GA Res. 36/55, (1981).
[44] Applicant's Submission on Merits page 184, paragraphs 431 to 432 and the Affidavit of Seli Chemeli Koech filed by Applicant.
[45] For instance, placing a dead person under the *Yemtit* tree (*Olea Africana*).

167. Article 8 of the Charter however allows restrictions on the exercise of freedom of religion in the interest of maintaining law and order. Though the Respondent can interfere with the religious practices of the Ogieks to protect public health and maintain law and order, these restrictions must be examined with regard to their necessity and reasonableness. The Court is of the view that, rather than evicting the Ogieks from the Mau Forest, thereby restricting their right to practice their religion, there were other less onerous measures that the Respondent could have put in place that would have ensured their continued enjoyment of this right while ensuring maintenance of law and order and public health. These measures include undertaking sensitisation campaigns to the Ogieks on the requirement to bury their dead in accordance with the requirements of the Public Health Act and collaborating towards maintaining the religious sites and waiving the fees to be paid for the Ogieks to access their religious sites.

168. On the contention that the Ogieks have abandoned their religion and converted to Christianity, the Court notes from the records before it, specifically from the testimony of the Applicant's witnesses that, not all the Ogieks have converted to Christianity. Indeed, the Respondent has not submitted any evidence to support its position that the adoption of Christianity means a total abandonment of the Ogiek traditional religious practices. Even though some members of the Ogieks might have been converted to Christianity, the evidence before this Court show that they still practice their traditional religious rites. Accordingly, the alleged transformation in the way of life of the Ogieks and their manner of worship cannot be said to have entirely eliminated their traditional spiritual values and rituals.

169. From the foregoing, the Court is of the view that given the link between indigenous populations and their land for purposes of practicing their religion, the evictions of the Ogieks from the Mau Forest rendered it impossible for the community to continue its religious practices and is an unjustifiable interference with the freedom of religion of the Ogieks. The Court therefore finds that the Respondent is in violation of Article 8 of the Charter.

F. Alleged violation of Articles 17(2) and (3) of the Charter

Applicant's Submission

170. The Applicant, citing its own jurisprudence in the *Endorois* Case avers that "Culture could be taken to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups and in that it encompasses a group's religion, language, and other defining characteristics". On the basis of this, the Applicant submits that the cultural rights of the Ogieks have been violated by the Respondent, through restrictions on access to the Mau forest which hosts their cultural sites. According to the Applicant, their attempts to access their historic lands for cultural purposes have been met with intimidation and detention, and serious restrictions have been imposed by the Kenyan authorities on their hunter-gatherer way of life, after the Respondent forcefully evicted them from the Mau Forest.

171. The Applicant maintains that the Ogieks should be allowed to determine what culture is good for them rather than the Respondent doing so. The Applicant calls on the Court to be inspired by Article 61 of the Charter and urges the Court to find that the Respondent is in violation of Article 17 of the Charter in respect of the Ogieks and prays the Court to issue an Order for reparation.

172. While testifying about the cultural evolution of the Ogieks, the expert witness maintains and reiterates her earlier position as elaborated in the section on religion above in paragraph 161.

Respondent's Submission

173. The Respondent argues that it recognises and affirms the provisions of Article 17 of the Charter and has taken reasonable steps both at the national and international levels to ensure that the cultural rights of indigenous peoples in Kenya

are promoted, protected and fulfilled. The Respondent submits that it has ratified the ICCPR and ICESCR with specific provisions on the protection of cultural rights enshrined in its Constitution.[46] The Respondent avers that it has also effected numerous legal and policy measures to ensure that cultural rights of "indigenous people" in Kenya are upheld and protected. In this regard, the Respondent reiterates that the 2010 Constitution of Kenya protects the right of all Kenyans to promote their own culture.

174. The Respondent underscores that while protecting the cultural rights, it also has the responsibility to ensure a balance between cultural rights vis-à-vis environmental conservation in order to undertake its obligation to all Kenyans, particularly in view of the provisions of the Charter[47] and its Constitution.[48] The Respondent further submits that the cultural rights of indigenous people such as the Ogieks may encompass activities related to natural resources, such as fishing or hunting which could have a negative impact on the environment and these must be balanced against other public interests. The Respondent urges the Court to bear in mind the intricate balance between the right to culture and environmental conservation for future generations.

175. Furthermore, the Respondent stresses that as far as the Ogieks are concerned, their life style has metamorphosed and the cultural and traditional practices which made them distinct no longer exist, thus, the group itself no longer exists and it cannot therefore claim any cultural rights. The Respondent also states that the Ogieks no longer live as hunters and gatherers, thus, they cannot be said to conserve the environment. They have adopted new and modern ways of living, including building permanent structures, livestock keeping and farming which would have a serious negative impact on the forest if they are allowed to reside there.

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[46] See Article 2(5) and (6) of the Constitution of Kenya, 2010: (5) "The general rules of international shall form part of the law of Kenya. (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution." Article 44 of the Constitution of Kenya, 2010 provides for the right to use the language and to participate in the cultural life of the person's choice.
[47] Articles 1 and 24 of the Charter.
[48] Article 69 of the Constitution of Kenya, 2010.

The Court's Assessment

176. Article 17 of the Charter provides:

> "1. Every individual shall have the right to education.
> 2. Every individual may freely, take part in the cultural life of his community.
> 3. The promotion and protection of morals and traditional values Recognised by the community shall be the duty of the State".

177. The right to culture as enshrined in Article 17 (2) and (3) of the Charter is to be considered in a dual dimension, in both its individual and collective nature. It ensures protection, on the one hand, of individuals' participation in the cultural life of their community and, on the other, obliges the State to promote and protect traditional values of the community.

178. Article 17 of the Charter protects all forms of culture and places strict obligations on State Parties to protect and promote traditional values. In a similar fashion, the Cultural Charter for Africa obliges States to adopt a national policy which creates conditions conducive for the promotion and development of culture.[49] The Cultural Charter specifically stresses "the need to take account of national identities, cultural diversity being a factor making for balance within the nation and a source of mutual enrichment for various communities".[50]

179. The protection of the right to culture goes beyond the duty, not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group's identity. In this respect, culture should be construed in its widest sense encompassing the total way of life of a particular group, including the group's languages, symbols such as dressing codes and the manner the group constructs shelters; engages in certain economic activities, produces items for survival; rituals such as the group's particular way of dealing with problems and

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[49] Article 6, Cultural Charter for Africa adopted by the Organisation of African Unity in Accra, Ghana on 5 July 1976, The Respondent became a State Party to the Cultural Charter on 19 September 1990.
[50] Article 3, ibid.

practicing spiritual ceremonies; identification and veneration of its own heroes or models and shared values of its members which reflect its distinctive character and personality.[51]

180. The Court notes that in the context of indigenous populations, the preservation of their culture is of particular importance. Indigenous populations have often been affected by economic activities of other dominant groups and large scale developmental programmes. Due to their obvious vulnerability often stemming from their number or traditional way of life, indigenous populations even have, at times, been the subject and easy target of deliberate policies of exclusion, exploitation, forced assimilation, discrimination and other forms of persecution, whereas some have encountered extinction of their cultural distinctiveness and continuity as a distinct group.[52]

181. The UN Declaration on Indigenous Peoples, states that "indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture" and States shall provide effective mechanisms to prevent any action that deprives them of "their integrity as distinct peoples, or of their cultural values or ethnic identities".[53] The UN Committee on Economic, Social and Cultural Rights, in its General Comment on Article 15 (1)(a) also observed that "the strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."[54]

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[51] Preamble, paragraph 9 and Articles 3, 5 and 8(a) Cultural Charter for Africa. Organisation of African Unity on 5 July 1976

[52] The ACHPR's work on indigenous peoples in Africa, Indigenous Peoples in Africa: The Forgotten Peoples? (2006), page 17 available at http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf.

[53] Articles 8(1) and 8(2)(a), of the United Nations Declaration on the Rights of Indigenous People, 2007 (hereinafter referred to as UNDRIP). NDRI; See also Article 4(2), UN General Assembly, *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1992, A/RES/47/135, available at: http://www.refworld.org/docid/3ae6b38d0.html.

[54] UNCESR, *General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, available at: http://www.refworld.org/docid/4ed35bae2.html paragraphs 36 and 37.

182. In the instant case, the Court notes from the records available before it that the Ogiek population has a distinct way of life centred and dependent on the Mau Forest Complex. As a hunter-gatherer community, they get their means of survival through hunting animals and gathering honey and fruits, they have their own traditional clothes, their own language, distinct way of entombing the dead, practicing rituals and traditional medicine, and their own spiritual and traditional values, which distinguish them from other communities living around and outside the Mau Forest Complex, thereby demonstrating that the Ogieks have their own distinct culture.

183. The Court notes, based on the evidence available before it and which has not been contested by the Respondent that the Ogieks have been peacefully carrying out their cultural practices until their territory was encroached upon by outsiders and they were evicted from the Mau Forest. Even in the face of this, the Ogieks still undertake their traditional activities: traditional wedding ceremonies, oral traditions, folklores, and songs. They still maintain their clan boundaries in the Mau Forest and each clan ensures the maintenance of the environment within the boundary it is allocated. However, in the course of time, the restrictions on access to and evictions from the Mau Forest have greatly affected their ability to preserve these traditions. In view of this, the Court holds that the Respondent interfered with the enjoyment of the right to culture of the Ogiek population.

184. Having found that there has been interference by the Respondent with the cultural rights of the Ogieks, the next issue for the Court to determine is whether or not such interference could be justified by the need to attain a legitimate aim under the Charter.[55] In this regard, the Court notes the Respondent's contention that the Ogiek population has evolved on their own by adopting a different culture and identity and that, in any event, the eviction measures the Respondent effected against them were aimed to prevent adverse impacts on the Mau Forest which was caused by the Ogiek lifestyle and culture.

185. With regard to the first contention that the Ogieks have evolved and their way of life has changed through time to the extent that they have

[55] Issa Konate Case paragraphs 145 to 154.

lost their distinctive cultural identity, the Court reiterates that the Respondent has not sufficiently demonstrated that this alleged shift and transformation in the lifestyle of the Ogieks has entirely eliminated their cultural distinctiveness. In this vein, the Court stresses that stagnation or the existence of a static way of life is not a defining element of culture or cultural distinctiveness. It is natural that some aspects of indigenous populations' culture such as a certain way of dressing or group symbols could change over time. Yet, the values, mostly, the invisible traditional values embedded in their self-identification and shared mentality often remain unchanged.

186. In so far as the Ogiek population is concerned, the testimony tendered by Mrs. Mary Jepkemei, a member of the Ogiek Community, attests that the Ogieks still have their traditional values and cultural ceremonies which make them distinct from other similar groups. In addition, the Court notes that, to some extent, some of the alleged changes in the way the Ogieks used to live in the past are caused by the restrictions put in place by the Respondent itself on their right to access their land and natural environment.[56]

187. With respect to the second contention that the eviction measures were in the public interest of preserving the natural environment of the Mau Forest Complex, the Court first notes that Article 17 of the Charter does not provide exceptions to the right to culture. Any restrictions to the right to culture shall accordingly be dealt with in accordance with Article 27 of the Charter, which stipulates that:

> "1. Every individual shall have duties towards his family and society, the State and other legally recognised communities and the international community.
> 2. The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest."

188. In the instant case, the restriction of the cultural rights of the Ogiek population to preserve the natural environment of the Mau Forest Complex may in principle be justified

[56] On the same, see IACtHR, *Case of the Sawhoyamaxa Indigenous Community v Paraguay*, Judgment of 29 March 29 2006 (Merits, Reparations and Costs) paragraphs 73(3) to 73(5).

to safeguard the "common interest" in terms of Article 27 (2) of the Charter. However, the mere assertion by a State Party of the existence of a common interest warranting interference with the right to culture is not sufficient to allow the restriction of the right or sweep away the essence of the right in its entirety. Instead, in the circumstances of each case, the State Party should substantiate that its interference was indeed genuinely prompted by the need to protect such common interest. In addition, the Court has held that any interference with the rights and freedoms guaranteed in the Charter shall be necessary and proportional to the legitimate interest sought to be attained by such interference.[57]

189. In the instant case, the Court has already found that the Respondent has not adequately substantiated its claim that the eviction of the Ogiek population was for the preservation of the natural ecosystem of the Mau Forest.[58] Considering that the Respondent has interfered with the cultural rights of the Ogieks through the evictions and given that the Respondent invokes the same justification of preserving the natural ecosystem for its interference, the Court reiterates its position that the interference cannot be said to have been warranted by an objective and reasonable justification. Although the Respondent alleges generally, that certain cultural activities of the Ogieks are inimical to the environment, it has not specified which particular activities and how these activities have degraded the Mau Forest. In view of this, the purported reason of preserving the natural environment cannot constitute a legitimate justification for the Respondent's interference with the Ogieks' exercise of their cultural rights. Consequently, the Court deems it unnecessary to examine further whether the interference was necessary and proportional to the legitimate aim invoked by the Respondent.

190. The Court therefore finds that the Respondent has violated the right to culture of the Ogiek population contrary to Article 17 (2) and **(3)** of the Charter by evicting them from the Mau Forest area, thereby, restricting them from exercising their cultural activities and practices.

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[57] See *Issa Konate* Case paragraphs 145 to 154.
[58] See section on the Court's Assessment on Alleged Violation of Article 8 of the Charter.

G. Alleged violation of Article 21 of the Charter

Applicant's Submission

191. The Applicant contends that the Respondent has violated the rights of the Ogieks to freely dispose of their wealth and natural resources in two ways. Firstly, by evicting them from the Mau Forest and denying them access to the vital resources therein, and secondly, by granting logging concessions on Ogiek ancestral land without their prior consent and without giving them a share of the benefits in those resources.

192. Countering the Respondent's contention that it has incorporated Article 21 of the Charter into the Kenyan Constitution[59], the Applicant maintains that, there is still no implementing legislation in place in this regard. The Applicant adds that, under the previous Constitution and legislation, the Respondent was unable to implement the framework for protection of the Ogieks, who, could not claim any part of Kenya as their community land like other communities.

193. The Applicant states that the Ogieks neither got land under the Native Land Trust Ordinance 1938, the Constitution of Kenya, 1969, the Land (Group Representatives) Act, Chapter 287 nor under the Trust Land Act. The Applicant adds finally that, the Ogieks have still not benefited from the new constitutional provisions recognising community land and therefore the violations are continuing to date. According to the Applicant, the purpose of Article 21 of the Charter is to facilitate development, economic independence and self-determination of the post-colonial States as well as the peoples that comprise those states, protecting them against multi-nationals as well as against the State itself.

[59] Article 69 of the Constitution of the Republic of Kenya (2010).

Respondent's Submission

194. The Respondent argues that it has not violated the rights of the Ogieks to freely dispose of their wealth and natural resources as alleged by the Applicant, and that Article 21 of the Charter calls for reconciliation between the State on the one hand and individuals or groups/communities on the other on the ownership and control of natural resources. For the Respondent, while the right of ownership and control of natural resources belongs to the people, States are the entities that would ultimately exercise the enjoyment of the right in the interest of the people, and efforts are being made to maintain a delicate balance between conservation, a people-centred approach to utilisation of natural resources and the ultimate control of natural resources. The Respondent emphasises that it has adopted a harmonised balancing of the two concepts of the ownership and control of natural resources, through focussing on access to, rather than ownership over natural resources.

The Court's Assessment

195. Article 21 of the Charter states that:

> "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
> 2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.
> 3. The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principle of international law
> 4. States parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity.

5. States Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopoles so as to enable their peoples to fully benefit from the advantages derived from their national resources."

196. The Court notes, in general terms, that the Charter does not define the notion of "peoples". In this regard, the point has been made that the drafters of the Charter deliberately omitted to define the notion in order to "permit a certain flexibility in the application and subsequent interpretation by future users of the legal instrument, the task of fleshing out the Charter being left to the human rights protection bodies."[60]

197. It is generally accepted that, in the context of the struggle against foreign domination in all its forms, the Charter primarily targets the peoples comprising the populations of the countries struggling to attain independence and national sovereignty[61].

198. In the circumstances, the question is whether the notion "people" used by the Charter covers not only the population as the constituent elements of the State, but also the ethnic groups or communities identified as forming part of the said population within a constituted State. In other words, the question that arises is whether the enjoyment of the rights unquestionably recognised for the constituent peoples of the population of a given State can be extended to include sub-state ethnic groups and communities that are part of that population.

199. In the view of the Court, the answer to this question is in the affirmative, provided such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter's consent. It would in fact be difficult to understand that the States which are the authors of the Charter intended, for example, to automatically recognise for the ethnic groups and communities that constitute their population, the right to self-determination and independence guaranteed under Article

[60] Report of the Rapporteur pages 4 to5, paragraph 13, cited in Ouguergouz Fatsah, The African Charter of Human and Peoples' Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa, (2003), page 205, Note 682.
[61] See paragraphs 3 and 8 of the preamble to the Charter.

20 (1) of the Charter, which in this case would amount to a veritable right to secession[62]. On the other hand, nothing prevents other peoples' rights, such as the right to development (Article 22), the right to peace and security (Article 23) or the right to a healthy environment (Article. 24) from being recognised, where necessary, specifically for the ethnic groups and communities that constitute the population of a State.

200. In the instant case, one of the rights at issue is the right of peoples to freely dispose of their wealth and natural resources guaranteed under Article 21 of the Charter. In essence, as indicated above, the Applicant alleges that the Respondent violated the aforesaid right insofar as, following the expulsion of the Ogieks from the Mau Forest, they were deprived of their traditional food resources.

201. The Court recalls, in this regard, that it has already recognised for the Ogieks a number of rights to their ancestral land, namely, the right to use *(usus)* and the right to enjoy the produce of the land *(fructus)*, which presuppose the right of access to and occupation of the land. In so far as those rights have been violated by the Respondent, the Court holds that the latter has also violated Article 21 of the Charter since the Ogieks have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands.

H. Alleged violation of Article 22 of the Charter

Applicant's Submission

202. The Applicant contends that the Respondent has violated the Ogieks' right to development by evicting them from their ancestral land in the Mau Forest and by failing to consult with and/or seek the consent of the Ogiek Community in relation to the development of their shared cultural, economic and social life within the Mau Forest. The Applicant states that the Respondent failed to recognise the Ogieks' right to development and

[62] This interpretation is buttressed by the OAU's adoption of Resolution AHG/R.S. 16(1) of July 1964 on the Inviolability of the Frontiers Inherited from Colonization.

as indigenous people, with the right to determining development priorities and strategies and exercising their right to be actively involved in developing economic and social programmes affecting them and, as far as possible, to administering such programmes through their own institutions. They contend that failure on the part of the Respondent to give effect to these facets of the right to development, constitutes a violation of Article 22 of the Charter.

203. With regard to Article 10(2) of the Respondent's Constitution, its Vision 2030 and its budget statements being proof of development for the Ogieks, the Applicant submits that, it is not a matter of whether or not these instruments provide for the right to development, but rather whether the Respondent has discharged its obligation to protect the Ogieks' right to development. According to the Applicant, this would be by establishing a framework which provides for the realisation of this right in its procedural and substantive processes, including consultation and participation.

204. Furthermore, the Applicant contends that despite the provisions of Article 1(2) of the Respondent's Constitution which demonstrates its willingness to consult on issues of development, the Respondent has failed to state how many the representatives of the Ogieks sit in any of the three or four tier electoral structures in the Respondent, that is, the local government, County legislative bodies, Parliament and Senate, or in any government decision making capacity.

Respondent's Submission

205. The Respondent argues that it has not violated the right to development of the Ogieks as alleged by the Applicant. It argues that the Applicant has to show specific instances where development has taken place without the involvement of members of the Ogiek Community, or where development has not taken place at all, or where members of the Ogiek Community have been discriminated against in enjoying the fruits of development. The Respondent submits that the Applicant has not

demonstrated how it has failed in undertaking development initiatives for the benefit of the Ogieks or how they have been discriminated against and excluded in the process of conducting development initiatives.

206. The Respondent maintains that its development agenda is guided both by the will and determination of its government and by its laws. On the consultative process leading to development initiatives in the Mau Forest, the Respondent argues that consultation can be achieved in diverse ways. It argues that in the present case, as provided under Article 1(2) of the Constitution of Kenya, consultations were held with the Ogieks' democratically elected area representatives and that the State has established several participatory task forces to review the legal framework and reports applicable to the situation while taking into account the views of the public. Finally, the Respondent argues that its development agenda, that is, Vision 2030, its various budget statements and Article 10(2) of its Constitution, provide that the fundamental criteria for governance include equity, participation, accountability and transparency. The Respondent avers that, it is the responsibility of the Applicant to demonstrate that all these instruments are at variance with development, more precisely that of the Ogiek community.

The Court's Assessment

207. Article 22 of the Charter provides that:

> "1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
> 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

208. The Court reiterates its view above with respect to Article 21 of the Charter that the term "peoples" in the Charter comprises all populations as a constitutive element of a State. These populations are entitled to social, economic and cultural development being part of the peoples of a State. Accordingly, the Ogiek

population, has the right under Article 22 of the Charter to enjoy their right to development.

209. The Court considers that, Article 22 of the Charter should be read in light of Article 23 of the UNDRIP which provides as follows:

> "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions."

210. In the instant case, the Court recalls that the Ogieks have been continuously evicted from the Mau Forest by the Respondent, without being effectively consulted. The evictions have adversely impacted on their economic, social and cultural development. They have also not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.

211. The Court therefore holds that the Respondent violated Article 22 of the Charter.

I. Alleged violation of Article 1 of the Charter

Applicant's Submission

212. The Applicant urges the Court to apply its own approach[63] and that of the Commission[64] in respect of Article 1 of the Charter, that if there is a violation of any or all of the other Articles pleaded, then it follows that the Respondent is also in violation of Article 1.

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[63] *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania.*

[64] ACHPR Communications 147/95 & 149/96 Sir *Dawda K. Jawara v Gambia* (2000), 11 May 2000 paragraph 46 *13th Annual Activity Report* 1999-2000; Communication 211/98 *Legal Resources Foundation v Zambia* (2001), paragraph 62; Communications 279/03-296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009) at paragraph 227 where the nature of Article 1 as expressed in *Dawda Jawara* and *Legal Resources Foundation* are succinctly combined: The Commission concludes further that Article 1 of the Charter imposes a general obligation on all State parties to recognise the rights enshrined therein and requires them to adopt measures to give effect to those rights;as such any finding of violation of those rights constitutes a violation of Article 1.

Respondent's Submission

213. The Respondent made no submissions on the alleged violation of Article 1 of the Charter.

The Court's Assessment

214. Article 1 of the Charter declares that

> "The Member States of the Organization of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them".

215. The Court observes that Article 1 of the Charter imposes on State Parties the duty to take all legislative and other measures necessary to give effect to the rights and freedoms guaranteed in the Charter.

216. In the instant case, the Court observes that by enacting its Constitution in 2010, the Forest Conservation and Management Act No. 34 of 2016 and the Community Land Act, Act No. 27 of 2016, the Respondent has taken some legislative measures to ensure the enjoyment of rights and freedoms protected under the Charter. However, these laws were enacted relatively recently. This Court has also found that the Respondent failed to recognise the Ogieks, like other similar groups, as a distinct tribe, leading to denial of access to their land in the Mau Forest and the consequential violation of their rights under Article 2, 8, 14, 17(2) and (3), 21 and 22. In addition to these legislative lacunae, the Respondent has not demonstrated that it has taken other measures to give effect to these rights.

217. In view of the above, the Respondent has violated article 1 of the Charter by not taking adequate legislative and other measures to give effect to the rights enshrined under article 2, 8, 14, 17 (2) and (3), 21 and 22 of the Charter.

VIII. REMEDIES AND REPARATIONS

Applicant's Submission

218. The Applicant contends that the remedies of restitution, compensation, satisfaction and guarantees of non-repetition would be most suitable to remedy the violations they have suffered by the actions and omissions of the Respondent.

219. On restitution, the Applicant argues that the Ogieks are entitled to the recovery of their ancestral land through delimitation, demarcation and titling process conducted by the relevant Government authorities. With regard to compensation, the Applicant argues that the Ogieks should be granted adequate compensation for all the loss they have suffered. With respect to satisfaction and guarantees of non-repetition, the Applicant urges the Court to adopt measures including full recognition of the Ogieks as an indigenous people of Kenya; rehabilitation of the economic and social infrastructure; acknowledgment of its responsibility within one year of the date of the judgment; publication of the official summary of the judgment through a broadcaster with wide coverage in the community's region; and establishing a National Reconciliation Forum to address long-term sources of conflict.

Respondent's Submission

220. On the issue of restitution the Respondent contends that the Mau Forest Complex is strictly a nature reserve, and that the Respondent is obliged to protect and conserve it for the benefit of its entire citizenry under its national laws as well as under the African Convention on Conservation of Nature and Natural Resources.

221. On the issue of compensation, the Respondent submits that the Ogieks have adopted modern lifestyles, and as they now exist, they do not depend

on hunting and gathering for their livelihood and sustainability, and therefore they cannot claim to have sustained any economic loss through lost opportunities. The Respondent reiterates that evicting the Ogieks from the Mau Forest was done in fulfilment of its national and international obligations, and therefore, the issue of compensation does not arise, otherwise, States will be plagued with compensation claims from their citizens in the fulfilment of their international obligations arising from international instruments they have acceded to or ratified.

The Court's Assessment

222. The Court's power on reparations is set out in Article 27(1) of the Protocol which states that: "if the Court finds that there has been violation of a human and peoples' rights, it shall make appropriate orders to remedy the violation including the payment of fair compensation or reparation". Further, pursuant to Rule 63 of the Rules, "The Court shall rule on the request for reparation submitted in accordance with Rules 34(5) of these Rules, by the same decision establishing the violation of a human and peoples' rights or, if the circumstance so require, by a separate decision".

223. The Court decides that it shall rule on any other forms of reparations in a separate decision, taking into consideration the additional submissions from the Parties.

IX. COSTS

224. Neither the Applicant nor the Respondent made claims as to costs

225. The Court notes that Rule 30 of its Rules states that, "Unless otherwise decided by the Court, each party shall bear its own costs."

226. The Court shall rule on cost when making its ruling on other forms of reparation.

227. For these reasons, the Court unanimously:

On Jurisdiction

i) Dismisses the objection to the Court's material jurisdiction to hear the Application;

ii) Dismisses the objection to the Court's personal jurisdiction to hear the Application;

iii) Dismisses the objection to the Court's temporal jurisdiction to hear the Application;

iv) Declares that it has jurisdiction to hear the Application.

On Admissibility

i) Dismisses the objection to the admissibility of the Application on the ground that the Matter is pending before the African Commission on Human and Peoples' Rights;

ii) Dismisses the objection to the admissibility of the Application on the ground that the Court did not conduct a preliminary examination of the admissibility of the Application;

iii) Dismisses the objection to the admissibility of the Application on the ground that the author of the Application is not the aggrieved party in the complaint;

iv) Dismisses the objection to the admissibility of the Application on the ground of failure to exhaust local remedies;

v) Declares the Application admissible.

On the Merits

i) Declares that the Respondent has violated Articles 1, 2, 8, 14 17(2) and (3), 21 and 22 of the Charter;

ii) Declares that the Respondent has not violated Article 4 of the Charter;

iii) Orders the Respondent to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six (6) months from the date of this Judgment;

iv) Reserves its ruling on reparations;

v) Requests the Applicant to file submissions on Reparations within 60 days from the date of this judgment and thereafter, the Respondent shall file its

Response thereto within 60 days of receipt of the Applicant's submissions on Reparations and Costs.

Done, at Arusha, this Twenty Sixth day of May 2017 in English and French, the English text being authoritative.

Signed:

Sylvain ORÉ, President

Gérard NIYUNGEKO, Judge

Augustino S.L. RAMADHANI, Judge

Duncan TAMBALA, Judge

Elsie N. THOMPSON, Judge

EL Hadji GUISSE, Judge

Rafâa Ben ACHOUR, Judge

Solomy B. BOSSA, Judge

Angelo V. MATUSSE, Judge and

Robert ENO, Registrar

Annex 6: Judgment of African Court on Human and Peoples Rights in Application 006/2012 (***Reparations***) - *African Commission on Human and People's Rights v. Republic of Kenya*, delivered on 23rd June 2022

AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

THE MATTER OF

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

V.

REPUBLIC OF KENYA

APPLICATION No. 006/2012

JUDGMENT
(REPARATIONS)

23 JUNE 2022



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The Court composed of: Imani D. ABOUD, President; Blaise TCHIKAYA, Vice-President, Rafaâ BEN ACHOUR, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO – Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9 (2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Ben KIOKO, member of the Court and a national of Kenya, did not hear the Application.

In the Matter of:

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

Represented by:

i. Hon. Solomon DERSSO, Commissioner, ACHPR
ii. Mr. Bahame Tom NYANDUGA, Counsel
iii. Mr. Donald DEYA, Counsel

Versus

REPUBLIC OF KENYA

Represented by:

i. Mr. Kennedy OGETO , Solicitor General
ii. Mr. Emmanuel BITTA, Principal Litigation Counsel
iii. Mr. Peter NGUMI, Litigation Counsel

after deliberation,

renders the following judgment

I. BACKGROUND TO THE MATTER

1. In its Application, filed on 12 July 2012, the African Commission on Human and Peoples' Rights (hereinafter referred to as "the Applicant" or "the Commission") alleged that, in October 2009, the Ogiek, an indigenous minority ethnic group in the Republic of Kenya (hereinafter referred to as "the Respondent State"), had received a thirty (30) days eviction notice, issued by the Kenya Forestry Service, to leave the Mau Forest. The Commission filed this Application after receiving, on 14 November 2009, an application from the Centre for Minority Rights Development and Minority Rights Group International, both acting on behalf of the Ogiek of Mau Forest. In the Application, the Commission argued that the eviction notice failed to consider the importance of the Mau Forest for the survival of the Ogiek leading to violations of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the African Charter on Human and Peoples' Rights (hereinafter referred to as "the Charter").

2. The Court delivered its judgment on merits on 26 May 2017. In the operative part of its judgment, the Court pronounced itself as follows:

> On the Merits
> i) Declares that the Respondent has violated Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter;
> ii) Declares that the Respondent has not violated Article 4 of the Charter;
> iii) Orders the Respondent to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six (6) months from the date of this judgment;
> iv) Reserves its ruling on reparations;
> v) Requests the Applicant to file submissions on Reparations within 60 days from the date of this judgment and thereafter, the Respondent shall file its Response

thereto within 60 days of receipt of the Applicant's submissions on Reparations and Costs.

II. SUBJECT OF THE APPLICATION

3. In conformity with Rule 69(3) of the Rules, and in implementation of the operative part of its judgment on merits, the Parties filed their submissions on reparations within the times permitted by the Court.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

4. On 30 May 2017, the Registry transmitted to the Parties, the African Union Commission and the Executive Council of the African Union certified copies of its judgment on merits.

5. On 10 August 2017, the Registry received an application for leave to participate in the proceedings as *amici curiae* from the Human Rights Implementation Centre of the School of Law at the University of Bristol (hereinafter referred to as "the HRIC") and Centre for Human Rights, University of Pretoria (hereinafter referred to as "the CHR"). On 30 November 2017, the Court granted them leave to act as *amici curiae,* after duly notifying the Parties of their application .

6. On 23 October 2017, the Registry received the Applicant's submissions on reparations. These were transmitted to the Respondent State on 25 October 2017, requesting it to file its Response within thirty (30) days of receipt.

7. On 30 January 2018, the *amici curiae* filed their combined brief and on 31 January 2018, this was transmitted to the Parties for their information.

8. On 13 February 2018, the Respondent State filed its submissions on reparations and these were transmitted to the Applicant on 16 February 2018 giving it thirty (30) days to file a Reply, if any. On 21 March 2018, the Respondent State filed its further submissions on reparations which were transmitted to the Applicant on 29 March 2018 for Reply, within thirty (30) days of receipt thereof.

9. On 9 May 2018, the Registry received the Applicant's Reply and this was transmitted to the Respondent State on 11 May 2018, for its observations, if any, within thirty (30) days of receipt of the Notice.

10. On 13 June 2018, the Registry received the Respondent' State's observations and these were transmitted to the Applicant for information on 14 June 2018.

11. On 20 September 2018, the Registry notified the Parties of the closure of the written proceedings effective on that date.

12. On 16 April 2019, the Registry received two applications, one from Wilson Barngetuny Koimet and 119 others, and the other from Peter Kibiegon Rono and 1300 others for leave to join the proceedings as interested parties. These applications were jointly considered by the Court and dismissed on 4 July 2019.[1]

13. On 29 August 2019, the Registry received an application for review of the Court's decision of 4 July 2019. This application was considered by the Court and dismissed on 11 November 2019.[2].

14. On 10 October 2019, the Registry received an "application to intervene at the reparations stage" filed by Kipsang Kilel and others, being members of the Ogiek

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[1] *African Commission on Human and Peoples' Rights v Kenya*, AfCHPR, Application No. 006/2012, Order (Intervention) 4 July 2019.
[2] *Application for review by Wilson Barngetuny Koimet and 114 others of the Order of 4 July 2019* (Order) 11 November 2019.

Community residing in the Tinet Settlement Scheme. This Application was considered by the Court and dismissed on 28 November 2019.[3]

15. On 22 November 2019, the Registry informed the Parties and the *amici curiae* of the Court's decision to hold a public hearing which was scheduled for 6 March 2020. The Parties and the *amici curiae* were also sent a list of issues to which their responses were required by 15 January 2021.

16. The Parties and the *amici curiae* all filed their responses to the list of issues within the time permitted by the Court.

17. On 3 March 2020, the Registry informed the Parties and the *amici curiae* of the Court's decision, under Practice Direction 34, to adjourn the hearing scheduled for 6 March 2020 to 5 June 2020 due to the non-availability of the Parties.

18. On the Court's request, two independent expert submissions were filed, one on 2 April 2020 by Dr Elifuraha Laltaika, former expert member of the United Nations Permanent Forum on Indigenous Issues and the other on 30 April 2020 by Victoria Tauli-Corpuz, the then United Nations Special Rapporteur on Rights of Indigenous People. These submissions were duly transmitted to the Parties and the *amici curiae* for their information.

19. On various occasions, in the course of 2020 and 2021, the Court attempted to convene the public hearing but was unable to do so largely due the COVID-19 Pandemic.

20. On 25 June 2021, the Court issued an Order adjourning the public hearing *sine die* and further directed that the reparations phase of the Application would be

[3] Application No. 001/2019, *Application for intervention by Kipsang Killel and others* , (Order) Intervention 28 November 2019.

"disposed of on the basis of the Parties' written pleadings and submissions." This Order was notified to the Parties and the *amici curiae* on 29 June 2021.

21. The Court acknowledges that the Parties filed several submissions in this matter including their responses to the list of issues developed by the Court.

IV. PRAYERS OF THE PARTIES

22. The Applicant prays the Court to order the Respondent to:

i. Undertake a process of delimiting, demarcation and titling of Ogiek ancestral land, within which the Ogiek fully participate, within a timeframe of 1 year of notification of the reparations order;

ii. Establish and facilitate a dialogue mechanism between the Ogiek (via the Original Complainants), KFS [Kenya Forest Service] (where relevant) and relevant private sector operators in order to reach mutual agreement on whether commercial activities on Ogiek land should cease, or whether they will be allowed to continue but operating via a lease of the land and/or royalty and benefit sharing agreement between the Ogiek communal title holders and the commercial operators, in line with provisions 35 to 37 of the Community Land Act, 2016, such dialogue to have concluded within a timeframe of 9 months of notification of the reparations order ...;

iii. Pay the sum of US$297 104 578 in pecuniary and non-pecuniary damage into a Community Development Fund for the Ogiek within no more than 1 year of the Court's Order on Reparations;

iv. Take all the necessary administrative, legislative, financial and human resource measures to create a Community Development Fund for the benefit of the members of the Ogiek people within 6 months of notification of the Court's Order on Reparations;

v. Adopt legislative, administrative and other measures to recognize and ensure the right of the Ogiek to be effectively consulted, in accordance with their traditions and customs and/or with the right to give or withhold their free prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land, and implement adequate safeguards to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Ogiek;

vi. Provide for full consultation and participation of the Ogiek, in accordance with their traditions and customs, in the reparations process as a whole, including all steps that the Respondent State and its agencies take in order to comply with the requested Court order to restitute Ogiek land, provide the Ogiek with compensation, and provide other guarantees of satisfaction and non-repetition ...;

vii. Introduce specific legislative, administrative and other measures that are necessary to give effect to the obligations of the Respondent State with respect to the restitution, compensation and other guarantees of satisfaction and non-repetition herein sought, as well as with respect to consultation and participation of the Ogiek, which become apparent as the implementation process takes place, and as set out in this brief, with such processes to be completed within 1 year of the date of the Court's order on reparations, and the Applicant accordingly submits that the Respondent State must take appropriate action to comply with the same;

viii. Fully recognize the Ogiek as an indigenous people of Kenya, including but not limited to the recognition of the Ogiek language and Ogiek cultural and religious practices; provision of health, social and education services for the Ogiek; and the enacting of positive steps to ensure national and local political representation of the Ogiek; and

ix. Publicly issue a full apology to the Ogiek for all the violations of their rights as identified by the Judgment, in a newspaper with wide national circulation

and on a radio station with widespread coverage, within 3 months of the date of the date of the Court's order on reparations; and

x. Erect a public monument acknowledging the violation of Ogiek rights, in a place of significant importance to the Ogiek and chosen by them, the design of which also to be agreed by them, within 6 months of the date of the date of the Court's order on reparations.

23. The Respondent State prays the Court to:

i. Find that it remains committed to the implementation of the Court's judgment as evidenced by its establishment of a multi-agency Task Force to oversee the implementation of the Court's judgment;

ii. Order that guarantees of non-repetition together with rehabilitation measures are the most far reaching forms of reparations that could be awarded to redress the root and structural causes of identified human rights violations;

iii. Order that the Court should use its offices to facilitate an amicable settlement with the Ogiek Community on the issue of reparations;

iv. Hold that restitution, for the Applicants, can be achieved by reverse action of guaranteeing and granting access to the Mau Forest, save where encroachment in the interest of public need or in the general interest of the community in accordance with the provisions of the appropriate law and that the modalities of how this can be undertaken to be advised by the Taskforce;

v. Find that demarcation and titling is totally unnecessary for purposes of access, occupation and use of the Mau Forest by the Ogiek; and further that the right to occupy and use the Mau Forest would suffice as adequate

restitution to the Ogiek and that the individual demarcation and titling would undermine common access and use of the land by other people i.e. nomadic groups that have seasonal access to the Mau Forest;

vi. Hold that the Respondent State's 2010 Constitution creates a legal super structure that is meant to address the structural and root causes of violations of Article 2 and that by virtue of the existing laws, the same have been substantially remedied and what is left can be attained by administrative interventions and guarantees of non-repetition;

vii. Find that the Court did not determine that the Ogiek were the owners of the Mau Forest. Additionally, that ownership is not a *sine qua non* for the utilization of land;

viii. Reject the community survey report submitted by the Applicant as not credible and the claim for US$ 297,104,578, as compensation, as being premised on speculative presumptions which are neither fair nor proportionate. Further, that no evidence has been led to prove that the survey was actually conducted;

ix. Find that any compensation due to the Applicants cannot be computed in United States Dollars for a claim involving a country whose currency is not the United States Dollar;

x. Order that the Respondent State's general liability for violations of the Charter can only be computed from 1992, the year when the Respondent became a party to the Charter. Specifically in relation to the eviction of the Ogiek from Mau Forest, that its liability can only be computed from 26 October 2009, when the notice of eviction from South Western Mau Forest was issued;

xi. Find that the Gazette Notice appointing the Task Force to give effect to the decision of the Court suffices as a public notice acknowledging violations of the Charter and should be deemed to be just satisfaction;

xii. Hold that there is no basis for ordering the erection of a monument for the Ogiek commemorating the violation of their rights since the Ogiek have no practice of monument erection and there is no evidence that the same would be of any significance to their community especially as the Respondent State already acknowledged its wrong and is actively taking steps to redress the same;

xiii. Find that any award of reparation made by the Court must take into account the situation of the Respondent State as a country so as not to cause it undue hardship.

xiv. Hold that the jurisprudence of the Inter-American Court of Human Rights is not binding on this Court and cannot be the basis for a claim for restitution before the Court;

xv. Hold that neither Minority Rights Group International not the Ogiek Peoples' Development Program are representative of the Ogiek and that only the Ogiek Council of Elders is recognised as the body that can speak on behalf of the Ogiek;

xvi. Find, overall, that the Applicant's claims are unsubstantiated and the Court should carefully assess all claims so as to exclude speculative claims.

V. RESPONDENT STATE'S OBJECTIONS

24. Before dealing with the claims for reparations, the Court considers it pertinent to

begin by addressing three objections raised by the Respondent State.

A. Liability for activities before 1992

25. The Respondent State contends that there is no basis for a claim for compensation for any violations before the year 1992 when it became party to the Charter. It further contends that "any claim for financial compensation can only be computed from 26 October 2009 and only in relation to the notice given to the Ogiek to vacate the South Western Mau Forest."

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26. The Court recalls that this issue was already resolved in its merits judgment when it confirmed its temporal jurisdiction in this Application.[4] Additionally, the Court takes notice of the fact that the violations alleged by the Applicant, which the Court established in its judgment of 26 May 2017, remain unaddressed up to date.

27. In the circumstances, the Court holds that comprehensive reparations need to take into account not only events after 10 February 1992 but also events before that so long as the same can be connected to the harm suffered by the Ogiek in relation to the infringement of their rights as established by the Court. This would ensure that reparations awarded comprehensively address the prejudice suffered by the Ogiek as a result of the Respondent State's conduct. The Court holds, therefore, that there is nothing barring it from considering events that occurred prior to 10 February 1992 in determining the reparations due to the Ogiek.

[4] See, *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 64-66.

B. The proposal for an amicable settlement

28. The Respondent State submits that the present Application is a proper case for an amicable settlement in line with Article 9 of the Protocol. According to the Respondent State, "a negotiated settlement is the best solution in the peculiar circumstance of this case".

29. The Applicant opposes the Respondent State's submission. It argues that a ruling on reparations is necessary in order to provide clear guidance on reparations to the Respondent State and to ensure the realisation of the Ogiek's rights and guarantee an effective remedy for violations. The Applicant also points out that previous attempts for an amicable settlement have failed. According to the Applicant, therefore, a genuine and efficient amicable settlement procedure is extremely doubtful but may also seriously undermine the possibility of the Ogiek being offered a fair deal and risks prolonging the human rights violations they have already suffered.

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30. The Court observes that Article 9 of the Protocol provides that "the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter." It further observes that Rule 29(2)(a) of the Rules provides that "in the exercise of its contentious jurisdiction, the Court may (a) promote amicable settlement in cases pending before it in accordance with the provisions of the Charter and the Protocol".[5] The Court's powers to facilitate an amicable settlement are further clarified in Rule 64.[6]

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[5] Rule 26 (1) (c) Rules of Court, 2 June 2010.

[6] Rule 64, in so far as is material, provides as follows: 1. Pursuant to Article 9 of the Protocol, the Court may promote amicable settlement of cases pending before it. To that end, it may invite the parties and take appropriate measures to facilitate amicable settlement of the dispute; 2. Parties to a case before the Court, may on their own initiative, solicit the Court's intervention to settle their dispute amicably at any time before the Court gives its judgment. (Formerly, Rule 56, Rules of Court 2 June 2010).

31. In the context of the present Application, the Court recalls that at the merits stage of the proceedings, it initiated a process for the possible amicable settlement of this matter. Although both Parties, initially, indicated willingness to participate in the envisaged amicable settlement, this process collapsed when the Parties could not agree on the issues to be covered by the settlement. It was as a result of the preceding that on 7 March 2016, the Court wrote both Parties conveying its decision to proceed with a judicial consideration of the matter especially given the Parties' failure to agree on an amicable settlement.

32. From the totality of the Parties' submissions on reparations, it is clear that they hold opposing views on the possibility of an amicable settlement. The Court stresses in this regard that a key prerequisite for an amicable settlement is that the Parties must be willing to engage in the process. Given the failure of the previous attempt at an amicable settlement in this matter, and also recalling that the provisions of the Protocol and Rules, on amicable settlement, are not mandatory, the Court finds that the prerequisites for an amicable settlement are not met. The Court, therefore, dismisses the Respondent State's prayer.

C. The involvement of the "original complainants" in the proceedings

33. The Respondent State questions the involvement of the Centre for Minority Rights Development (hereinafter referred to as "CEMIRIDE"), Minority Rights Group International (hereinafter referred to as "MRGI") and the Ogiek People's Development Programme (hereinafter referred to as "OPDP") in the present proceedings on the basis that these organisations are not representative of the Ogiek. It argues that the present matter could be resolved amicably if "rent seeking western funded organisations" are excluded from the negotiations. The Respondent State further argues that the Rules "do not provide for parties described as original complainants other than the applicant before this Court." The Respondent State invites the Court to "invoke the provisions of either Rules 45 or 46 of the Rules to ascertain the fact of whether the named non-

governmental organisations have the mandate from the Ogiek Council of Elders to speak on their behalf and whether they consulted and obtained by way of a resolution or consent of the said Council of Elders the permission to purport to act for them."

34. The Applicant submits that "the Ogiek have been and remain clear on who should represent them throughout the 9 year journey that this case has been pending before the Commission and then the Court, namely OPDP." In the Applicant's view, this was confirmed to the Respondent State's Attorney General and others by way of letters dated 11 July 2017 and 8 October 2017. The Ogiek, through the OPDP, it is argued, also clarified representation issues in a letter to the Ministry of Environment and Natural Resources dated 7 December 2017, accompanied by a power of attorney signed by forty (40) Ogiek elders from all locations in the Mau Forest, confirming that OPDP should continue to represent them within discussions on reparations and implementation of the Judgment. The Applicant thus submits that the OPDP, which is among the "original complainants" in this case, truly represents the Ogiek Community.

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35. The Court recalls that the question of the representation of the Ogiek in this Application is not arising for the first time. During the merits stage, the Respondent State raised an objection relating to the involvement of the "original complainants" before the Commission in the litigation before this Court.[7] As against this background, the Court reiterates that the Applicant before it is the Commission rather than the "original complainants" that filed the case, on behalf of the Ogiek, before the Commission. As pointed out in the judgment on merits, since the "original complainants" are not appearing before the Court as Parties[8] the Court holds that it has proper Parties before it to enable it dispose of the

[7] *ACHPR v Kenya* (merits) §§ 84-85.
[8] *ACHPR v Kenya* (merits) § 88.

Application.

VI. REPARATIONS

36. The Court recalls that the right to reparations for the breach of human rights obligations is a fundamental principle of international law.[9] A State that is responsible for an international wrong is required to make full reparation for the damage caused. The Permanent Court of International Justice (hereinafter referred to as "the PCIJ") ably restated the position in the following words:[10]

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.

37. This fundamental principle has been consistently reiterated by the Court in its case law.[11] For example, in *Reverend Christopher Mtikila v United Republic of Tanzania* the Court stated as follows: [12]

> One of the fundamental principles of contemporary international law on State responsibility, that constitutes a customary norm of international law, is that, any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation.

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[9] Cf. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 - https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx.

[10] PCIJ: *The Factory at Chorzow (Jurisdiction)* Judgment of 26 July 1927 p.21; See also: *Idem* (Merits), Judgment of 13 September 1928, Series A, No. 7, p. 29.

[11] *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples Rights v Burkina Faso* (Reparations) (5 June 2015) 1 AfCLR 258 §§ 20-30; and *Lohe Issa Konate v Burkina Faso* (Reparations) (3 June 2016) 1 AfCLR 346 §§ 15-18.

[12] (14 June 2013) 1 AfCLR 72 §§ 27-29.

38. The Protocol aligns itself with this well-established principle of international law by providing, in Article 27(1), that "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including payment of fair compensation or reparation."

39. The above principles are reiterated, with a focus on indigenous peoples, in the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter referred to as "the UNDRIP"). For example, Article 28 provides as follows:[13]

> Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
> Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

40. The Court recalls that it is a general principle of international law that the Applicant bears the burden of proof regarding the claim for reparations.[14] Additionally, it is not enough for the Applicant to show that the Respondent State has violated a provision of the Charter, it is also necessary to prove the damage that the State is being required to indemnify.[15] As pointed out in *Zongo and others v Burkina Faso* the existence of a violation of the Charter is not sufficient, *per se*, for reparation to accrue.[16] There must, therefore, be a causal link between the wrongful act that has been established and the alleged prejudice.

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[13] It also bears pointing out that the provisions of Article 28 of the UNDRIP find resonance in Articles 8(2), 11(2) and 20(2) of the same Declaration, where the emphasis is on the right to reparations for violation of indigenous peoples' rights.
[14] *Mtikila v Tanzania* § 40.
[15] Ibid § 31.
[16] *Zongo and others v Burkina Faso* (Reparations) § 24. See also, *Konate v Burkina Faso (Reparations)* § 46.

41. In terms of the damage that reparations must cover, the Court notes that, according to international law, both material and moral damages have to be repaired. [17] While reparations serve multiple functions, fundamentally their objective is to restore an individual(s) to the position that he/she would have been in had he/she not suffered any harm while at the same time establishing means for deterrence to prevent recurrence of violations.[18]

42. In terms of quantification of the reparations, the applicable principle is that of full reparation, commensurate with the prejudice suffered. As stated by the PCIJ in *The Factory at Chorzow*, the State responsible for the violation needs to make effort to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[19]

43. The Court observes that whenever it is called upon to adjudicate on reparations, it takes into account not only a fair balance between the form of reparation and the nature of the violation, but also the expressed wishes of the victim.[20] Further, the Court supports a wide interpretation of "victim" such that, in an appropriate case, not only first line heirs can claim damages but also other close relatives of the direct victim. In this connection, the Court notes that in *Zongo and others v Burkina Faso*, it cited with approval the definition of a victim proposed in the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. [21]

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[17] *Zongo and others v Burkina Faso* (Reparations) § 26.
[18] D Shelton *Remedies in international human rights law* (2015) 19-27
[19] PCIJ: *The Factory at Chorzow (Merits)*, Judgment of 13 September 1928, Series A, No. 17, p 47.
[20] *Ingabire v Rwanda* (Reparations) § 22.
[21] "Victim" is defined as "... persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" § 8.

44. In its understanding of a "victim/s" of human rights violations, the Court remains alive to the fact that the notion of "victim" is not limited to individuals and that, subject to certain conditions, groups and communities may be entitled to reparations meant to address collective harm.[22]

45. In the present Application, the Court recalls that the wrongful acts generating the international responsibility of the Respondent State is the violation of Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter. All the reparation claims, therefore, have to be considered and assessed in relation to the violation of the earlier mentioned provisions of the Charter. It is against the above outlined principles that the Court will consider the prayers for both pecuniary and non-pecuniary reparations.

A. Pecuniary reparations

46. The Court notes that the Applicant has requested the award of sums of money as compensation for material harm and moral harm.

i. Material prejudice

47. The Applicant prays for compensation to be awarded to the Ogiek as a result of the violations that the Court found. The Applicant submits that for compensation to the Ogiek to be proportional to the circumstances, the compensation should be awarded for all damage suffered as a result of the violations including the payment of pecuniary damages to reflect the violation of their right to development and the loss of their property and natural resources.

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[22] Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth Session, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Final report submitted by Mr Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, 2 July 1993 §§ 14-15.

48. As to the violations that should inform the compensation, the Applicant avers that the encroachments on the Ogiek's land is the basis for the claim for compensation. Specifically, the Applicant submits that the eviction of the Ogiek from their land and the resulting loss of their non-movable possessions on the land, including dwellings, religious and cultural sites and beehives, the lack of prompt and full compensation to the Ogiek for the loss of their ability to use and benefit from their property over the years and the denial of benefit, use of and interest in their traditional lands since eviction, including the denial of any financial benefit from the lands resources, such as that generated by logging concessions and tea plantations should inform the award of compensation.

49. In a bid to substantiate its claim, the Applicant submits a report from a community survey (Annex E to the Applicant's submissions on reparations) that was supposedly undertaken among the Ogiek. According to the Applicant, for quantification of pecuniary loss, one hundred and fifty-one (151) members of the Ogiek community, each representative of a distinct household, were interviewed through a questionnaire focused on the pecuniary loss suffered as a direct result of the violation of Article 14 and 21 of the Charter. The Applicant submits that the community survey was complemented by a desk-based analysis to quantify the loss to the Ogiek as a result of denial of financial benefits from the resources on the Ogiek ancestral land.

50. In connection to the community survey, the Applicant further submits that the quantification of pecuniary damage, and even non-pecuniary damage, simply represents the "best efforts of the Applicant to provide the evidentiary elements for the Court to have confidence to set a compensation award for the Ogiek ..." The Applicant concedes that calculating the pecuniary, and even non-pecuniary damage, occasioned to the Ogiek over the years is challenging given, among other things, the number of Ogiek involved in the forcible evictions, the passage of time and the dying of some members of the community as well as the peculiar nature of the Ogiek traditional life style which makes it difficult to preserve specific

records and proof of lost property. The Applicant thus submits that the Court should "acknowledge the efforts of the Applicant to quantify the compensation it believes is owed to the Ogiek and accept that some aspects of the quantification may require the Court to speculate and base the award on principles of equity in light of the context in which the human rights violations have occurred."

51. Overall, the Applicant contends that the material loss survey was designed to determine the extent of the loss across the broader Ogiek population. Given the preceding, the Applicant submits that the pecuniary damages due to the Ogiek, as a result of the violations established by the Court, should amount to at least US$204,604,578 (Two hundred and four million, six hundred thousand and four, and five hundred seventy eight United States Dollars). and accordingly prays for this amount to be awarded.

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52. The Respondent State submits that pecuniary damages cannot be awarded on the basis of the "best efforts" of an Applicant which are premised on speculative presumptions but only on legal evidentiary standards based on verifiable empirical data. According to the Respondent State, "pecuniary reparations ought not to be speculative but must be based on cogent proof, the legal and evidential [burden] which squarely falls on the shoulders of the Applicant and to have it otherwise would have no basis in law."

53. The Respondent State also submits that the Applicant's claim for pecuniary damages is fanciful, has no basis in law or practice, and if it were to be awarded alongside other forms of reparations it would be manifestly disproportionate and would constitute unjust enrichment contrary to principles for reparations under international law.

54. Specifically, the Respondent State further submits that the claims on account of loss of farm buildings (US$ 18,029,915 – Eighteen million twenty nine thousand and nine hundred fifteen United States Dollars) and loss of livestock (US$ 97,923,370 – Ninety seven million nine hundred twenty three thousand three hundred seventy United States Dollars) are a clear departure from the Applicant's pleadings and submissions at the merits stage about the Ogiek way of life and are without basis.

55. The Respondent State also submits that, for loss of housing, the principle of causality requiring a causal link between the violation found, the harm produced and the reparation sought is missing because the Applicant failed to demonstrate the materials used in building the houses and to show a clear nexus between the same and the losses occasioned.

56. The Respondent State submits that the claim for US$14,777,233 (Fourteen million seven hundred seventy seven thousand two hundred thirty three United States Dollars), on account of loss of revenue generated from the Mau forest, is fanciful and not premised on any evidence.

57. Overall, the Respondent State opposes the admission into evidence of the community survey report submitted by the Applicant. According to the Respondent State, the community survey report has no probative value, its methodology is flawed, its analysis is faulty and there is no proof that actual interviews were conducted among the Ogiek to inform the report. Further, the Respondent State also opposes the Applicant's computation of damages in United States Dollars when the claim at issue involves an African country and it is before a court sitting in Africa.

58. The Respondent State further submits that any award for compensation, in case the Court decides to award compensation, should not be such as to cause any unjust enrichment and the Court should be careful not to put the Respondent

State into a situation of disproportionate hardship.

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59. The Court acknowledges that compensation is an important means for effecting reparations. For example, in the *Mtikila v Tanzania* the Court reiterated the fact that a State that has violated rights enshrined in the Charter should "take measures to ensure that the victims of human rights abuses are given effective remedies including restitution and compensation".[23]

60. As acknowledged by the Court, however, it is not enough for an Applicant to show that the Respondent State has violated a provision of the Charter, it is also necessary to prove the damage that the State is being required to indemnify.[24] The Applicant, therefore, bears the duty of proving the causal nexus between the violations and the damage suffered. Additionally, all material loss must be specifically proved. In insisting on proof of material loss, however, the Court is alive to the fact that victims of human rights violations may face challenges in collating evidence in support of their claims for various reasons. As such, the Court proceeds on a case by case basis paying attention to the consistency and credibility of the Applicant's assertions in the light of the whole Application.[25]

61. In attempting to prove the pecuniary loss occasioned to the Ogiek, the Applicant relied on a community survey report which was submitted as Annex E to its submissions on reparations. In its further submissions, the Applicant offered clarification about the methods and processes that were used in developing the community survey report especially data collection and analysis. The Court notes, however, that the Respondent State opposes the admission into evidence of this report.

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[23] *Mtikila v Tanzania (Reparations)* § 29.
[24] Ibid §§ 31-32.
[25] *Anudo Ochieng Anudo v United Republic of Tanzania* ACtHPR Application No. 012/2015 Judgment of 2 December 2021 (reparations) §§ 31-32.

62. In so far as the community survey report is concerned, the Court notes that the Applicant has conceded some limitations in the process of developing and executing the survey which limitations have the potential of affecting the outcomes. For example, the Applicant posits that the "methodological and logistical challenges of ascribing a precise monetary value to the collective harms suffered by the Ogiek community are numerous."

63. The Court, therefore, while noting the Applicant's effort to deploy a scientific method for determining the compensation due to the Ogiek, holds that the best way forward is to make an equitable award while being mindful of the general challenges of assessing compensation, with mathematical precision, in cases involving violation of indigenous peoples' rights. Resultantly, the Court does not consider itself bound by the community survey report submitted by the Applicant.

64. Specifically, the Court recalls that the claim for compensation by the Applicant relates to the violation of Articles 14 and 21 of the Charter and specifically in relation to the following: the loss of non-moveable possessions from Ogiek land, both houses($59 736 172); and farm buildings ($18 029 915) the loss of livestock reliant on the land from which the Ogiek were evicted ($97 923 370); the loss of household income generated from activities on Ogiek land ($14 137 888); and the loss of revenue generated from activities using the Mau Forest due to the eviction of the Ogiek ($14 777 233). The detailed breakdown for the amounts claimed in respect of each head of loss are contained in Annex E to the Applicant's submissions on reparations, and the total claim is US$204,604,578 (Two hundred and four million, six hundred and four thousand, and five hundred seventy eight United States Dollars).

65. Notwithstanding the limitations with the community survey report submitted by the Applicant, it is incontrovertible that the actions of the Respondent State resulted in a violation of the rights of the Ogiek under Articles 14 and 21 of the

Charter, among other Charter provisions.[26] Given that the Respondent State is responsible for the violation of the rights of the Ogiek, it follows that it bears responsibility for rectifying the consequences of its wrongful acts.

66. The Court, however, acknowledges that the length of time over which the violations occurred, the number of people affected by the violations, the Ogiek way of life and the general difficulties in attaching a monetary value to the loss of resources in the Mau Forest, among other factors, make a precise and mathematically exact quantification of pecuniary loss difficult. It is for the preceding reasons, among others, that the Court must exercise its discretion in equity to determine what amounts to fair compensation to be paid to the Ogiek.

67. In choosing to proceed by way of making an award in equity, the Court does not thereby subject the final award to its absolute and unregulated discretion.[27] The Court has paid particular attention to all the submissions, and the supporting documents, filed by the Parties, the *amici curiae* and also the independent experts in order to inform its decision on the equitable award due to the Ogiek. The Court's award, therefore, though premised on the exercise of its equitable discretion is nevertheless informed by the submissions before it and the applicable law.

68. In terms of the currency in which the moneteray awards must be made, the Court recalls that the Applicant has pegged all its claims in United States Dollars. The Respondent State, however, opposes this approach and insists that any award, if it is made, should be made in its currency.

69. In relation to this issue, the Court recalls that in *Ingabire Victoire Umuhoza v Republic of Rwanda* it held that where an Applicant is residing in the territory of

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[26] *ACHPR v Kenya* (merits) § 201.
[27] Cf. IACtHR, *Case of The Kichwa Indigenous People of Sarayaku v. Ecuador* Judgment of June 27, 2012 (Merits and reparations) § 314 available at https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf.

the Respondent State, the amount of reparation should be calculated in the currency of the said State.[28] In the present case, therefore, the Court holds that the currency of any monetary award issued to the Applicant must be in the currency of the Respondent State since the Ogiek, for whose benefit this Application was commenced, are all resident in the territory of the Respondent State and all the violations happened within the territory of the Respondent State.

70. The Court takes particular cognisance of the fact that the claim for compensation relates to the right to property and also the right to freely dispose of wealth and natural resources. The Court is aware that the violations at issue herein have been ongoing for a long time and that they affect a particularly vulnerable section of the Respondent State's population. The award of compensation must, therefore, and in so far as is possible, operate to ameliorate the overall condition of the Ogiek..

71. Given the Parties' contrasting submissions about the relevance of comparative international law, the Court wishes to reiterate that it is not bound by decisions and statutes from other regional human rights systems. Nevertheless, in appropriate cases, it can draw inspiration from pronouncements emerging from other supranational human rights bodies and also distinguish the emerging principles as appropriate.

72. It is against this background that the Court considers the *Case of the Saramaka People v Suriname*[29] , also involving an indigenous community, in which the Inter-American Court of Human Rights ordered the respondent to pay, into a development fund for the benefit of the applicants, the sum of US$75, 000 (Seventy five thousand United States Dollars) as compensation for the material prejudice suffered by the applicants.[30] In this particular case, the material

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[28] *Ingabire v Rwanda (Reparations)* § 45. See also, *Anudo Ochieng Anudo v United Republic of Tanzania*, ACtHPR, Application 012/2015, Judgment of 2 December 2021(Reparations) § 21 and *Amir Ramadhani v United Republic of Tanzania,* ACtHPR, Application 010/2015, Judgment of 25 June 2021 (Reparations) § 14.
[29] Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs).
[30] http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

damage suffered by the applicants consisted primarily of the illegal exploitation of their lands and natural resources.

73. The Court also notes that in the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* also involving an indigenous community, the Inter-American Court found that the sum of US$90 000 (Ninety thousand United States Dollars) was adequate compensation in equity for the pecuniary prejudice suffered by the Sarayaku People.[31] In coming up with this award, the Court took into consideration the fact that the Sarayaku incurred expenses in commencing domestic proceedings to enforce their rights, that their territory and natural resources were damaged, and that their financial situation was affected when their production activities were suspended during certain periods.

74. In so far as distinguishing the earlier referred to cases from the Inter-American System is concerned, and in a non-exhaustive way, the Court takes notice of the fact that the violations at issue in the present Application are not all fours with those established in the the *Case of the Saramaka People* or even the *Case of The Kichwa Indigenous People of Sarayaku*. The Court acknowledges that the violations of the rights of the Ogiek have spanned a long period of time during which the Respondent State has failed/neglected to implement measures meant to safeguard their rights.

75. The Court is aware that the Ogiek have suffered violations that involve multiple rights under the Charter. This points to a systemic violation of their rights.

76. Given the communal nature of the violations, the the Court finds it inappropriate to order that each member of the Ogiek community be paid compensation individually or that compensation be pegged to a sum due to each member of the Ogiek Community. The Court is reinforced in its preceding finding given not only the communal nature of the violations but also due to the practical

[31] IACtHR *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* Judgment of June 27, 2012 (Merits and reparations) § 317 available at https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf.

challenges of making individual awards for a group numbering approximately 40 000 (forty thousand).

77. Taking all factors into consideration, the Court decides, in the exercise of its equitable jurisdiction, that the Respondent State must compensate the Ogiek with the sum of KES 57 850 000. (Fifty seven million, eight hundred and fifty thousand Kenya Shillings) for the material prejudice suffered.

ii. Moral prejudice

78. The Applicant prays for the payment of compensation for the moral prejudice as a result of violations related to the principle of non-discrimination (Article 2), the right to religion (Article 8), the right to culture (Article 17) and the right to development (Article 22) of the Charter.

79. According to the Applicant, the Ogiek have suffered routine discrimination at the hands of the Respondent State including the non-recognition of their tribal or ethnic identity and their corresponding rights. The Ogiek have not been able to practice their religion including prayers and ceremonies intimately connected to the Mau Forest, to bury their dead in accordance with traditional spiritual rituals, and access sacred sites for initiation and other ceremonies. They have also been denied access to an integrated system of beliefs, values, norms, traditions and artefacts closely linked to the Mau Forest and have had their right to development violated due to the Respondent State's failure to consult with or seek their consent about their shared cultural, economic, and social life within the Mau Forest.

80. The methodology used by the Applicant to quantify the non-pecuniary loss is contained in the compensation analysis report earlier referred to. According to the Applicant, bearing in mind the number of human rights violations found by the Court, the seriousness of the violations, the number of victims at stake and

the anxiety, inconvenience and uncertainty caused by the violations, the sum of US$92 500 000 (ninety two million five hundred thousand United States Dollars) would be adequate to compensate the Ogiek for their moral loss.

81. In coming up with the amount of US$92 500 000, the Applicant has referred the Court to the following cases –*the case of the Kichwa Indigenous People of Sarayaku v Ecuador* (2012) [1200 victims, compensation awarded US$1 250 000], the *Case of the Xakmok Kasek Indigenous Community v Paraguay* (2010) [268 victims, compensation awarded US$700 000], the *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (2006) [407 victims, compensation awarded US$ 1 000 000] and the *Case of the Yakye Axa Indigenous Community v Paraguay* (2005) [319 victims, compensation awarded US$950 000].

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82. The Respondent State disputes the Applicant's claims for moral loss. Specifically, it reiterates its objection to the admissibility of the compensation analysis report filed by the Applicant and avers that all the information contained in the report is incorrect and without any factual basis.

83. In respect of the alleged violation of Article 2 of the Charter, the Respondent State avers that its Constitution of 2010 provides a solid legal super structure which seeks to address the structural and root causes of violations of Article 2 and that the Ogiek's principal grievance lay with the period before the 2010 Constitution was adopted. As for the violation of Article 8 of the Charter, the Respondent State submits that that "the Court in its judgment proposed reparation by means of allowing access to the Mau Forest and government interventions including sensitizing campaigns, collaboration towards maintenance of sites, waiving fees, which the Respondent State has demonstrated willingness to observe and is only structuring the how to."

84. As for the violation of Article 17 of the Charter, the Respondent State submits that it has already addressed the issue of eviction and access to the Mau Forest. In relation to the violation of Article 21 of the Charter, the Respondent submits that the Applicant has misinterpreted the Court's judgment on merits. According to the Respondent State, "the Court did not determine that the Ogiek were the owners of Mau Forest ..." and that the Applicants have misapprehended the findings of the Court and placed emphasis on ownership rather than the right to access, use and occupy the land.

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85. The Court notes that, in its judgment on merits, it established that the Respondent State violated the Ogiek's rights under Article 2 of the Charter by failing to recognise the Ogiek as a distinct tribe like other groups;[32] Article 8 of the Charter by making it impossible for the Ogiek to continue practising their religious practices;[33] Article 17(2) and (3) of the Charter by evicting the Ogiek from the Mau Forest area thereby restricting them from exercising their cultural activities and practice; and Article 22 of the Charter due to the manner in which the Ogiek have been evicted from the Mau Forest.[34]

86. The Court confirms that moral prejudice includes both the suffering and distress caused to the direct victims and their families, and the impairment of values that are highly significant to them, as well as other changes of a non-pecuniary nature, in the living conditions of the victims or their family.[35]

87. In so far as the question of causation for moral prejudice is concerned, the Court recalls that in *Zongo and others v Burkina Faso* it held that the causal link

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[32] *ACHPR v Kenya* (merits) § 146.
[33] Ibid § 169.
[34] Ibid § 210.
[35] Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala* (Reparations and costs) § 84, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_77_ing.pdf; and *Case of Forneron and daughter v. Argentina* § 194, available at: https://corteidh.or.cr/docs/casos/articulos/seriec_242_ing.pdf.

between the wrongful act and the moral prejudice suffered, may result from the violation of a human right, as an automatic consequence, without any need to prove otherwise. [36] In terms of quantification of damages for moral harm, the Court, reaffirmed that such a determination should be done equitably taking into account the specific circumstances of each case. [37]

88. The Court confirms, therefore, that international law requires that the determination of compensation for moral damage should be done equitably taking into account the specific circumstances of each case.[38] The nature of the violations and the suffering endured by the victims, the impact of the violations on the victim's way of life and length of time that the victims have had to endure the violations are among the factors that the Court considers in determining moral prejudice.

89. In the circumstances of the present Application, it is not contested that members of the Ogiek Community have suffered from the lack of recognition as an indigenous group; from the evictions from their ancestral land; the denial of enjoyment of the benefits emanating from their ancestral land; the failure to practice their religion and culture as well as the right to fully and meaningfully participate in their economic, social and cultural development.

90. While it is not possible to allocate a precise monetary value equivalent to the moral damage suffered by the Ogiek, nevertheless, the Court can award compensation that provides adequate reparation to the Ogiek. In determining reparations for moral prejudice, as earlier pointed out, the Court takes into consideration the reasonable exercise of judicial discretion and bases its decision on the principles of equity taking into account the specific circumstances of each case.[39]

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[36] *Zongo and others v Burkina Faso (reparations)* § 55.
[37] D Shelton (n 17 above) 346-348.
[38] Ibid.
[39] *Zongo and others v Burkina Faso (Reparations)* § 61 and *Ingabire v Rwanda (Reparations)* § 20.

91. The Court notes that in the *Case of Sawhoyamaxa Indigenous Community v. Paraguay*[40], the Inter-American Court of Human Rights awarded the sum of "US$ 1,000,000.00 (One million United States Dollars) for moral prejudice to be paid into a fund, which would be used to implement educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure, for the benefit of the members of the Community."[41]

92. The Court also notes that in *the Case of the Kalina and Lokono Peoples v. Suriname* [42] the Inter-American Court of Human Rights ordered that the Respondent should allocate the sum of US$1 000 000 (One million United States Dollars) to a fund established for the benefit of the applicants to cover for the Applicants' moral prejudice.[43] The case involved the responsibility of the State of Suriname for a series of violations of the rights of members of the Kalina and Lokono indigenous peoples. Specifically, the violations related to the absence of a legal framework recognising the legal personality of the indigenous communities; the failure to recognise collective ownership of the lands, territories and natural resources of the Kalina and Lokono peoples; and the granting of concessions and licences to carry out mining operations on lands belonging to the Kalina and Lokono without consulting them.

93. The Court is mindful that the violations established in the present Application relate to rights that remain central to the very existence of the Ogiek. The Respondent State, therefore, is under a duty to compensate the Ogiek for the moral prejudice they suffered as a result of the violation of their rights. Taking into account the exercise of its reasonable discretion in equity the Court, orders the Respondent to compensate the Ogiek with the sum of KES100 000 000 (One hundred million Kenyan Shillings) for the moral prejudice suffered.

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[40] Judgment of March 29, 2006 (Merits, Reparations and Costs).
[41] Ibid § 224.
[42] Judgment of November 25, 2015 (Merits, Reparations and Costs).
[43] http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf § 298.

B. Non-pecuniary reparations

94. The Applicant prays the Court to order several non-pecuniary reparations. The Court now considers the Applicant's prayers in respect of each of the non-pecuniary claims as follows:

i. Restitution of Ogiek ancestral lands

95. The Applicant, relying on the Court's finding of a violation of Article 14 of the Charter, submits that a natural consequence thereof is the restitution of the Ogiek ancestral lands. In the Applicant's view, this violation can be remedied by the recovery of the ancestral lands through delimitation, demarcation and titling or otherwise clarification and protection of all such land. The Applicant submits that all processes in this regard should be undertaken within a timeframe of one (1) year of notification of the reparations order with the full participation of the Ogiek.

96. The Applicant also submits that the legal framework in the Respondent State already possesses legislation that can be used to effect restitution of Ogiek ancestral land including the Community Land Act 2016, the Forest Conservation and Management Act, 2016 and the 2010 Constitution of the Respondent State. According to the Applicant, the Respondent State's laws have established a class of lands known as "community lands" (Article 61, Constitution) and one sub-category of community lands is ancestral lands and lands traditionally occupied by hunter gatherer communities (Article 63(2)(d)(ii), Constitution). The Community Land Act 2016 lays out the procedure to be followed by communities seeking to secure formal title over their lands. The Applicant further submits, with the support of an expert report, that these provisions can be used positively to facilitate restitution of Ogiek ancestral land.

97. The Applicant identified the Ogiek ancestral land to be restituted back to the Ogiek through communally held titles, subject to delimitation, delineation and demarcation, as follows:

    a. The entire Public Forest area, which comprises the Mau Forest Complex, in all its parts, currently defined as public Forest, as well as the Maasai Mau Forest Block. (These lands have been delineated in Annex A to the Applicant's submission on reparations)
    b. Additional areas of Ogiek ancestral land: Kiptagich tea estate and tea factory in South West Mau near Tinet,; the Sojanmi Spring Field flower farm in Njoro area (East Mau) and land owned by a logging company in East Mau (south west of Njoro) measuring about 147 acres.

98. In relation to the ongoing commercial activities on the Ogiek ancestral land, the Applicant submits that the Respondent State should establish and facilitate dialogue mechanisms between the Ogiek (via the original complainants), Kenya Forestry Service (where relevant) and relevant private sector operators in order to reach mutual agreement on whether they will be allowed to continue their activities but operating via a lease of the land and/or royalty and benefit sharing agreement between the Ogiek communal title holders and the commercial operators, in line with Sections 35 to 37 of the Community Land Act 2016. Such dialogue, it is further submitted, must be concluded within a time frame of nine (9) months of notification of the reparations judgment.

99. As to the details of the restitution process, the Applicant submits that the Ogiek should be returned all twenty-two (22) forest blocks within the Mau Forest Complex by means of twenty-four (24) communally held titles. Each community, it is submitted, will hold title according to the procedure set out in the Community Land Act 2016 and will manage the forested areas as community forests under the Forest and Conservation Management Act 2016.

100. The Applicant also prays for the rescission of such titles and concessions found to have been illegally granted with respect to the Ogiek ancestral land; and such land to be returned to the Ogiek with common title within each location. Accordingly, the Applicant submits that the Respondent State should enter into a dialogue with the Ogiek, via the "original complaints", regarding the land to be returned from non-Ogiek to the Ogiek.

101. In so far as the restitution of Ogiek ancestral land is concerned, the Applicant filed a Road Map which it submitted should guide the restitution. According to the Applicant's Road Map, the Court should order a process of restitution that revolves around four elements: first, the appointment of an independent gender balanced panel of experts to oversee the settlement of all claims; second, reclassification of the Mau Forest into three categories depending on the difficulty of resettlement; thirdly, the Court to remain seized of the case until both the merits and reparations are fully implemented and, lastly, the Court to play an active role in overseeing the process of implementation of its judgments.

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102. The Respondent State opposes the Applicant's prayer for restitution of Ogiek ancestral land by means of delimitation, demarcation and titling.

103. The Respondent State reiterates its position that the Applicant has misinterpreted the findings of the Court in relation to the ownership of the Ogiek ancestral land. It emphasises that the Court's judgment on merits did not pronounce that the Ogiek were/are the owners of the Mau Forest. In the Respondent State's view, the Applicant has erroneously emphasised ownership rather than the rights of access, use and occupation which the Court granted the Ogiek in its judgment on merits. According to the Respondent, ownership is not a *sine qua non* to the utilisation of land and any process of demarcating forests and titling for indigenous communities will set a dangerous precedent across the

world.

104. The Respondent State also submits that guarantees of non-repetition together with rehabilitation measures are the most far-reaching forms of reparation that can be awarded to redress human rights violations since they address the root and structural causes of the violations. These remedies, the Respondent State submits, would best address the human rights violations suffered by the Ogiek including those relating to their ancestral land.

105. In relation to Article 14 of the Charter, the Respondent State submits that the Court's finding was that the violation of Article 14 was occasioned by the denial of access to the Mau Forest. According to the Respondent State, therefore, restitution for this violation can be achieved by the reverse action of guaranteeing and granting access to the Mau Forest for the Ogiek, save where encroachment is necessary in the interest of public need or in the general interest of the community.

106. The Respondent State further submits that demarcation and titling is unnecessary for purposes of access, occupation and use of the Mau Forest because such action is inimical with the character of the Ogiek as hunter and gatherer communities who do not have possession based land tenure systems.

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107. The Court observes that, in the context of indigenous peoples' claims to land, demarcation is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground.[44]. Demarcation is important and necessary because

[44] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights *Indigenous peoples and their relationship to land: final working paper* prepared by the Special Rapporteur, Erica-Irene A. Daes – available at https://digitallibrary.un.org/record/419881?ln=en.

mere abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the land is determined and marked. This serves to remove uncertainty on the part of the concerned indigenous people in respect of the land to which they are entitled to exercise their rights.

108. As has been noted:[45]

> The jurisprudence under international law bestows the right of ownership rather than mere access. .... if international law were to grant access only, indigenous people would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous people can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.

109. The Court takes special notice of the fact that the protection of rights to land and natural resources remains fundamental for the survival of indigenous peoples.[46] As confirmed, the right to property includes not only the right to have access to one's property and not to have one's property invaded or encroached upon but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.[47]

110. The Court thus finds that , in international law, granting indigenous people privileges such as mere access to land is inadequate to protect their rights to land. [48] What is required is to legally and securely recognise their collective title

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[45] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v Kenya* available at: https://www.achpr.org/sessions/descions?id=193. § 204.

[46] Report of the African Commission's Working Group Report on Indigenous Populations/Communities, Adopted by the African Commission on Human and Peoples' Rights at the 28th Session, p. 11.

[47] *Social Economic Rights and Accountability Project v Nigeria*; available at: https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2010/109.

[48] See, for example, *Case of the Saramaka People v Suriname*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of 28 November 2007 §§ 110 & 115; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, (Merits, Reparations and Costs), Judgment of August 31 2001, Series C No. 79, § 153; *Case of the Indigenous Community Yakye Axa v. Paraguay*, (Merits, Reparations and Costs) Judgment

to the land in order to guarantee their permanent use and enjoyment of the same.

111. The Court wishes to emphasise though that given the unique situation and way of life of indigenous people, it is important to conceptualise and understand the distinctive dimensions in which their rights to property like land can be manifested. Ownership of land for indigenous people, therefore, is not necessarily the same as other forms of State ownership such as the possession of a fee simple title.[49] At the same time, however, ownership, even for indigenous people, entails the right to control access to indigenous lands. It thus behoves duty bearers, like the Respondent State, to attune their legal systems to accommodate indigenous peoples' rights to property such as land..

112. The Court acknowledges that "among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community".[50] Indigenous people, therefore, have, by the fact of their existence, the right to live freely in their own territory.[51] The close ties that indigenous peoples have with the land must be recognised and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival.[52]

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of June 17 2005 Series C No.125, §§ 143 & 215; *Case of the Moiwana Community v. Suriname.*(Preliminary Objections, Merits, Reparations and Costs) Judgment of June 15, 2005. Series C No. 124, § 209.

[49] A Erueti "The demarcation of indigenous peoples' traditional lands: Comparing domestic principles of demarcation with emerging principles of international law" (2006) 23 (3) *Arizona Journal of International and Comparative Law* 543 544.

[50] *Mayagna (Sumo) Awa Tingni v Nicaragua* §149.

[51] Ibid.

[52] *Yakye Axa Indigenous Community v Paraguay* §131. See also, UN Committee on Racial Discrimination *General Comment No. 23* § 5 - Also relevant here is ILO Convention 169 especially Article 14 which provides as follows: 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect; 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession; 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

113. The Court recalls that in its judgment on merits it confirmed that the right to property, as guaranteed in Article 14 of the Charter, applies to groups or communities and can be exercised individually or collectively. The Court also held that in determining the applicability of Article 14 of the Charter to indigenous peoples, comparable international law, such as the UNDRIP, was applicable. As the Court further held, rights that can be recognised for indigenous peoples on their ancestral lands are variable.[53]

114. Given all of the above the Court reiterates its position that the Ogiek have a right to the land that they have occupied and used over the years in the Mau Forest Complex. However, in order to make the protection of the Ogiek's right to land meaningful, there must be more than an abstract or juridical recognition of the right to property.[54] It is for this reason that physical delineation, demarcation and titling is important.[55] This delineation, demarcation and titling must be premised on, among others, the Respondent State's Community Land Act, 2016, and the Forest Conservation and Management Act, 2016, without undermining any of the protections accorded to indigenous people by the applicable international law.

115. In the circumstances, the Court holds that the Respondent State should undertake an exercise of delimitation, demarcation and titling in order to protect the Ogiek's right to property, which in this case revolves around their occupation, use and enjoyment of the Mau Forest Complex and its various resources. The Court does not agree with the Respondent State's submission that delimitation, demarcation and titling is inimical to the ways of life of indigenous people. While the Court recognises that the Ogiek way of life, like that of many indigenous people, has not remained stagnant, the evidence before it demonstrates that they

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[53] *ACHPR v Kenya* (merits) 123-127.
[54] Ibid § 143.
[55] In this context, demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground - Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights *Indigenous peoples and their relationship to land: final working paper* prepared by the Special Rapporteur, Erica-Irene A. Daes

have maintained a way of life in and around the Mau Forest that distinguishes them as an indigenous people. Securing their right to property, especially land, creates a conducive context for guaranteeing their continued existence.

116. The Court, therefore, orders the Respondent State to take all necessary measures be they legislative or administrative to identify, in consultation with the Ogiek and/or their representatives, to delimit, demarcate and title Ogiek ancestral land and to grant *de jure* collective title to such land in order to ensure the permanent use, occupation and enjoyment, by the Ogiek, with legal certainty. Where the Respondent State is unable to restitute such land for objective and reasonable grounds, it must enter into negotiations with the Ogiek through their representatives, for purposes of either offering adequate compensation or identifying alternative lands of equal extension and quality to be given for Ogiek use and/or occupation. This process must be undertaken and concluded within two (2) years from the date of notification of this judgment.

117. The Court further orders that , where concessions and/or leases have been granted over Ogiek ancestral land to non-Ogiek and other private individuals or corporations, the Respondent State must commence dialogue and consultations between the Ogiek and/or their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek in line with the Community Land Act. In cases where land was allocated to non-Ogiek and where it proves impossible to reach a compromise, the Respondent State must either compensate the concerned third parties and return the land to the Ogiek or agree on appropriate compensation for the Ogiek.

ii. Recognition of the Ogiek as an indigenous people

118. The Applicant prays for the full recognition of the Ogiek as an indigenous people, including but not limited to the recognition of the Ogiek language and

Ogiek cultural and religious practices; provision of health, social and education services for the Ogiek; and the enacting of positive steps to ensure national and local political representation of the Ogiek.

119. The Applicant further prays for the Respondent State to immediately engage in dialogue with the Ogiek's representatives, in accordance with their traditions and customs, to grant full recognition of the Ogiek, such processes to be completed within one (1) year of the date of the Court's order on reparations.

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120. The Respondent State submits that it has constituted a Task Force to formulate further administrative interventions to redress the violations suffered by the Ogiek including their non-recognition as an indigenous people.

121. The Respondent State further submits that its Constitution of 2010 provides a solid legal superstructure which seeks to address the structural and root cause of the violations suffered by the Ogiek and that the same have been substantially remedied and what is left can be attained by administrative interventions and guarantees of non-repetition.

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122. The Court recalls that in its judgment on merits it found that the Respondent State violated Article 2 of the Charter by failing to recognize the Ogiek's status as a distinct tribe like other similar groups and thereby denying them the rights available to other tribes. [56]

123. The Court notes that the Respondent State, on 23 October 2017, established a multi-agency Task Force with an initial period for operation of six (6) months, to implement its decision on merits. The Court also notes that on 25 October 2018 the Respondent State again appointed a Task Force for the implementation of the Court's judgment, albeit with a different composition from

[56] *ACHPR v Kenya* (merits) § 146.

the one set up on 23 October 2017. The Court observes that while the Respondent State has stated that the Task Force appointed in October 2018 conducted extensive consultations with the Ogiek and other communities likely to be affected by its judgment, the Applicants have seriously questioned the composition of the Task Force as well as the methods it employed.

124. Notwithstanding the Parties' lack of agreement on the utility of the Task Force, the Court notes, from the Respondent State's report to the Court of 25 January 2022, that the Task Force submitted its report to the appointing authority in October 2019. The Court, however, has not been able to access any publicly available record(s) of the findings and recommendations of the Task Force. The Court thus finds that whatever interventions may emerge from the Task Force, the processes afoot this far have not contributed meaningfully to the implementation of its judgment on the merits.

125. Separately, but again from the report filed by the Respondent State on 25 January 2022, the Court notes that the Respondent State, at least from 2019, has recognised the Ogiek as a sub-group of the Kalenjin, for purposes of its Population and Housing Census.

126. In its judgment on the merits, the Court already recognised the Ogiek as an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability.[57] Following from this recognition, the Court, therefore, orders that the Respondent State must take all necessary legislative, administrative and other measures to guarantee the full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition and protection to the Ogiek language and Ogiek cultural and religious practices within twelve (12) months of notification this judgment.

[57] *ACHPR v Kenya* (merits), § 112.

iii. Public apology

127. The Applicant submits that the Respondent State should be ordered to publicly issue a full apology to the Ogiek for all the violations of their rights as identified by the Court, in a newspaper with wide national circulation and on a radio station with widespread coverage, within three (3) months of the date of the Court's order on reparations.

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128. The Respondent State submits that the Gazette Notice appointing the Task Force to give effect to the decision of the Court suffices as a public notice acknowledging violations of the Charter and would constitute just satisfaction for the violations suffered by the Ogiek.

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129. The Court, recalling its jurisprudence, holds that a judgment can constitute a sufficient form of reparation and also a sufficient measure of satisfaction.[58] In the instant case, the Court believes that its judgments, both on the merits and reparations, are a sufficient measure of satisfaction and that, therefore, it is not necessary for the Respondent State to issue a public apology.

iv. Erection of public monument

130. The Applicant submits that the Respondent State should be ordered to erect a public monument acknowledging the violation of Ogiek rights, in a place of significant importance to the Ogiek within six (6) months of the date of the Court's order on reparations.

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[58] *Mtikila v Tanzania (Reparations)* § 45; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 477 § 194 and Application No. 005/2015 *Thobias Mang'ara Mango and another v Tanzania*, ACtHPR, Application No.005/2015, Judgment of 2 December 2021 (merits and reparations) § 106.

131. The Respondent State submits that there is no justification for the erection of a monument as a form of reparations and that the Ogiek have no practice of monument erection and there is no evidence that the same would be of any significance to their community. It further submits that there is no evidence that the erection of a monument would be of any significance to the Ogiek Community especially given that it has "already acknowledged its wrongs and is actively taking steps to redress the same."

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132. Commemoration of victims of human rights violations by way of erecting a memorial or even by way of other acts of public acknowledgment of the violations, is an accepted form of reparations in international law.[59] In the main, this serves as a way of dignifying the victims and also to create a reminder of the violations that occurred and thus, hopefully, spur undertakings not to repeat the violations. The erection of a monument to victims of human rights violations, therefore, is a symbolic gesture which simultaneously acknowledges the violations while deterring further violations.

133. As the Court has established, however, a judgment itself can constitute sufficient reparation.[60] In the present Application, having considered all the circumstances of the case, especially the other orders on reparations that the Court has made, the Court holds that it is not necessary for the Respondent State to erect a monument for the commemoration of the violation of the rights of the Ogiek. Resultantly, the Court dismisses the Applicant's prayer.

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[59] Cf. *Gonzales and others (Cotton Field) v Mexico* § 471 (16 November 2009).
[60] *Mtikila v Tanzania (reparations)* § 37.

v. The right to effective consultation and dialogue

134. The Applicant submits that the Court had, in its judgment on merits, found that the Respondent State repeatedly failed to consult with the Ogiek resulting in a violation of Article 22 of the Charter.

135. The Applicant prays the Court to make an order directing the Respondent State to adopt legislative, administrative and other measures to recognise and ensure the right of the Ogiek to be effectively consulted, in accordance with their traditions and customs and/or with the right to give or withhold their free, prior and informed consent, with regard to development, conservation or investment projects on Ogiek ancestral land, and implement adequate safeguards to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Ogiek, with such processes to be completed within one (1) year of the date of the Court's order on reparation.

136. The Applicant further prays the Court for an order requiring the Respondent State to fully consult and facilitate the participation, in accordance with their traditions and customs, of the Ogiek in the reparation process as a whole, including all steps that the Respondent State and its agencies take in order to comply with the Court's order.

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137. The Respondent State submits that it intends to engage directly with the Ogiek through the Ogiek Council of Elders which it views as the generally accepted body mandated to speak on behalf of the Ogiek community. In the same vein, the Respondent State reiterates its willingness and commitment to offer a comprehensive and long-lasting solution to the predicament of the Ogiek of the Mau Forest in line with the Court's judgment on the merits.

138. The Respondent State, however, has also categorically submitted that "it is opposed to engagement with self-serving third parties ...who have been a stumbling block to all attempts to meaningful engagement with the Ogiek Community to resolve this long standing issue."

***

139. The Court recalls that in its judgment on merits it found that the Ogiek had been continuously evicted from the Mau Forest without being effectively consulted.[61] As the Court further held, the evictions have adversely impacted on the Ogiek's economic, social, and cultural development. The Court also found that the Ogiek have not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.

140. The Court observes that the Respondent State has not, generally, opposed the establishment of mechanisms and processes which could facilitate engagement with the Ogiek especially in relation to remedying the various violations of their human rights. So far as the Court has been able to discern, from the Respondent State's submissions, its major objection relates to engagement with the complainants that filed this Application before the Commission. In this regard, the Court wishes to reiterate its earlier finding that the complainants that filed this case before the Commission are not Parties to the present case, the only Applicant before it is the Commission.

141. The Court also observes that in its various submissions before it, the Respondent State has expressed its willingness to engage the Ogiek to solve the land problem in the Mau Forest. However, apart from the establishment of the Task Force, the Respondent State has not been forthcoming with information about the concrete steps that it has been taking towards the implementation of the judgment on merits. This seems to contradict the Respondent State's own

[61] *ACHPR v Kenya* (merits) § 210.

submissions in relation to its commitment to engagement towards the resolution of the differences that it has with the Ogiek.

142. As against the above background, the Court reiterates its position, as reflected in the judgment on merits, that it is a basic requirement of international human rights law that indigenous peoples, like the Ogiek, be consulted in all decisions and actions that affect their lives. In the present case, therefore, the Respondent State has an obligation to consult the Ogiek in an active and informed manner, in accordance with their customs and traditions, within the framework of continuing communication between the parties. [62] Such consultations must be undertaken in good faith and using culturally-appropriate procedures. Where development programmes are at stake, the consultation must begin during the early stages of the development plans, and not only when it is necessary to obtain Ogiek's approval. In such a case, it is also incumbent on the Respondent State to ensure that the Ogiek are aware of the potential benefits and risks so they can decide whether to accept the proposed development or not. This would be in line with the notion of Free Prior and Informed Consent which is also reflected in Article 32(2) of the UNDRIP.

143. The Court observes that it is not strange for indigenous peoples to self-organise along lines of national, regional and sometimes even international networks covering non-governmental organisations and other civil society organisations. In the case of the Ogiek, it is clear that they have several bodies that represent their interests. It is thus incumbent on the Respondent State, in line with the obligation to consult in good faith, to create space for engagement with all actors that represent the interests of the Ogiek. This engagement, for the avoidance of doubt, must follow culturally appropriate procedures and processes. In case challenges arise in identifying organisations/bodies to represent the Ogiek, in consultations and engagement with the Respondent, the

[62] IACtHR *Case of The Kichwa Indigenous People of Sarayaku v. Ecuador* Judgment of June 27, 2012 (Merits and reparations) § 177.

Respondent State must facilitate the creation of civic space, and time, where the Ogiek must be allowed to resolve all representation-related challenges.

144. The Court, therefore, grants the Applicant's prayer and orders that the Respondent State must take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs, and/or with the right to give or withhold their free, prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land and to implement measures that would minimise the damaging effects of such projects on the survival of the Ogiek.

145. Given that the Court has established that the violation of the Ogiek's rights was partly due to the Respondent State's failure to consult the Ogiek, the Court further orders that the Respondent State to ensure the full consultation and participation of the Ogiek, in accordance with their traditions/customs, in the reparation process as a whole including specifically all the steps taken in order to comply with this judgment.

vi. Guarantees of non-repetition

146. The Applicant prays that the Court make an order that the Respondent State guarantees non-repetition of the violation of the rights of the Ogiek People.

*

147. The Respondent State does not contest the Applicant's prayer and has submitted that guarantees of non-repetition together with rehabilitation measures are the best means for addressing human rights violation especially where the objective is to address the root and structural causes of the violations.

***

148. Guarantees of non-repetition are aimed at ensuring that further violations do not occur. As a form of reparations, they serve to prevent future violations, to cease on-going violations and to assure victims of past violations of the harm they suffered and of action to prevent the repetition thereof.The overall aim of guarantees of non-repetition is to "break the structural causes of societal violence, which are often conducive to an environment in which [human rights violations] take place and are not publicly condemned or adequately punished."[63]

149. The Court recalls that it is trite that a State that is a party to an international human rights instrument thereby undertakes to honour the terms of the instrument including through the modification of its domestic laws to align them with the obligations that it has assumed. In this Application, the Court observes that the Parties are not in dispute on the need for guarantees of non-repetition.

150. In the present case, the Court orders the Respondent State to adopt legislative, administrative and/or any other measures to avoid a recurrence of the violations established by the Court including, inter alia, by the restitution of the Ogiek ancestral lands, the recognition of the Ogiek as an indigenous people, and the establishment of mechanisms/frameworks for consultation and dialogue with the Ogiek on all matters affecting them.

C. Development fund for the Ogiek

151. The Applicant has requested the Court to order the Respondent State to take "all necessary measures administrative, legislative, financial and human resource measure to create a Community Development Fund for the benefit of the members of the Ogiek people within 6 months of notification of the Court's Order on Reparation."

---

[63] African Commission on Human and Peoples' Rights *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment* (Article 5) § 45 – available at: https://www.achpr.org/public/Document/file/English/achpr_general_comment_no._4_english.pdf.

152. According to the Applicant, a community development fund provides "the governance framework for the allocation of funds to projects of a collective interest to the indigenous community such as agriculture, education, food security, health housing, water and sanitation projects, resource management and other projects that the indigenous community consider of benefit ..."

*

153. The Respondent State's submissions did not address this issue.

***

154. The Court recalls that it has ordered the Respondent State to pay compensation to the Ogiek for violation of their rights. The Court is aware that the members of the Ogiek in the Mau Forest area number approximately forty thousand (40, 000). Given that the violations leading up to this judgment have been experienced by many members of the Ogiek Community and over a substantial expanse of time, the Court considers it very important that any benefit, as a result of this litigation, should be extended to as many members of the Ogiek Community as possible.. In the circumstances, the establishment of a fund is one mechanism to ensure that all Ogiek benefit from the outcome of this litigation.

155. The Court thus orders the Respondent State to establish a community development fund for the Ogiek which should be a repository of all the funds ordered as reparations in this case. The community development fund shall be used to support projects for the benefit of the Ogiek in the areas of health, education, food security, natural resource management and any other causes beneficial to the well-being of the Ogiek as determined from time to time by the committee managing the fund in consultation with the Ogiek. The Respondent State must, therefore, take the necessary administrative, legislative and any other measures to establish this Fund within twelve (12) months of the notification of this judgment.

156. In terms of administration of the community development fund, the Court orders that the Respondent State should coordinate the process of constituting a committee that will oversee the management of the fund. This Committee must have adequate representation from the Ogiek with such representatives being chosen by the Ogiek themselves.

VII. COSTS

157. None of the Parties made any submissions in respect of costs.

158. The Court, however, recalls that in terms of Rule 32 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."[64]

159. In the present case, the Court sees no reason to depart from the above general principle and accordingly orders each party to bear its own costs.

VIII. OPERATIVE PART

160. For these reasons:

THE COURT,

Unanimously,

On the Respondent State's objections

i. *Dismisses* all the Respondent State's objections;

[64] Rule 30 of the Rules of Court 2 June 2010.

On pecuniary reparations

ii. *Orders* the Respondent State to pay the sum of KES 57 850 000. (Fifty seven million, eight hundred and fifty thousand Kenya Shillings), free from any government tax, as compensation for the material prejudice suffered by the Ogiek;

iii. *Orders* the Respondent State to pay the sum of KES 100 000 000 (One hundred million Kenya Shillings), free from any government tax, as compensation for the moral prejudice suffered by the Ogiek;

On non-pecuniary reparations

iv. *Orders* the Respondent State to take all necessary measures, legislative, administrative or otherwise to identify, in consultation with the Ogiek and/or their representatives, and delimit, demarcate and title Ogiek ancestral land and to grant collective title to such land in order to ensure, with legal certainty, the Ogiek's use and enjoyment of the same.;

v. *Orders* the Respondent State, where concessions and/or leases have been granted over Ogiek ancestral land, to commence dialogue and consultations between the Ogiek and their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek in line with all applicable laws. Where it proves impossible to reach a compromise, the Respondent State is ordered to compensate the concerned third parties and return such land to the Ogiek;

vi. *Orders* that the Respondent State must take all appropriate measures, within one (1) year, to guarantee full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition to the Ogiek language and Ogiek cultural and religious practices;

vii. *Dismisses* the Applicant's prayer for a public apology;

viii. *Dismisses* the Applicant's prayer for the erection of a monument to commemorate the human rights violations suffered by the Ogiek;

ix. *Orders* the Respondent State to take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs in respect of all development, conservation or investment projects on Ogiek ancestral land;

x. *Orders* the Respondent State to ensure the full consultation and participation of the Ogiek, in accordance with their traditions/customs, in the reparation process as ordered in this judgment;

xi. *Orders* the Respondent State to adopt legislative, administrative and/or any other measures to give full effect to the terms of this judgment as a means of guaranteeing the non-repetition of the violations identified;

xii. *Orders* the Respondent State to take the necessary administrative, legislative and any other measures within twelve (12) months of the notification of this judgment to establish a community development fund for the Ogiek which should be a repository of all the funds ordered as compensation in this case;

xiii. *Orders* the Respondent State, within twelve (12) months of notification of this judgment, to take legislative, administrative or any other measures to establish and operationalise the Committee for the management of the development fund ordered in this Judgment;

On implementation and reporting

xiv. *Orders* that the Respondent State must, within six (6) months of notification

of this judgment, publish the official English summaries, developed by the Registry of the Court, of this judgment together with that of the judgment of 26 May 2017. These summaries must be published, once in the official Government Gazette and once in a newspaper with widespread national circulation. The Respondent State must also, within the six (6) months period earlier referred to, publish the full judgments on merits and on reparations together with the summaries provided by the Registry of the Court on an official government website where they should remain available for a period of at least one (1) year;

xv. *Orders* the Respondent State to submit, within twelve (12) months from the date of notification of this Judgment, a report on the status of implementation of all the Orders herein;

xvi. *Holds,* that it shall conduct a hearing on the status of implementation of the orders made in this judgment on a date to be appointed by the Court twelve (12) months from the date of this judgment.

On Costs

xvii. *Decides* that each party shall bear its own costs;

Signed:

Imani D. ABOUD, President;

Blaise TCHIKAYA, Vice-President;

Rafaâ BEN ACHOUR – Judge;

Suzanne MENGUE – Judge;

M-Thérèse MUKAMULISA – Judge;

Tujilane R. CHIZUMILA – Judge;

Chafika BENSAOULA – Judge;

Stella I. ANUKAM – Judge;

Dumisa B. NTSEBEZA – Judge;

Modibo SACKO – Judge;

and

Robert ENO, Registrar.

In accordance with Article 28 (7) of the Protocol and Rule 70(1) of the Rules, the Separate Opinion of Judge Blaise TCHIKAYA is appended to this Judgment.

Done at Arusha, this 23rd Day of the month of June in the year Two Thousand and Twenty-Two, in English and French, the English text being authoritative.

Annex 7: Copy of Gazette Notice No. 10944 dated 23rd October, 2017 on establishment of a Taskforce on implementation of the African Court Decision on the Ogiek Community



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CORRIGENDA

IN Gazette Notice No. 8072 of 2017, Cause No. 525 of 2017, *amend* the second petitioner's name printed as "Livy Akoth Otieno" to *read* "Livy Akoth Omondi".

IN Gazette Notice No. 10754 of 2017, Cause No. 146 of 2017, *amend* the petitioner's name printed as "Beatrice Wanjiru Wambu" to *read* "Beatrice Wanjiku Wambui".

IN Gazette Notice No. 10218 of 2017, *amend* the expression printed as "Cause No. 123 of 2017" to *read* "Cause No. 194 of 2017".

GAZETTE NOTICE NO. 10943

TASKFORCE ON THE NATIONAL CLIMATE CHANGE ACTION PLAN

IT IS notified for general information of the public that the Cabinet Secretary for Environment and Natural Resources has appointed a task force on the National Climate Change Action Plan to develop Kenya's National Climate Change Action Plan (NCCAP 2018-2022).

1. The Taskforce shall comprise of—

Membership

Charles Sunkuli—(*Chairman*)
Joyce Njogu
Faith Ngige
Philip Odhiambo
Esther Wangombe
Cecelia Kibe
Lulu Hayanga
Clara Busolo
Stephen Osingo
Erastus Wahome
Elizabeth Wamalwa
James Yatich
Lucy Nganga
Martin Eshiwani

Joint Secretaries:

Pacifica Achieng Ogola (Dr.)
Stephen M. King'uyu

Terms of Reference

2. The terms of reference of the Taskforce shall be to—

(a) co-ordinate the preparation of National Climate Change Action Plan (NCCAP 2018-2022) building on a review of NCCAP 2013 -2017;

(b) formulate a realistic roadmap, strategy and plan to ensure delivery;

(c) review NCCAP 2013-2017, National Adaptation Plan (NAP 2015-2030) Medium Term Plan (MTP 2013-2017), Nationally Determined Contribution (NDC), and other relevant documents, to assess the level of mainstreaming of climate change in planning and implementation and identify actions that need to be carried over to NCCAP 2018-2022;

(d) incorporate priorities in NCCAP 2018-2022 as brought out in the review referred to in number (c) above;

Mode of Operation

3. In the performance of its mandate, the Taskforce—

(a) shall co-ordinate an inclusive stakeholder consultation process at all levels;

(b) may identify and co-opt technical experts or any other resource, provided that the co-opted members do not exceed one third of the steering committee; and

(c) may with the approval of the Principal Secretary, State Department of Environment, engage the services of such consultants as may be found necessary for the execution of the set terms of reference.

Term of Office

4. The term of office of the Taskforce shall be a period six (6) months from the date of the publication of this notice.

Costs

5. The costs incurred by the Taskforce shall be defrayed from the voted funds of the Ministry.

Secretariat

6. The Secretariat of the Taskforce shall be based at the headquarters of the Ministry of Environment and Natural Resources.

Dated the 19th September, 2017.

JUDI W. WAKHUNGU,
Cabinet Secretary for Environment and Natural Resources.

GAZETTE NOTICE NO. 10944

TASKFORCE ON THE IMPLEMENTATION OF THE DECISION OF THE AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS ISSUED AGAINST THE GOVERNMENT OF KENYA IN RESPECT OF THE RIGHTS OF THE OGIEK COMMUNITY OF MAU

APPOINTMENT

IT IS notified for the general information of the public that the Cabinet Secretary for Environment and Natural Resources has appointed a Taskforce on implementation of the African Court Decision on the Ogiek Community

Membership:

Margaret W. Mwakima (Dr.)—(*Chairperson*)
Gideon N. Gathaara—(*Alternate Chair*)
Nimrod Koech, Office of the President
Abraham Korir Sigoei (Dr.), Office of the Deputy President
Hewson M. Kabugi, Ministry of Environment and Natural Resources
Annie Syombua, Ministry of Environment and Natural Resources
Wanjiku Manyatta, Ministry of Environment and Natural Resources
Teresia Gathagu, Ministry of Lands and Physical Planning
Samuel M. Macharia, The National Treasury
Emmanuel Bitta, Attorney-General
Cyrus Maweu, Kenya National Human Rights Commission
Edmond Gichuru, National Lands Commission
John Njogu, Ministry of Sports and Culture
Esther Keige, Kenya Forest Service

Joint Secretaries:

Mary Nyamichaba, Ministry of Lands and Physical Planning (Head);
Belinda Akello, National Land Commission;
Patrick Njagi, Kenya Forest Service (Assistant Head).

Terms of Reference

The Terms of Reference of the Taskforce shall be to—

(a) study the African Court decision of the African Court on Human and People's rights issued against the Government of Kenya in respect of the rights of the Ogiek Community in issue and also other judgements issued by the local courts in relation to the Ogieks occupation of the Mau Forest;

(b) study all land related laws and policies to see how they address the plight of the Ogieks of the MAU;

(c) establish both the registration and ground status of the claimed land;

(d) recommend measures to provide redress to the Ogiek's claim. These may include restitution to their original land or compensation with case or alternative land;

(e) prepare interim and final report to be submitted to the African Court on Human and Peoples Rights in Arusha; and

(f) examine the effect of the Judgement on other similar cases in other areas in the country;

(g) conduct studies and public awareness on the rights of indigenous people.

Mode of Operation

In the performance of its functions, the Taskforce—

(a) shall regulate its own procedure;

(b) shall prepare and submit to the Cabinet Secretary its Work Plan and budget;

(c) shall hold such number of meetings in such places and at such times as it may consider necessary for the discharge of its functions;

(d) may solicit, receive and consider the view of the members of the public and any interest groups;

(e) identify and coopt technical experts provided that the coopted members do not exceed one third of the Steering Committee;

(f) may with the approval of the Cabinet Secretary, Ministry of Environment and Natural Resources engage the services of such consultants as may be found necessary for the execution of the set Terms of Reference; and

(g) shall submit to the Cabinet Secretary interim report within one month of this appointment;

Terms of Office

The Taskforce shall be in place for a period of six (6) months from the date of publication of this notice for such longer period as the Cabinet Secretary for Environment and Natural Resources in consultation with the Attorney-General may, by notice in the Gazette, prescribe.

Costs

The cost incurred by the Taskforce and joint secretaries of the Taskforce shall be drawn from the Kenya Forest Service.

Secretariat

The Joint Secretariat shall be based at headquarters of Ministry of Environment and Natural Resources.

Dated the 23rd October, 2017.

JUDI W. WAKHUNGU,
Cabinet Secretary for Environment and Natural Resources.

GAZETTE NOTICE NO. 10945

THE WILDLIFE CONSERVATION AND MANAGEMENT ACT

(*No.* 47 *of* 2013)

PUBLIC PARTICIPATION ON DEVELOPMENT OF THE NATIONAL WILDLIFE CONSERVATION AND MANAGEMENT STRATEGY

IT IS notified for general information of the public that the Ministry of Environment and Natural Resources, having initiated the process of developing the National Wildlife Conservation and Management Strategy, is collecting views from the public to inform the Strategy in relation to measures related but not limited to—

(a) protection of wildlife species and their habitats and ecosystems;

(b) ecosystem conservation planning;

(c) facilitating community based natural resource management in wildlife conservation and management;

(d) prioritizing areas for wildlife conservation and increasing such areas including national parks, national reserves, conservancies and sanctuaries;

(e) innovative schemes and incentives to secure critical wildlife conservation areas;

(f) increasing landscape and seascape to be brought under protected areas;

(g) national wildlife research and monitoring priorities;

(h) equitable sharing of benefits;

(i) granting and monitoring wildlife user rights;

(j) listing and protection of endangered and threatened wildlife species;

(k) mitigating human wildlife conflict;

(l) wildlife disease surveillance and control;

(m) adaptation and mitigation measure of adverse impacts of climate change on wildlife resources; and

(n) regional co-operation to enhance protection, conservation and management of wildlife.

Members of the public are invited to submit presentations on the strategy, through a written memorandum, to the following email address wildlifestrategy@environment.go.ke.

The Ministry of Environment and Natural Resources will also hold structured regional meetings to further obtain oral and written presentations on the strategy.

Dated the 31st October, 2017.

JUDI W. WAKHUNGU,
Cabinet Secretary for Environment and Natural Resources.

GAZETTE NOTICE NO. 10946

THE VALUERS ACT

(*Cap.* 532)

APPOINTMENT

IN EXERCISE of the powers conferred by paragraph (1) of the Schedule to the Valuers Act, the Cabinet Secretary for Lands and Physical Planning appoints—

Under paragraph 1 (*d*)—

David Ngetich,
James Kiragu,

to be members of the Valuers Registration Board, for a period of three (3) years, with effect from the 30th October, 2017.

Dated the 20th September, 2017.

JACOB KAIMENYI,
Cabinet Secretary for Lands and Physical Planning.

GAZETTE NOTICE NO. 10947

THE VALUERS ACT

(*Cap.* 532)

APPOINTMENT

IN EXERCISE of the powers conferred by paragraph (1) of the Schedule to the Valuers Act, the Cabinet Secretary for Lands and Physical Planning appoints—

Under paragraph 1 (*e*)—

Catherine Kariuki,

to be a member of the Valuers Registration Board, for a period of three (3) years, with effect from the 30th October, 2017.

Dated the 20th September, 2017.

JACOB KAIMENYI,
Cabinet Secretary for Lands and Physical Planning.

GAZETTE NOTICE NO. 10948

THE PRISONS ACT

(*Cap.* 90)

THE PRISON RULES

(*L.N.* 60 *of* 1963)

RECLASSIFICATION OF LANGATA WOMEN PRISON

IT IS notified for the general information of public that in exercise of the powers conferred by rule 4 of the Prisons Rules, the Commissioner-General of Prisons has reclassified the Langata Women

Annex 8: Submissions by the Torobeek Community

PO BOX 461 NAKURU

TELL: 0721233375

TOROBEEK COMMUNITY ASSOCIATION OF KENYA

SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS SITTING

In the matter of

HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY

VENUE: **MOLO TOWN** GREENLAND HOLIDAY CENTER

TIME: 9:00-AM TO 4:-00PM

SUBMISSIONS

-prepared by

TOROBEEK COMMUNITY ASSOCIATION OF KENYA

1. **Honourable chair and Honourable members** of the standing committee on Justice , Legal Affairs and Human Rights, it is a pleasure to welcome you to Molo Town and the appreciate the great auspices of your committee, having granted us an opportunity to make our submissions and presentations on today's subject matter.

2. These submissions are borne out of our petition to the senate dated the **5th of December 2022** and received on the **8th of December 2022**. The petition is signed by the national chairman one **Mr. Paul Kiprotich Mosbei**, on behalf of the Torobeek Community under the umbrella body of the Torobeek Community Association of Kenya. The petition was also co-signed by other 20 members of the community, citizens of good standing within the Republic of Kenya.

See annexure	**1**	**Today's invitation**	**Page**	**1**
See annexure	**2**	**confirmation of admission**	**Page**	**2**
See annexure	**3**	**the petition itself**	**Page**	**3**

3. As a historical procedural fact it is noteworthy to highlight that this is not the first time the petition is being presented to the senate, in the 12th parliament a similar petition was presented, received and admitted as compliant but was not heard to its full conclusion as the term of the 12th parliament expired. As such it is our humble prayer and reasonable expectation that this committee will consider the petition with at most speed. We urge the honourable members to take note of that.

See annexure	**4**	**Petition**	**Page**	**5**
See annexure	**5**	**confirmation of admission**	**Page**	**8**
See annexure	**6**	**Request for information**	**Page**	**9**

4. The petition can be summarised in the following thematic areas which will largely inform the body of our humble submissions;-

a. **It poses and answers the questions who are the Torobeek Community?**
b. **Where this community is found and where are its peoples?**
c. **What are the plights of this community past and present?**
d. **What interventions has the community sought in the past?**
e. **What remedies do they now seek from government and in particular the Senate?**

5. Before we can delve into the particular issues within our petition we wish to restate the mandate of the senate as enunciated by the constitution of Kenya. This is to is with the express intention that it meets the following objectives;
    i. That the findings of this select committee are not in vain for want of legal and jurisdictional mandate;
    ii. That the remedies we seek can be granted by this committee;
    iii. That where not possible this committee goes out of its way to enjoin mandated institution, state departments/agencies and in certain cases private sector actors to commit to a final solution; and;
    iv. That it will also help inform an implementation matrix proposed at the end of the committee's work.

ROLE AND MANDATE OF THE SENATE

6. Senate's overall function is to protect the interests of the counties and their governments. Article 96 of the Constitution provides that the Senate has a role in-

a. Law -making;
b. Determining allocation of national revenue among counties as per Article 217 of the Constitution and overseeing national revenue allocated to county governments; and
c. Considering and determining any resolution to impeach the President and Deputy President as per the provisions of Article 145 and 150(2) of the Constitution respectively.

7. **Specific to this select committee**; this committee draws its mandate from standing orders 228(3) & (4) which provides as follows

   (3) The Standing Committees shall be as set out in the Fourth Schedule and shall deal with the subject matters respectively assigned to them.

   (4) The functions of a Standing Committee shall be to—

   (a) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration and operations of the assigned Ministries and departments;
   (b) study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation; (c) study and review all legislation referred to it;
   (c) study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
   (d) consider the Budget Policy Statement in line with Committee's mandate;
   (e) report on all appointments where the Constitution or any law requires the Senate to approve;
   (f) make reports and recommendations to the Senate as often as possible, including recommendation of proposed legislation;
   (g) consider reports of Commissions and Independent Offices submitted to the Senate pursuant to the provisions of Article 254 of the Constitution;
   (h) examine any statements raised by Senators on a matter within its mandate; and
   (i) Follow up and report on the status of implementation.

8. In furtherance to the forgoing the SECOND SCHEDULE on STANDING COMMITTEES **(Standing Order 218 (3))** this Standing Committee has mandate to consider all matters relating to

a. Constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity;

b. Agreements, treaties and conventions; and

c. Implementation of the provisions of the Constitution on human rights.

It is our humble view that the issues raised within the body of the petition, concern **basic human rights and dignity; constitutional issues; the mandate of constitutional institutions such as NLC among others; and the question of justice.** This falls within the confine of the committee's mandate. We humbly submit that the committee has mandate and should proceed to hear and consider the petition. Having considered the petitions we pray for concrete findings, favourable recommendations and practical yet binding implementation matrix.

WHO ARE THE TOROBEEK PEOPLE?

9. The Torobeek people (commonly referred alongside the Ogieks' and Dhorobos) a are a community within the Republic of Kenya largely drawn from the Mau Complex of Nakuru County, Mt. Londiani across to North Tindiret Forest, Serengonik Forest, Ceng'alo Forest and Kipkurere and Kapchorua forest areas of what is in Nandi, Baringo and Uasin Gishu counties. The other counties include Laikipia, Turkana, Elgeyo Marakwet, Kericho, Bomet, Trans Nzoia Kajiado, Narok, Bungoma, Kakamega, Kisumu, Nyamira, Migori, Nyadarua, Kiambu, Isiolo, Nairobi, and Marsabit

10. In its Etymology the name **"Torobeek"** is derived from the name **"Dorobo"** which was a name associated with forest dwellers within the Kalenjin community. In Kenya they were found originally living together with the **Ogiek community** before the forceful displacement by the government.

11. In pre-colonial, colonial and post colonial Kenya the Torobeek lived in close affinity to the forest environment drawing sustenance and livelihood from their natural ecosystems, that is the forest.

12. That as norms and culture changed being overrun by modern civilization, there was a shift in the national consensus on the occupation of otherwise gazetted forest by local communities. Subsequently the government began a process of mass evictions of our community and its members from their natural residence, first started in April of 1981 and concluded in the year 2006.

13. This process however noble in the eyes of modern society failed to take into consideration the need to provide alternative residence for the Torobeeks. The Kenya Government despite acknowledging their way of life (Arusha East Africa Court of Justice decision)[i] proceeded with their decision to end their occupation and evict them from the forest. To date the community is yet to be settled and continue to reside in squatter villages around the forest as they await the Government's program to recognise their plight, adopt an all of government strategy to resettle them, mitigate their immediate needs, educate their children and leveraging their cultural heritage integrate them in local economies and at the global stage in the mitigation of climate change.

14. The Torobeek community association of Kenya is an association duly registered to advocate for their rights. In its objectives, it seeks to advocate for the rights of the vulnerable in society and thus servers as the ideal avatar for the community in its quest for justice and the protection of its most vulnerable members of the community.

See annexure	**7**	**certificate of registration**	**Page**	**11**
See annexure	**8**	**Association constitution**	**Page**	**13-29**

WHERE THIS COMMUNITY IS FOUND AND WHO ARE ITS PEOPLES?

15. The Torobeek are believed to be the first people to have settled in Eastern Africa and were found inhabiting all Kenyan forests before 1800AD. Due to domination and assimilation, the community is slowly becoming extinct with figures showing about 20,000 countrywide. The Torobeek people commonly known as "Dorobo" are one of the most widely distributed communities in Kenya, inhabiting, now or in the recent past, virtually all of the high forest areas of Kenya.

16. The Torobeek are a marginalized community. Traditionally they partake in hunting and gathering, though today virtually all of them now have added animal husbandry or cultivation, or both. The Torobeek have been living in Mau Forest since pre-colonial times on communally held pieces of land, which were administered through customary law.

17. Everyone has ignored the fact that the Torobeek too have a right to their lands. When the British curved out areas of Kenya into tribal reserves[6] for the various communities, the Torobeek were excluded as they lived in small scattered groups over large areas and did not appear to have any property. This and many other agreements signed with other communities with the colonialists and poor government policies since independence has seen the loss and dispossession from their ancestral lands.[7] This has in turn led them to becoming 'squatters' on their own land who face eviction notices from their own government.

18. A majority of the community members were found living alongside their Ogiek brothers in the Mau complex and Londiani crossing into Nandi, Baringo and Uasin Gishu counties. After recent displacement from the forest, those who did not remain in surrounding communities were scattered across the Rift Valley counties some ending in other counties such as Kiambu, Nyandarua, Migori Isiolo and Bungoma just to name a few.

19. Acknowledging this fact the Association leadership has reached out to elected leaders and officers in the administrative state. In these engagements the priority has always been recognition of the plight of the community and where possible direct intervention and assistance to the vulnerable members of the community.

See annexure	**10**	**The letters of endorsement from council of governors**	**Page**	**30-37**
See annexure	**11**	**councils' of elders endorsement**	**Page**	**38-54**
See annexure	**12**	**Letters from the administrative state from village elders to PS's**	**Page**	**55-159**

20. As to who the Torobeek are, they are a people whose life revolved around their close affinity to nature drawing sustenance and livelihood from their natural ecosystems that is the forest. From the geographical placement, one reasonable concussion is inevitable can be drawn that these are communities surrounding Kenya's forest ecosystems.

WHAT INTERVENTIONS HAS THE COMMUNITY SOUGHT IN THE PAST?

21. The humble petitioners before you are acutely aware that this is not the first fora or first time they have sought interventions from state and no state actors. None the less the central issue at the core of their plight is the question of justice. They now stand before you asking for justice. Your determination of their petition will cement their claim and obligate a response(s) to some of their paltry demands. The past responses which are attached can be informative to this committee. The common thread in these responses has always been along the lines of**; lack of mandate, transferred mandate, lack of resources and referral to other actors.** The most painful sting has been the **lack of response**

See annexure	**13**	**The past correspondence and response to correspondence**	**Page**	**160 & 161**
See Annexure	**14**	**Petition to the regional commissioner**	**Page**	**162 - 163**

22. Just to highlight the institutions approached by the community include;-

a. Office of the Deputy President
b. The National Land Commission
c. The Ministry Of Devolution and Planning
d. Ministry of Interior and Coordination of National Government
e. Regional Commissioner – Rift Valley Region
f. Various host county governments

WHAT ARE THE PLIGHTS OF THIS COMMUNITY PAST AND PRESENT?

23. Several petitions over the years have been presented to different forums concerning the government evictions of persons from Northern Tinderet Forest and other forest in Nandi and Uasin Gishu and the greater MAU.

24. Generally, their petitions are premised on partial resettlement of the **FOREST DWELLERS** *(generally referred to as Ogiek, Dorobos Torobeek)* by the Government in the years between 1993-1996 and some as late as the year 2015. The rest of the families who were not resettled remained in the forest until the year 2006 when they were finally evicted.

25. Their eviction was done on the premise that they would be resettled elsewhere after identification of genuine FOREST DWELLER communities.

See annex	**15**	**Orders of eviction**	**Pages**	**167n**
See annex	**16**	**Photos**	**Pages**	**171 - 173**

26. To resolve the eviction issue, the Government vide a letter through the then permanent secretary for Environment and Natural Resources dated **4th August, 1993** authorized the excision of **1,500 Ha.** of land from Northern Tinderet Forest for purposes of settling members of the petitioners. The Chief Conservator of Forests vide letter dated **13th January, 1999** indicated that the District Surveyor Kapsabet had undertaken cadastral survey of the area that was to be excised thus expected to submit his report for processing.

27. In the year 2001, the government excised **788.30 Ha** from the said forest vide gazette notice **NO. 898** of **16th February,2001**. It is unclear whether the intended resettlement was done on the excised land though the petitioner paid survey fees. They also claim that the excised portion is still vacant to date

28. In the foregoing, it seems the intent and purpose of excision of **788.30 ha** from the Northern Tinderet Forest was to settle members of Torobeek community.

29. It is also unclear why the process of resettlement on the excised portion stalled. The petitioners paid the requisite fees and justice demands that they be resettled as intended. The Forest Service, KFS herein did not traverse the petitions.

30. The matter has also been handled by;

1. **THE EAST AFRICA COURT OF JUSTICE**
2. **THE LAND AND ENVIROMENT COURT BY LADY JUSTICE NYAMWEA**

We have attached copies of this decisions for your perusal and consideration	**Appendix 1 & 2**

CONCLUSIONS AND REMEDIES SOUGHT FROM GOVERNMENT AND IN PARTICULAR THE SENATE?

CONCLUSIONS

31. Transition to an open democratic society whose values envisage the recognition, enjoyment and protection of human rights has been the most gainful experiment in the history of human existence. Just like in any army this has to be fast enough for the strong but slow enough for the weak. Failure to honour this principal will always have its consequences. Communities being left behind in the march of progress. The unintended victims are always women, children and persons living with disabilities. Large swathes of our community thus remain illiterate or semi-illiterate due to years of lack of access to education.

32. For the Torobeek generations have been left behind as the rest of the country developed. Their plight has been further been exacerbated by the directive on cessation of farming within government forests which was their source of livelihood.

REMEDIES

33. As an association we pray that the honourable senate makes the following findings;-

a. That the petitioners are a marginalised community

b. That the petitioners should be registered as a community and issued with a code by the ministry of interior and coordination of national government.

c. That the eviction of the petitioners by the government fron the forests where they called home was a violation of their human rights

d. That in light of the forgoing the government should take affirmative action in the following terms;--

(i) Recognition, partnership and cooperation towards elevating the plight to the community.

(ii) Provision of essential amenities such a food and blankets especially as we head in to the rainy season.

(iii) Partnership with the community in the broader agenda of environmental conservation and climate change mitigation. This can be achieved by engaging the community in conservation activities such as re-afforestation and other efforts such a tree planting and tree nursery activities.

(iv) Partnership with the community in the awarding of scholarships by your good office. Whereas we are alive to the criteria set by your Education Department for qualification we request special consideration for children drawn from our communities not only in the numbers awarded scholarships but also in the eligibility criteria. Such a partnership and affirmative action will go a long way in equalising opportunities for our community and integrating us in the national development agenda.

(v) Job quotas in national and county governments for a reasonable period of time.

(vi) Any such programs you shall deem fit and achievable towards the greater goal of assisting the community.

Recommendation

1. There is need for the recognition both in law and practice that Kenya has not only marginalised communities but indigenous communities exist and with such recognition will come the safeguarding of their rights.

2. The conflict of laws portrayed in the Constitution should be addressed so as to effectively protect and safeguard the rights of the Torobeek. The revisiting of the conflict portrayed in the Constitution will go a long way in ensuring their historical injustice is curbed and An exception to their land being a public land guaranteed. demarcate an area within the forest to act as their home, like any other community in Kenya, and by conserving the remaining forest. This will reduce the number of people posing as Torobeek so as to be given squatter status as they encroach on land and finally destroy the forests.

3. The National Land Commission as mandated should effectively initiate investigations into past and present historical land injustices facing the Torobeek and recommend appropriate redress so as to curb the problem of landlessness facing the Torobeek community.

4. Part of the gazetted forest land should be converted into community land for the Torobeek and the original Torobeek families identified so as to avoid a free rider problem that will only augment their land grievances. A portion within the forest should be demarcated to act as their home, and strict policies should be set up to ensure the conservation of the remaining forest as it is a major water catchment area. This will effectively reduce the number of people posing as Torobeek so as to be given squatter status as they encroach on land and finally destroy the forests.

5. The laws dealing with indigenous and marginalised communities need to be homogenized into one single statute that encapsulates all their rights. This will minimize and avoid a myriad of laws that end up creating a gap in the legal framework which trickles down to improper implementation of laws.

6. There should be co-managing of selected forests with community forest associations. These associations are to be formed by communities living adjacent to the selected forests. However, special arrangements are to be made in the case of forests considered as important water catchment areas like the Mau forest. This will ensure the forest is managed well while also catering for forest communities.

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[i] AFRICAN COMMISSION ON HUMAN A/ND PEOPLES' RIGHTS v. REPUBLIC OF KENYA APPLICATION No. 006/2012

Annex 9: Submissions by the National Land Commission

NATIONAL LAND COMMISSION

RESPONSE TO THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS.

REPORT BY:

GERSHOM OTACHI BW'OMANWA

CHAIRMAN

11TH MAY 2023

RESPONSE TO COMMITTEE REQUEST ON PETITIONS REGARDING HISTORICAL LAND INJUSTICES BY TOROBEEK COMMUNITY AND KIPSIGIS COMMUNITY CLANS' ORGANIZATION

Honourable Chair,

Pursuant to the letter Ref: **SEN/DGAC/DGC/JLAHRC/2023/(96)** dated **27th April, 2023** and a further letter Ref: **SEN/DGAC/DGC/JLAHRC/2023/(101)** dated **5th May, 2023** inviting the Chairman, National Land Commission to submit a written response to the Committee to address matters raised in the petitions. NLC wishes to acknowledge the courtesy extended by your committee in acceding to our request for additional time occasioned by another conflicting Parliamentary appearance.

Honourable Chair, I wish to respond as follows:

The National Land Commission (NLC) was established under articles 67 and 248 of the Constitution of Kenya 2010. It was formed to spearhead the land reform agenda in Kenya as intended in the National Land Policy 2009. The Commission is operationalized through Acts of Parliament that include: National Land Commission Act, 2012; the Land Act, 2012 and the Land Registration Act, 2012. The role of the Commission is to facilitate sustainable land use in Kenya through a holistic land policy, efficient land management practices, equitable access to land, comprehensive land registration, consider and make recommendation on Historical Land Injustice claims and applying appropriate land dispute handling mechanisms among others.

1. PETITIONS REGARDING HISTORICAL LAND INJUSTICES BY KIPSIGIS COMMUNITY CLANS' ORGANIZATION

Honourable Chair, considering the petition as submitted by Mr. Joel K. Kimetto for the Kipsigis Clans Organization, the National Land Commission submits as follows;

In 2018, the Commission received, registered and admitted Historical Land Injustice claims from the Kipsigis of Kericho and Bomet Counties as follows;

i. NLC/HLI/044/2017 by Joel K Kimetto for Kipsigis Community Clans;

ii. NLC/HLI/013/2017 by David Ngasura Tuei for Kipsigis Talai Clan/Community, and

iii. NLC/HLI/173/2017 by Peter Kiprotich Bett for Borowo and Kipsigis Clans Self-Help Group.

Hon Chair, the Commission proceeded to carry out investigative hearings and made the following decision in favor of the Talai & Kipsigis Clans of Kericho and Bomet Counties in the following terms:

a) The claims were allowed.

b) A resurvey should be done on the lands being held by the tea estates to determine if there is any surplus land or residue to be held in trust for the community by the County Government for public purposes.

c) The County Government and the multi-nationals sign a Memorandum of Understanding (MoU) for the multinationals to provide public utilities to the community.

d) Renewal of the leases to these lands be withheld until an agreement is reached with the respective County Governments of Kericho and Bomet.

e) With regard to rate and rent on such lands the Commission recommends that these should be enhanced to benefit national and county governments.

f) The Commission orders that all 999-year-old leases should be converted to the Constitutional requirement of 99 years.

The above Commission's recommendations were also published in the Kenya Gazette no 1995 on 01/03/2019.

Court Case

However, the tea companies were aggrieved with the Commission's decision and moved to court and filed a court case number **Nairobi JR No.95 of 2019 James Finlays Kenya Ltd & Others-vs-NLC & Others (later consolidated as Nairobi ELC JR 3 of 2020, JR 4 of 2020, JR 5 of 2020)**. The details for ELC JR 3 of 2020 relates to the Kipsigis claims. The parties to the court case are,

i. Republic ..... Applicant

ii. National Land Commission ..... 1st Respondent
iii. Director of Survey (Under The Ministry of Lands) ..... 2nd Respondent
iv. County Government of Kericho ..... 3rd Respondent
v. County Government of Bomet ..... 4th Respondent
vi. David Tuei & 19 Others ..... 1st - 20th Interested Parties
vii. Borowo & Kipsigis Clans Self Help Group ..... 21st Interested Parties

EX-PARTE (Being Members of Kenya Tea Growers Association).

i. James Finlays Kenya Ltd;
ii. Sotik Tea Company Limited;
iii. Sotik Highlands Tea Co. Ltd;
iv. Changoi/Lelsa Tea Estate Ltd;
v. Tinderet Tea Estate Ltd;
vi. Kaimosi Tea Estate Ltd;
vii. Kapchorua Tea Plc;
viii. Kipkebe Ltd;
ix. Nandi Tea Estate Ltd;
x. Kaisugu Ltd; And
xi. Emrock (EPZ) Tea Factory Ltd

The multinational tea companies sought to quash the decision of NLC on a number of grounds that included lack of fair hearing and fair administrative action contrary to Articles 50 and 47 of the Constitution of Kenya and the Fair Administrative Actions Act. They also stated that NLC conducted the hearings without regulations and went beyond their jurisdiction under the law. At the beginning, the court gave the multinational tea companies an order injuncting the Commission from implementing its decision until the case was finalized.

Hon Chair, on 20th April 2023, the Court rendered its judgement and issued the following **Final Orders** on ELC No. JR 3 of 2020 after its finding that the Commission did not afford the tea companies a fair hearing.

i. ***An order of Certiorari be and is hereby issued to remove into this Court for purposes of being quashed and quashing, quash the Gazette notice***

published on the 1st March, 2019 in so far as it relates to the National Land Commission recommendations dated 18th February, 2019 in so far as it relates to the claims by the County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai clans, Kipsigis clans and the Borowo and Kipsigis Clans Self Help Group vs The Colonial Government and the Government of Kenya under Ref: NLC/HL1/044/2017, NLC/HL1/546/2018 and NLC/HL1/173/2017.

ii. ***An order of Prohibition be and is hereby issued, prohibiting the Director of Surveys under the Ministry of Land and the County Governments of Kericho and Bomet from implementing the recommendations published in the Kenya Gazette Notice of 1st March, 2019 and dated 18th February, 2019 in respect of the claims by the County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai clans, Kipsigis clans and the Borowo and Kipsigis Clans Self Help Group vs The Colonial Government and the Government of Kenya under Ref: NLC/HL1/044/2017, NLC/HL1/546/2018 and NLC/HL1/173/2017.***

Honourable Chair, the National Land Commission takes cognizance of the above judgement and stands guided by this Committee on way forward.

2. PETITION BY PAULO MOSBEI ON BEHALF OF TOROBEEK COMMUNITY OF KENYA ON HISTORICAL LAND INJUSTICE

Honourable Chair, the National Land Commission in considering the petition as submitted by Mr. Paulo Mosbei for the Torobeek community responds as follows;

Background

Torobeek Community Association of Kenya of Box Nakuru made a formal complaint on 10th September, 2021 to the National Land Commission concerning historical land injustice suffered by the community in Kenya.

The claimants allege that:

i. That Torobeek Community are associated with the Dorobo who are forest dwellers within Kalenjin community in Kenya and they were found originally living together with Ogiek Community before they were forcefully evicted and displaced from the region of Mau Complex of Nakuru. They claim to be equally marginalized in Kenya like the Ogiek.

ii. That they are still living with Ogiek Community in Mau Complex while the rest are scattered across Rift Valley counties

Prayers

i. The government to set aside fund for compensation

ii. The government to resettle the community in collaboration with the relevant National government ministries and agencies

Upon receipt of the claim by Torobeek Community, the NLC proceeded to record it as file reference number NLC/HLI/1117/2021 alongside other 3,740 claims. The claim was admitted for hearing after being taken through the admissibility criteria as per Section 15 of the National Land Commission Act of 2012. Currently the matter is under active investigation.

Honourable Chair, I submit.

GERSHOM OTACHI BW'OMANWA

CHAIRMAN

11TH MAY 2023

Annex 10: Submissions by the Kenya National Commission on Human Rights

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

ADVISORY ON

1. **PETITION CONCERNING THE BRITISH COLONIAL HISTORICAL LAND INJUSTICES AGAINST THE KIPSIGIS PEOPLE**
2. **PETITION CONCERNING HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY**
3. **PETITION CONCERNING MISTREATMENT, HARASSMENT, PROPERTY LOSS AND HUMAN RIGHTS VIOLATIONS METED ON THE FAMILY OF THE LATE HON. JEAN MARIE SERONEY**

PRESENTED TO

THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

DATED: 8TH AUGUST 2022

Kenya National Commission on Human Rights
1st Floor, CVS Plaza, Lenana Road
P.O. Box 74359-00200
NAIROBI, KENYA
Tel: 254-20-2717908 /2717256/2712664
Fax: 254-20-2716160
Website: www.knchr.org
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1. The Kenya National Commission on Human Rights ("KNCHR" or "National Commission") is an independent National Human Rights Institution established under Article 59 of the Constitution with a broad mandate to promote a culture of respect for human rights in the Republic of Kenya. The operations of the National Human Rights Commission are guided by the United Nations Paris Principles on the establishment and functioning of Independent National Human Rights Institutions commonly referred to as the Paris Principles and is accredited as an 'A' status institution for its compliance with the Paris Principles by the Global Alliance of National Human Rights Institutions (GANHRI). The Commission also enjoys Affiliate Status before the African Commission on Human and Peoples' Rights.
2. The National Commission under Article 249 of the Constitution has a mandate to secure observance of all state organs of democratic values and principles and to promote constitutionalism. Article 10 of the Constitution requires all state organs to ensure they uphold constitutionalism and the rule of law whenever they make public policy decisions or interpret the constitution. One of the strategies pursued by the Commission to secure observance of all state organs of democratic values and principles is through the issuance of advisories.
3. Article 19 of the Constitution of Kenya affirms that the Bill of Rights is an integral part of Kenya's democracy, which forms the framework for social, political, economic and cultural policies. The purpose of recognizing, protecting human rights and fundamental freedoms is to preserve the dignity of individuals, communities and to promote social justice and the realization of the potential of all human beings. That said, the Commission is alive to a myriad of competing interests between Communities and investors especially those in the tea sector; processes of land acquisition and ownership, benefit

sharing amongst others. The Commission is also alive to the country and counties as well as global business interests. These are very weighty issues, which must be balanced, canvassed deeply and with finality.

The Commission wishes to respond to the aforementioned petitions as follows:

A. PETITION CONCERNING THE BRITISH COLONIAL HISTORICAL LAND INJUSTICES AGAINST THE KIPSIGIS PEOPLE

4. The Commission wishes to inform the Committee that it has not received complaints from the community on the issues raised in the petition. However, it has had a very informed discussion with National Land Commission on the Subject matter. Similarly the Commission is privy to the appeal application by various parties who were negatively affected by the decision of the National Land Commission as gazetted under Gazette Notice No. 1995 dated 1st March 2019.
5. The Commission is informed that the appeal has been heard and concluded in favour of the applicants. The Environment and Land Court in Nairobi vide decision dated 20th April 2023 in Judicial Review No. 3 of 2020 has issued orders quashing the decisions of the National Land Commission as gazetted under Gazette Notice No. 1995 of 1st March 2019.

The Commission's Recommendations:

6. Whereas the Commission appreciates the role the Committee plays in oversight, protecting and promoting access to justice and human rights, the

Commission is of the view that the National Land Commission (NLC) is given an opportunity to hear the matter afresh in view of the Court's judgement.

7. The Commission's view is guided by the doctrine of separation of powers, as both the Commission and National Land Commission do enjoy independence as far as their mandates are concerned. The Committee is requested to remit the matter back to NLC for its consideration in line with Section 6 as read together with Section 15 of the National Land Commission Act, 2012.

B. PETITION CONCERNING HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY

8. Indigenous People in Kenya continue to face a myriad of challenges. With lack of land tenure rights to their ancestral lands being a key concern. Indigenous people are so connected to their lands that the lands enable them to enjoy other rights such as the right to culture and religion. Eviction of indigenous people from their ancestral lands has in effect made it impractical for them to enjoy these rights.[1]
9. In 2009, the Government of the Republic of Kenya sought to evict Members of the Ogiek Community from their ancestral lands within Mau forest. The Community approached the African Commission on Human and Peoples' Rights (African Commission) that later referred the matter to the African Court on Human and Peoples' rights (African Court) for a judicial determination. The African Court delivered its Judgment on merits on 26th

[1] See para 164 of the decision of the African Court on Human and People's Rights decision in African Commission on Human and Peoples Rights v Republic of Kenya (Application No 006/2012) where the Court observed that: "*in the context of traditional societies where formal religious institutions do not exist, the practice and profession of religion are usually inextricably linked with land and the environment. In indigenous societies in particular, the freedom to worship and to engage in religious ceremonies depends on access to land and the natural environment. Any impediments to, or interference with accessing the natural environment, including land, severely constrains their ability to conduct or engage in religious rituals with considerable repercussion on their freedom of worship.*"

May 2017.[2] While delivering its Judgment, the African Court Ordered the Republic of Kenya to take steps to remedy the violations disclosed and file its report within 6 months from the date of the Judgment.

10. In 2019, the Government of the Republic of Kenya through the then Cabinet Secretary, Ministry of Environment and Forestry appointed a Taskforce to advise on implementation of the African Court Judgment. The KNCHR sat in the Taskforce whose report has never been made public.

11. The African Court later (on 23rd June 2022) gave its Judgment on Reparations. In its Judgment on reparations, the African Court observed that there was no compliance with its earlier Judgment on merits. The Court ordered the Republic of Kenya to among others:

    a) Pay compensation to the Ogiek community an amount of Ksh 57,850,000 and Ksh 100,000,000 for material and moral prejudice respectively;
    b) Take all necessary measures, in consultation with the Ogiek community and its representatives, to identify, delimit and grant collective land title to the community and, by law, assure them of unhindered use and enjoyment of their land;
    c) Take all steps to ensure full recognition of the Ogiek as an Indigenous People by among others recognition of the Ogiek language, culture and religious practices;
    d) Take all necessary legislative, administrative or other measures to recognize, respect and protect the right of the Ogiek to be effectively consulted in accordance with their traditions and customs, on all matters concerning development, conservation or investment on their lands;

[2] The Judgment confirmed violation of the rights to; the freedom of conscience and religion, the right to culture, ancestral land rights, the right of the Ogiek to dispose of freely their wealth and natural resources and the right to development.

e) Establish a Community Development Fund within 12 months, in which all funds ordered as compensation - in this case - will be deposited;

f) Adopt legislative and administrative and/or any other measures to give full effect to the terms of the judgment as a means of guaranteeing the non-repetition of the violations identified;

g) Ensure the full consultation and participation of the Ogiek, in accordance with their traditions/customs in the reparation process (in line with the judgment);

h) Publish the Judgments of the Court on both Merits and Reparations and their summaries (as provided by the Registry of the Court) in a government website where they will be available for a period of at least 1year. The State was further ordered to publish the summaries on the official Kenya Gazette and a newspaper with nationwide circulation.

12. The KNCHR notes that Kenya has no specific legislation governing indigenous peoples and has not ratified the United Nations Declaration on the Rights of Indigenous People. There is need to have a specific legislation to enhance the protection of among others ancestral land rights, the freedom of religion and/or belief for indigenous communities, Free Prior and Informed Consent among other safeguards.

13. The KNCHR has documented incidences of forced evictions against members of the Ogiek and Sengwer communities from their ancestral lands in Embobut and Mau forests respectively. The evictions have been pursued ostensibly for purposes of forest conservation. In this respect, the Commission conducted various investigation missions including a high level fact finding mission to ascertain the allegations and seek redress on behalf of the community. The

forced evictions have resulted in destruction of property, loss of life and made it impractical for the community to exercise its freedom of religion and belief.[3]

14. The KNCHR notes that conservation efforts have often times disadvantaged indigenous people who have since time immemorial conserved the forests that they assert ancestral land ownership rights. The State needs to adopt and mainstream a Human Rights Based Approach to conservation that appreciates the role and significant contribution of indigenous people to climate change, mitigation and adaptation.

15. Notably, that the Ogiek and Endorois decisions are grounded on the provisions of the African Charter on Human and Peoples' rights which is binding and applicable in the Kenyan context by virtue of Article 2 (6) of the Constitution.[4] The Commission notes the current government's commitment to determine "*within 60 days, all judgments and orders against the government, and make sure that the government abides by all court rulings.*"[5]

16. Of concern, the timelines within which certain orders in the Ogiek Judgment ought to have been implemented is running out and the continued non-implementation of the decisions puts into question Kenya's commitment to ensure full implementation of the African Charter on Human and Peoples' Rights.

The Commission's Recommendations:

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[3] See Kenya National Commission on Human Rights 'The Report of the High Level Independent Fact-Finding Mission to Embobut Forest in Elgeyo Marakwet Community' available at http://www.knchr.org/portals/0/grouprightsreports/KNCHR-Fact_Finding_Mission_to_Embobut_Forest.pdf

[4] Article 2(6) of the Constitution provides that "any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"

[5] Page 58 of the Kenya Kwanza Plan: The Bottom Up Economic Transformation Agenda

17. Given that the Torebeek community claims to be living with the Ogiek community in the Mau forest complex, the Commission holds the view that the primary focus at the first instance will be Ogiek Decision of the African Court owing to its binding and final nature having been rendered by the African Court unanimously.[6] The reliefs applied by the State should address the concerns of all Mau dwelling communities. The Republic of Kenya being a State Party to the Protocol establishing the African Court has an obligation to comply with the judgment of the court within the specified timelines and to guarantee its implementation.[7]

18. The Commission further reiterates to the Committee the need to have a legislation on Indigenous People and fast tracking the legislation envisioned under Article 100 of the Constitution.

C. PETITION CONCERNING MISTREATMENT, HARASSMENT, PROPERTY LOSS AND HUMAN RIGHTS VIOLATIONS METED ON THE FAMILY OF THE LATE HON. JEAN MARIE SERONEY

19. The Commission is well aware of the epoch in the Kenyan history when human rights were a privilege, rather than an inherent right; thus, people who stood firm for justice were considered political dissents and severely punished. The 2010 Constitution heralded a new dawn, where the government is required to subscribe and be guided by the essential values of human rights,

[6] Article 28(2) of the Protocol to the African Charter Establishing the African Court on Human and Peoples Rights provides that the judgment of the Court decided by Majority is final and is not subject to appeal.
[7] Article 30 of the Protocol the African Charter Establishing the African Court on Human and Peoples Rights

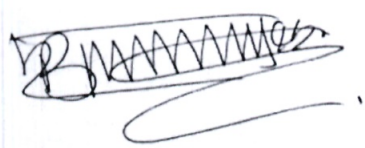
equality, freedom, democracy, social justice and the rule of law; values that were conspicuously absent in the former regimes.

20. On the Petition concerning Hon. J.M Seroney, the Commission would have wished that the relevant Court orders were annexed. Nonetheless, the Commission notes that the current government campaigned on a platform for respect for the Rule of Law with a clear undertaking in its Manifesto to review within 60 days all Judgments made against the state with a view to ensure/advise on compliance. As a National Human Rights Institution that supports the observance of the rule of law, which is a National Value and Principle of Governance under Article 10 of the Constitution, the Commission welcomes this commitment as a good starting point, and supports this petition and look forward to the findings of the Committee.

The Commission hopes that this advisory would enable the Committee to successfully deliberate on the three Petitions and would welcome an opportunity to engage further.

Please receive the considerations of our highest regards,

Signed by,



Dr. Bernard Mogesa PhD, CPM
Commission Secretary/Chief Executive Officer

Annex 11: Submissions by the National Gender and Equality Commission

National Gender and Equality Commission
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Landline: +254(020) 3213100
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When replying please quote

Ref: No: NGEC/CS/NAS/005/VOL.III (96)

3rd May 2023

J. M. Nyegenye, CBS
Clerk of the Senate
Clerk's Chambers
Parliament Building
P.O. BOX 41842-00100
NAIROBI

Dear *Mr. Nyegenye,*

INVITATION TO A MEETING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

Thank you for your letter Ref. No. SEN/DGAC/DGC/JLAHRC/2023/(97) of 27th April 2023.

Please find attached the National Gender and Equality Commission (NGEC) written submissions on the issues contained in the Petition by Mr. Paulo Kiprotich Mosbei regarding historical injustices suffered by the minority Torobeek community as requested, for consideration by the Standing Committee on Justice, Legal Affairs and Human Rights.

The Commission will appear before the Committee on Thursday, 4th May, 2023 at 9.00 am in the Senate Chamber at Parliament Buildings, to address the Committee on the matters raised in the said Petition.

Yours *sincerely,*

Betty Sungura, **MBS**
COMMISSION SECRETARY/CEO

Encl.

NATIONAL GENDER AND EQUALITY COMMISSION

"Gender Equality and Non-Discrimination"

SUBMISSIONS BY THE CHAIRPERSON OF THE NATIONAL GENDER AND EQUALITY COMMISSION, DR. JOYCE MUTINDA (PhD) TO THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE PETITION BY PAULO KIPROTICH MOSBEI, 3RD MAY 2023

The Honorable Chairperson; Sen. Wakili Hillary Kiprotich Sigei

The Vice Chairperson, Sen. Chimera Raphael Mwinzago

The Honorable Committee Members

1. Sen. Nyamu Karen Njeri
2. Sen. Veronica Waheti Nduati
3. Sen. Kipkiror William Cheptumo
4. Sen. Adan Dullo Fatuma
5. Sen. Hamida Ali Kibwana
6. Sen. Okoiti Andrew Omtatah
7. Sen. Catherine Muyeka Mumma

The Commission received communication from the Clerk Senate on 27th April 2023 forwarding the Petition by Mr. Paulo Kiprotich Mosbei and requesting the Commission to respond to the issues raised in the Petition and in particular the historical injustices suffered by the Torobeek minority community.

The Commission is delighted to appear before you to make submissions on the actions that the Commission has done to address historical injustice suffered by minority and marginalized groups within our mandate of promoting gender equality and freedom from discrimination at national and county levels.

Honorable Chairperson and members, the National Gender and Equality Commission (NGEC) is a Constitutional Commission established by the National Gender and Equality Commission Act, 15 of 2011 pursuant to Article 59 (4) & (5) of the Constitution of Kenya, 2010. The Commission's mandate is to promote gender equality and freedom from discrimination for all people in Kenya with focus on Special Interest Groups (SIGs), which include: women, children, youth, Persons with Disabilities (PWDs), older members of society, minority and marginalized groups. Section 8 of National Gender and Equality Commission Act,2011 provides for the functions of the Commission. In particular section 8(b) obligates the

Commission to monitor, facilitate and advice on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, administrative regulations, in all public and private institutions. Section 27 to 29 spells out our quasi-judicial powers including our jurisdiction to investigations.

Honorable Chairperson and members,

Introduction

As an overarching approach, the Commission has been addressing the issues of minority and marginalized communities through its mandate. For instance,

In 2013, the Commission undertook a community-based intervention with overall goal to identify key drivers of marginalization in the history and contemporary life of the minority groups, in six counties of Kenya (Baringo, Nandi, Isiolo, Laikipia, Tana-River and Kilifi).

The educational forum found that the most common and influential factors promoting perpetual exclusion and inequalities included poverty, loss of identity, negative perceptions and stereotypes, historical and contemporary political exclusion and erosion of cultural values and traditions, underrepresentation in all sectors and spheres of life, government policies including subsidy interventions and past affirmative actions, and limited educational opportunities. The findings are published in a report titled, ***"Flares of Marginalization among selected minority communities of Kenya***". https://www.ngeckenya.org/Downloads/flares-of-marginalization-in-Kenya .

In 2017, the Commission and its stakeholders carried out an assessment in the 47 counties to audit, identify and map ethnic minorities and marginalized communities in order to profile their status and provide data for policy formulation and to inform county development agenda. The findings, published in a report titled, ***"Unmasking Ethnic Minorities and Marginalized Communities in Kenya"*** indicate that minority and marginalized groups have low literacy rates; higher unemployment rates; limited or no access to transport and communication infrastructure; limited or no access to social amenities; experience water scarcity and food insecurity; high poverty levels; negative climatic effects and are insecure. See, https://www.ngeckenya.org/Downloads/Unmasking%20Ethnic%20Minorities%20and%20Marginalized%20Communities%20in%20Kenya

During this mapping exercise, the Commission was not able to map out all minority and marginalized communities due to lack of resources. There is therefore the need to undertake a comprehensive mapping exercise of the minority and marginalized communities in order to generate the necessary data required to implement Article 56 of the Constitution.

Based on our mandate and these two publications, has received complaints from the Ogieks, the Sakuyes and Gubawein. These complaints are not different from the issues raised by the Petitioner's herein the Torobeeks neither are they from the findings in the aforementioned reports. However, it is worth mentioning that the Ogiek's and Sakuye have been the consistent complainants and have served as an example to the other indigenous communities on how to fight for their rights.

Interventions

The Commission's interventions are geared towards enhancing inclusion of Minority and Marginalised Groups by facilitating the Recognition of Minority and Marginalised groups and in particular, indigenous persons

1.1 The Commission based on complaints from the Ogiek's on among other issues, discrimination and lack of recognition, done the following:

a) Issued advisory to the Public Service Commission advising them to use correct listing of names for minority and marginalized communities in public service records and reports. In particular, the advisory advised the PSC to use the code issued and used by the Kenya National Bureau of Statistics in the 2009 census while referring to the Ogiek's as opposed to referring to them as Dorobo's. **(See Doc. A)**

While we take cognizance that the Ogiek's and the Petitioners herein are distinct, the Commission is of the view that this approach, of engaging the Kenya National Bureau of Statistics towards ensuring that they are giving an identification code is among the key steps that needs to be done in order to ensure their recognition and inclusion.

b) Wrote the Attorney a follow up letter to the Hon. Attorney General on the status of implementation of the Judgement of the African Court on Human and Peoples' Rights: APPLICATION NO. 006/2012. **(See Doc B)**

While we acknowledge that the Petitioners are distinct from the Ogiek's, the issued raised in the judgement affect all minority and marginalized communities in the Mau forest that have continuously suffered forced evictions. The implementation of the judgment will ultimately result to addressing some of the pertinent historical injustices raised by the Petitioners.

Recommendations

Taking into considerations that the issues of minority and marginazlied groups are yet to be addressed, they will keep being brought up over and over and every decision of the government, without a comprehensive policy and/or strategy to address their issues, will in one or the other run foul with article 56 of the constitution.

Realizing that the rights of minority and marginalized groups are not similar or synonymous to the rights of indigenous people,

Further, cognizant of the fact that there is no comprehensive framework of identifying and mapping out minority and marginalized groups, the Commission makes the following recommendations to this honourable Committee:

1. The need to Commission a multi-agency team to undertake an anthropological evidence-based study on the all ethnic minority and indigenous people in Kenya
2. Based on the findings on the study above, the allocation of unique identifying codes by the Kenya National Bureau of Statistics for purposes of census and planning statistics.
3. The listing of identified communities and indigenous people in the Public Service Commission for purposes of affording them affirmative access to public service opportunities
4. The government to ensure that while undertaking registration of purposes, the ethnic communities identified and verified under the 1st recommendation is taken into consideration while issuing national identification cards to persons from the identified ethnic minority, marginalized communities and indigenous people.
5. Consideration by the executive for the establishment of State department for Minority and Marginalized that will have the responsibility of advising the government on the implementation of the provisions of Article 56 of the Constitution on minorities and marginalized groups.

It is my hope that our response aids this Committee in addressing the Petition. We registered our commitment to serving Kenyans and being available to them through your committee whenever called upon.

Thank you

Annex 12: Supplementary Submissions by the National Gender and Equality Commission

FURTHER SUBMISSIONS: THE NATIONAL GENDER AND EQUALITY COMMISSION TO THE SENATE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON THE PETITION BY PAULO KIPROTICH MUSOBEI MAY 11, 2023

The Honorable Chairperson; Sen. Wakili Hillary Kiprotich Sigei
The Vice Chairperson, Sen. Chimera Raphael Mwinzago
The Honorable Committee Members

1. Sen. Nyamu Karen Njeri
2. Sen. Veronica Waheti Nduati
3. Sen. Kipkiror William Cheptumo
4. Sen. Adan Dullo Fatuma
5. Sen. Hamida Ali Kibwana
6. Sen. Okoiti Andrew Omtatah
7. Sen. Catherine Muyeka Mumma

The Commission appeared before this Committee on 4th May 2023 where it submitted its report on the subject matter. The Senate upon deliberations advised the Commission to prepare a detailed report upon consultations with the Petitioner and present its report preferably before 11th May 2023. This report is to be read together with our first submission of 4th May 2023, which is hereby enclosed.

Honorable Chairperson and Members, The Commission embarked on a preliminary investigation on the Petitioner guided by Sections 28, 29, 30, 31, 32, 33 of the National Gender and Equality Commission Act, No. 15 of 2011 and the National Gender and Equality Commission Complaints Handling Procedure Regulations, 2022. The Commission analyzed the petition, the tele-conversation submissions and supporting documents submitted by the Petitioner and made the following Preliminary findings are THAT:

1. The Prayer for grievances suffered by the Torobeek be expeditiously addressed. This will save the Torobeek Community from further marginalization and neglect by the Government. The prayer falls within the mandate of the Commission and is hereby admitted.
2. The prayer for time bound mechanisms/framework for the resettlement/compensation of the Torobeek Community members in their respective counties does not fall within the mandate of the Commission and therefore is inadmissible.
3. The prayer to set aside funds to compensate and re-settle the Community falls outside the scope of the mandate of the Commission and is therefore inadmissible.

Honourable Chairperson and Members, having admitted prayer no. 1, the Commission, further reviewed the prayer based on the supporting documentations presented and the main petition into the following domains:

1. Lack of recognition by the Government as an ethnic marginalized community by not having a unique identification code.
2. Lack of access to Government opportunities and services as a marginalized community.
3. Lack of representation in appointive and elective positions in County and National Government.
4. Challenges in promoting their culture and ethnic language due to lack of recognition.

Honourable Chairperson and Members, these 4 issues unpack the grievance on marginalization and neglect by Government.

Domain 1: Lack of recognition by the Government as an ethnic marginalized community by not having a unique identification code.

The Commission, just like in other complaints of lack of recognition and identification, undertakes to work with the Ministry of Interior in facilitating the recognition of the Torobeek community by being:

a) issued with a unique identification code.
b) recognized as an ethnic community in Kenya.

Domain 2: Lack of access to Government opportunities and services as a marginalized community.

Honorable Chairperson and Members, the Petitioner painted a picture of barrier erected against members of the community to access Government opportunities and services such affirmative action programs. The barriers also lead to lack of representation in appointive and elective positions.

The mural of this picture is by the very words of the Petitioner, systemic identifying the members of this community as part of dominant tribes in the various counties where they live. For instance, those in Kisii are identified as Kisii's, Nyandarua as Kikuyu's, Nandi and Baringo as either Nandi's or Kipsigis et cetra. The scarce distribution of the Torobeek community members forces them to compete for little available opportunities and services with other dominant communities-whom they are living and clustered with. Consequently, Torobeek are edged out of available opportunities and services.

Honourable Chairperson and members, the impact of this clustering and wrong identification is variant and outlaying including:

i) Lack of data of the number of Torobeek community members in each of the 47 counites;
ii) Lack of data on wrongly identified Torobeek members who have **no** access to Government opportunities and services;
iii) Lack of data on wrongly identified Torobeek members who have access to Government opportunities and services;
iv) No known representation in appointive or elective positions in National and County Governments;
v) Lack of data on wrongly identified Torobeek members who have been appointed or elected into Government offices;
vi) Lack of access to affirmative action programs of government; and

vii) Lack of data on wrongly identified Torobeek members who have had access to affirmative action programs of government.

Honourable Chairperson and Members, based on this, the Commission has decided to undertake an inquiry into this complaint of lack of recognition of the Torobeek community and its impact on their right to access Government opportunities and services. It is, however, not lost to the Commission that the Torobeek are not the only marginalized communities that are seeking recognition and identification which precludes them from access to Government services and opportunities. Therefore, the proposed inquiry will also seek to delve into other communities such as the Sakuye's, Waata and Waayu community of Marsabit, Bongomek community of Bungoma among others. Accordingly, this Commission seeks the support and intervention of this Committee in terms of its budget allocation for it to be able to undertake these commitments. The funds can be in a ring-fenced vote line to be estimated upon your concurrence.

Domain 3. Lack of representation in appointive and elective positions in County and National Government.

Honourable Chairperson and Members, once the Commission addresses the challenge of recognition and identification, we believe that the issue of representation in appointive and elective positions will be halfway solved. However, the Commission will embark, upon completion of the inquiry, on public awareness and sensitization meetings to create awareness among Torobeek on their participation in elective politics, compete for appointive positions as well as inform them of the available affirmative action seats and positions to seek for.

Domain 4. Challenges in promoting their culture and ethnic language due to lack of recognition.

Honourable Chairperson and Members, as observed, recognition and identification is the bacon towards addressing most of the issues raised by the petitioner under prayer 1. Once they are recognized and identified, they will be better placed to participate in activities of promoting their ethnic culture and language. While acknowledging that culture, museums, and heritage are largely transferred functions to counties, the Commission will work closely with counties hosting Torobeek community and implore them to preserve and protect the culture, artifacts, ethno science, documentation of language, among other attributes of culture. The Commission will also work closely with the State Department for Culture and Heritage on this issue. In the meantime, the Commission implores the Torobeek community to continue practicing their culture in order to safeguard it.

In conclusion, **Honourable Chairperson and Members,** the Commission reiterates its earlier recommendations to comprehensively address this Petition and specifically on issues of marginalization, neglect, lack of identification and recognition of the Torobeek and other marginalized communities. **There is need for establishment of a State Department or unit responsible for matters of Minority and Marginalized** that will have the responsibility of advising the Government on the implementation of the provisions of Article 56 of the Constitution on minorities and marginalized groups.

Now, **Honourable Chairperson and Senators,** with regards to prayers 2 and 3 on resettlement and compensation of the Torobeek community, the Commission notes that the relevant institutions that include, the National Land Commission, the Ministry of Lands, Public Works, Housing and Urban Development as well as the Ministry of Interior and National Administration are seized of the issue and would address it. However, the Commission proposes that the inquiry we are proposing, may include members from these institutions if adequate funding is available. Their inclusion will greatly contribute to available evidence that they will require in order to address the issue of resettlement and compensation.

It is my hope that our response aids this Committee in addressing the Petition. We register our commitment to serving Kenyans and be available to them through your Committee whenever called upon.

Thank you,

Dr. Joyce M. Mutinda, PhD, EBS
CHAIRPERSON

Annex 13: Submissions by the Attorney General

REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE

Our Ref: AG/CIV/NA/84/23 **25th May, 2023**

Mr. Jeremiah M Nyegenye, CBS
Clerk of the Senate
Clerk's chambers
P.O Box 41842- 00100
NAIROBI

RE: INVITATION TO A MEETING OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

Reference is made to your letter under Reference No. **SEN/DGAC/JLAHRC/2023/ (104)** dated 27th April, 2023 received by us on 2nd May, 2023 inviting the Honourable Attorney General to respond to Three Petitions:

a) Petition by Mr. Paulo Mosbei regarding historical injustices suffered by the Torobeek community.
b) Petition by Mr. Joel K Kimetto and Kipsigis community clan organization members concerning land injustices suffered by the Kipsigis community.
c) Petition by Ms. Zipporah C. K Seroney regarding mistreatment, harassment, property loss and human rights violations meted on the family of the late Hon. Jean Marie Seroney.

Much as the Hon. Attorney General would have wished to appear before the committee unfortunately due to exigencies of duty he couldn't hence following are our response:

A. INTRODUCTION

The office of the Attorney General is established under Article 156 of the Constitution of Kenya as read together with the Office of the Attorney General Act, as the Principal legal adviser to Government and provides policy, coordination and oversight with

regard to various legal sector institutions and therefore has a broader cross-cutting mandate to support the strengthening of legal sector institutions in Kenya. The Attorney General has the overall mandate to promote, protect and uphold the rule of law and defend public interest.

B. RESPONSE

a) PETITION BY MR. PAULO MOSBEI REGARDING HISTORICAL INJUSTICES SUFFERED BY THE TOROBEEK COMMUNITY.

The Committee has sought for submission on the status of historical injustices suffered by the Torobeek community.

1. The Torobeek Community claim they lived together with the Ogiek in the Mau Complex before their forceful eviction and displacement by the colonialists. As a result of the displacement, the community is facing marginalization and has not been recognized by the government. They thus seek among other prayers compensation, resettlement and consideration for employment.

2. Land remains a politically sensitive and culturally complex issue in Kenya. The land question is characterized by indications of a breakdown in land administration, disparities in land ownership, tenure insecurity and conflict courtesy of history of colonialism. These challenges necessitated the promulgation of the Constitution of Kenya, 2010 which established a legislative and institutional framework for land use and management on the basis of equity, efficiency, productivity and sustainability.

3. The Constitution also established the National Land Commission (NLC) as the manager of public land, articulator of the National Land Policy and investigator of historical land injustices.

4. Issues of historical land injustices all begun during the colonial administration which used irregular and/or illegal methods to obtain land from local communities such as the establishment of native reserves; forced evictions of the Talai, Pokot, Turkana and Sabaot communities, land alienation by multinational corporations and measures such as forced African labour, forced taxation and forced military service.

5. These colonial policies, laws and practices had both immediate and long-term effects on African communities, including permanent displacement and the devastating post elections violence of 2007/2008 which led to loss of lives, properties and Internally displaced persons (IDPs). As part of remedial approach, the Truth, Justice and Reconciliation Commission (TJRC) was

established by the Truth, Justice and Reconciliation Act No. 6 of 2008. The mandate of the Commission was to:

a) Inquire into human rights violations, including those committed by the state, groups or individuals.
b) Inquire into major economic crimes, particularly grand corruption, **historical land injustices** and illegal or irregular acquisition of land especially those relating to conflict and violence.
c) Promote peace, justice, national unity, healing and reconciliation among Kenyans.
d) Investigate gross human right violations and other **historical injustices** in Kenya between 12th December 1963 and 28th February 2008 and determining ways and means of redress for victims of gross human rights violations.
e) Make recommendations with regard to the granting of reparations to victims or undertaking of other measures aimed at rehabilitating and restoring human and civil dignity of victims.

6. The TJRC report and the recommendations therein, was submitted to His Excellency Uhuru Kenyatta, the then President, on 21st May, 2013. The Report was laid before the National Assembly on 24th July 2013 by the then Leader of Majority.

7. The Historical Land Injustices of Torobeek community can be addressed either at the National assembly under TJRC report or National Land Commission, however at the National Assembly the following matters are notable:

   a) The TJRC report made recommendations on incidents of historical injustices alleged to have happened during colonial period, well beyond its mandate.

   b) The National Assembly must consider and make recommendations on the TJRC report as required by Section 49 of the Truth, justice and reconciliation Act, then implementation can take place based on the recommendations of the National Assembly.

   c) At the moment Senate or the Committee has no authority to discuss the TJRC report.

8. The Constitution under Article 67(1) establishes the **National Land Commission.** The Commission has among other mandates, the mandate of initiating investigations on *suo moto* or on a complaint into present or historical land injustices and recommend appropriate redress under Article 67(2)(e). In

addition to Section 15(1) of National Land Commission Act, 5 of 2012 which empowers the Commission to receive, admit and **investigate all historical land injustice complaints** and recommend appropriate redress.

9. Section 15(1) defines historical land injustices to mean grievances which: -
   a) was occasioned by a violation of right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement;
   b) Resulted in displacement from their habitual place of residence;
   c) Occurred between **15th June 1895** when Kenya became a protectorate under the British East African Protectorate and **27th August, 2010** when the Constitution of Kenya was promulgated;
   d) Has not been sufficiently resolved and subsists up to the period specified under paragraph (c); and
   e) Meets the criteria set out under subsection 3 of this section.

10. **National Land Commission Act, 2012** under Section 15(9)(b) allows the Commission to recommend appropriate remedies including compensation or restoration of the land to the rightful owners after investigation, nevertheless any institution mandated to act to redress the recommendations of the Commission shall be done within 3 years.

11. **Land Law (Amendment)Act No.28 of 2016** under Section 38(11) extends the mandate of the Commission to receive, admit and investigate historical land injustices claim for another 10 years from 2016 and the mandate lapses in the years 2026.

12. **National Land Commission (Investigation of Historical Land Injustices) Regulations, 2017 (L.N. No. 258 of 2017).** The regulations were formulated to facilitate the expeditious, efficient, impartial investigations and just resolution of claims arising out of historical land injustices. Under regulation 26(1), after conducting investigations on the matter, the Commission shall render a decision within twenty-one days.

13. The Courts have in a number of cases held that "where a clear procedure for redress of any particular grievances prescribed by the Constitution or Act of Parliament, that procedure should be followed, provided that the remedy thereunder is effectual" **Safepak Limited v Henry Wambega & 11 others [2019] eKLR,** see also **Advisory opinion of the Supreme Court in the Matter of the National Land Commission.**

14. The National Land Commission is properly placed to investigate the matter and provide appropriate remedies to the Torobeek community, nevertheless,

the Community engaged a number of Government Institutions among them: - the Ministry of Interior and Coordination of National Government, Ministry of Lands, National Lands Commission, Kenya National Human Rights Commission. It will be prudent to find out the deliberations and the outcome of the meetings, in particular with the National Land Commission.

b. PETITION BY MR. JOEL K KIMETTO AND KIPSIGIS COMMUNITY CLAN ORGANIZATIONS MEMBERS CONCERNING LAND INJUSTICES SUFFERED BY THE KIPSIGIS COMMUNITY

15. The County Government of Kericho, The County Government of Bomet, the Kipsigis Clans, Talai Clan Community and Borowo & Kipsigis Clans Self-help Group filed an historical land injustice claim at the National Land Commission against the British Government and the Government of Kenya claiming that the Kipsigis and Talai communities lost several thousands of Acres of land to the British white settlers as a result of the British colonialism. With support of the British Colonial Government, the white settlers forcefully took away the most fertile and arable parcels. To date a number of such parcels are occupied by British Multi-National Tea Companies which include: -Chagaik, Cheymen, Tagabi, Saosa, Timbilil, Chemosit, Chamji, Kapkorech, Kimulot, Kimugu, Koiwa, Kipkebe, Chemamul, Tendwet, Chebown among others. They further alleged that the Talai were forcefully removed to Gwasi a place that was quite hostile for their habitation.

16. The claimants are seeking the following reliefs: -

- **i)** An apology from the British Government for the injustices inflicted upon the Kipsigis and Talai victims.
- **ii)** Compensation by the British Government for the injustices inflicted upon them.
- **iii)** Mesne profits for the loss of use of land for the period they were denied possession and ownership.
- **iv)** The land occupied by the Multi-National Companies be reverted back to them.
- **v)** The Multi- National companies be asked to lease the said parcels from the County Governments of Kericho and Bomet.
- **vi)** The Companies be allowed to remain as tenants in the unexpired period of tenancy.
- **vii)** The British Government asked to construct community amenities for the communities.

17. The National Land Commission made a finding and recommended the following Redress:-

i) The British Government do apologize to the Kipsigis and Talai victims for the injustices inflicted on them.

ii) The Kenya Government to make a formal acknowledgment that what was crown land was unlawfully taken away from the Kipsigis and Talai by the Colonial Government and ought to have been surrendered to the community at independence.

iii) The British Government to construct community amenities for the communities.

iv) The British Government do pay reparations to the direct victims of the historical land injustices.

v) The Multi-National Companies do pay Mesne profits to the victims for loss of use of land since 1902.

vi) Rates and Rent for land occupied by the companies be enhanced so as to benefit the County Governments of Kericho and Bomet.

vii) The companies do lease the said parcels from the County Governments of Kericho and Bomet.

viii) The leases that have expired should not be renewed without concurrence of the County Government where the land is domiciled.

ix) The Government of Kenya to resettle the members of the Kipsigis and Talai Community within the vicinity of Kericho and Bomet to end their perennial landlessness.

x) A fresh survey and audit be undertaken for land allocated to the companies and any land in excess of the size documented in the official records be reverted back to the County Governments of Kericho and Bomet and be held in trust on behalf of the residents of the two counties.

18. These recommendations were published on the Kenya Gazette on 1st March, 2019 and on 30th May, 2019 the following Multi-National Companies: - James Finlays Kenya Limited, Sotik Tea Co. Ltd, Sotik Highlands Tea Ltd, Changoi/Lelsa Tea Estate Ltd, Tinderet Tea Estate Ltd, Tinderet Tea Estate Ltd, Kaimosi Tea Estate Ltd, Kapchorua Tea PLC, Kipkebe Ltd, Nandi Tea Estates Ltd, Kaisugu Ltd, Emrok (EPZ) Tea Factory Ltd, filed an Application for Judicial Review before the Environment and Land Court at Nairobi being **Nairobi ELC JR. NO. 3 OF 2020,** R vs. The National Land Commission & Others Ex parte James Finlays Kenya Limited, Sotik Tea Co. Ltd, Sotik Highlands Tea Ltd, Changoi/Lelsa Tea Estate Ltd, Tinderet Tea Estate Ltd, Tinderet Tea Estate Ltd, Kaimosi Tea Estate Ltd, Kapchorua Tea Plc, Kipkebe Ltd, Nandi Tea Estates Ltd, Kaisugu Ltd, Emrok (Epz) Tea Factory Ltd being members of Kenya tea growers and Kenya tea growers associated with the ex-parte applicants. **(ANNEX 1)**

19. In the said suit, the Multi-National Companies sought among other Orders a judicial review order of certiorari to quash the decision of the National Land Commission. This matter was heard and judgment delivered on **20th April, 2023** in which the Court held that the National Land Commission did not grant the Applicants a chance of being heard and as such, the Court quashed the gazette notice dated 1st March, 2019 and the recommendations of the Commission dated 18th February, 2019 in so far as it relates to the claims by the County Governments of Kericho and Bomet on behalf of the Kipsigis and Talai clans. The Court further prohibited the Director of Surveys from implementing the NLC recommendations.

20. In addition to the above mentioned Judicial Review proceedings, the County Government of Kericho filed Supreme Court **Advisory Opinion Reference No. 2 of 2020** between the **County Government of Kericho and The National Land Commission, the Ministry of lands and the Hon. Attorney General (ANNEX 2).** In the said reference, the County Government of Kericho raised the historical land injustice against the Kipsigis clan, the Talai community among others. The County Government therefore sought an advisory from the Supreme Court on the following questions:-

a) What happens to the leases granted to multinational companies operating in Kenya and owned by non-citizens which were for a term of 999 years and were converted to a term of not more than 99 years according to Article 65 of the constitution?

b) When does time start running for the fresh 99 year leases held by non-citizens?

c) Upon expiry of the lease to which level of government does the land revert to?

d) Whether the NLC has exclusive powers to issue leases without the involvement of the County Government?

e) What is the role of the County Government in renewal of leases within the meaning of Article 65(1) of the Constitution?

f) Is the land allocated to the Multi-national companies during colonial administration, leasehold tenure within the meaning of Article 65(1) of the Constitution?

g) Whether NLC has exclusive powers to allocate land and the role of the County Government in renewal of leases within the meaning of Article 65(1) of the Constitution.

h) Whether the public land previously managed by the defunct local authorities and municipal councils was envisioned to be held by the County Governments on behalf of the people.

i) What is the role of the County Governments in community land management and administration?

21. The matter is pending before the Supreme Court. Parties have filed submissions. We appeared before Court on 12th May 2023 for directions. The Court informed us that it had directed the County Government of Kericho to seek a legal opinion from our office. The Court therefore directed this office to advise the County Government of Kericho within two weeks. This matter shall be mentioned on 29th May, 2023 for purposes of reporting back to the Court on whether the office has advised the County Government of Kericho as directed.

22. We received a letter dated 28th April, 2023 from the firm of Manyonge Wanyama & Associates LLP, who are on record for the County Government of Kericho, seeking our opinion on this issue among other legal issues. We are in the process of preparing the said legal opinion.

c) PETITION BY MS. ZIPPORAH C. K SERONEY REGARDING MISTREATMENT, HARASSMENT, PROPERTY LOSS AND HUMAN RIGHTS VIOLATIONS METED ON THE FAMILY OF THE LATE HON. JEAN MARIE SERONEY.

23. **Ms. Zipporah C.K Seroney** sued the office of the Attorney General in the High Court in Nairobi in constitutional petition No. 500 of 2013, **Zipporah Seroney vs. Attorney General (ANNEX 3),** the court heard the matter and on 3rd April 2020, judgment was entered against the Attorney General. The Office of the Attorney General has made full payment of Kshs. **20,000,000** to Ms. Zipporah C.K Seroney, being the decretal sum inclusive of the costs of the suit.

C) RECOMMENDATIONS

24. The petition involving the Kipsigis community is a matter under judicial consideration, I humbly request that the Supreme Court be allowed to make a determination as it will be inappropriate for the Senate to comment on a matter under consideration by the Court of law.

25. On the Petition involving the family of the Late Hon. Jean Marie Seroney, it is my opinion that this matter has already been determined by the Court and compensation paid to the family by the Government.

26. The petition involving the Torobeek Community falls within the mandate of the National Land Commission, it is my considered view that this issue be handled by the Commission, if the claim has been lodged with them, as per the Provisions of Article 67(2)(e) of the Constitution of Kenya, 2010, Section 15(1), (2)(c) and 2(d) of the National Land Commission Act No.5 of 2012 and Section 38 of the Land Laws (Amendment) Act. No.28 of 2016.

We respectfully submit this report for your due consideration.

HON. J.B.N MUTURI, EGH
ATTORNEY GENERAL

Copy to:

Hon. Shadrack J. Mose
Solicitor General

LIST OF ANNEXES

Annex 1: Judgment in Nairobi ELC JR. NO. 3 OF 2020
Annex 2: Supreme Court Reference No. 2 of 2020
Annex 3: Judgment in Nairobi Constitutional Petition No. 500 Of 2013