African Commission on Human and Peoples' Rights v Kenya (merits) (2017) 2 AfCLR 9

Application 006/2012, *African Commission on Human and Peoples' Rights v Republic of Kenya*

Judgment, 26 May 2017. Done in English and French with the English text being authoritative.

Judges: ORE, NIYUNGEKO, RAMADHANI, TAMBALA, THOMPSON, GUISSE, ACHOUR, BOSSA and MATUSSE

Recused under Article 22: KIOKO

The Court found a number of violations of the African Charter in a case dealing with the eviction of an indigenous population, the Ogiek, from the Mau Forest.

Procedure (public hearing, 28; hearing of original complainant, 29; amicable settlement procedure unsuccessful, 31-39)

Jurisdiction (material jurisdiction – Article 58 of the African Charter does not prevent jurisdiction of the Court, 53; personal jurisdiction - standing of original complainant before African Commission irrelevant, 58; temporal jurisdiction – continuing violation, 65)

Admissibility (pending case, 74; standing of original complainant, 88; exhaustion of local remedies – prolonged proceedings, 96, judicial proceedings, 97)

Indigenous peoples (definition, 105-108; application to Ogiek people, 109-112; preservation of culture, 180)

Property (elements of right to property, 124; land rights of indigenous peoples, 128; limitation in public interest, 129, 130)

Interpretation (international instruments, 125)

Equality, non-discrimination (any other status, 138; elements of discrimination, 139; Ogieks not granted same recognition as other similar communities, 142-146)

Life (physical not existential, 154)

Religion (natural environment, traditional rites, 164-169)

Cultural life (respect for and protection of cultural heritage, 179, 182-186; definition of culture, 179

Limitations (state must show justification, 188, 189)

People (definition, 196-199)

Peoples' right to freely dispose of wealth and natural resources (eviction from forest, 201)

Peoples' right to development (lack of consultation, 210)

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 seized 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 had 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,

b. 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;

c. 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

d. 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

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.

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

i. 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.

ii. 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.

iii. 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.

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.

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 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

i. 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.

ii. 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

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

complaint before it on behalf of victims without necessarily getting the consent of the victims. For this reason, the Commission was seized with the Communication in November 2009 by two of the complainants: CEMIRIDE and OPDP, which are Non-Governmental Organizations (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.

iii. 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.

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

C. Temporal jurisdiction

i. 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.

ii. 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.

iii. 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 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

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, paras 61 to 64.

accordance with Rule 39 of its Rules.

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

a. 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.

b. 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 seized the Court, it can no longer be argued that the matter is pending before the Commission.

c. 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 seized the Court in conformity with Article 5(1) of the Protocol.

74. Having seized the Court, the Commission decided not to examine the matter itself. The seizure 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

a. 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.

b. 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.

c. 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 seized with the matter; and
> 7. Not raise any matter 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)

a. 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.

b. 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 seize 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.

c. 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)

a. 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 seized its national human rights commission to get redress for the alleged violations before bringing this Application to this Court.

b. 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.

c. 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 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

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.

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.

97. Regarding the possibility for the original complainants to have seized 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

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 17 years 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 before this 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.

10 See Section 3 of the Kenya National Human Rights Commission Act.

11 See *Mohamed Abubakari* Case paras 66 to 70.

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.

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

i. 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

12 *Mohamed Abubakari* Case para 64; *Alex Thomas* Case, para 64 and *Christopher Mtikila* Case, para 82.3.

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.

ii. 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.

iii. 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

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.

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]

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 collective; 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

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.

16 n15 paragraphs 381 to 382.

17 See E/CN.4/Sub.2/AC.4/1996/2, paragraph 69.

of the Mau Forest.[18] These reports affirm the Applicant's assertion that the Mau Forest is the Ogieks' 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

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.

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 CA Kratz, 'Are the Ojiek Really Masai? Or Kipsigis? Or Kikuyu?' (1980) 20 *Cahiers d'Etudes Africaines* 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) availa*ble at http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.37.Add.1.pdf, at para 268.

22 Kratz (n 20) 355 to 368.

23 Kratz (n 20) 357-358.

from continued subjugation, and marginalisation.[24] Their suffering as a result of evictions from their 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

i. 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 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.

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 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 paras 41 and 65 to 77.

25 See also TJ Kimaiyo, 'Ogiek Land Cases and Historical Injustices – 1902-2004' (2004).

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

ii. 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

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

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.

iii. 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.

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

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27 See *Issa Konate* Case paras 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.

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

i. 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]

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.

ii. 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".

iii. 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

31 *Christopher Mtikila* Case paragraphs 105.1 and 105.2.

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 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

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.

treatment.[35]

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

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.

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

i. 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] 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.

36 See para 130 above.

37 See *Forum of Conscience v Sierra Leone African Commission on Human and Peoples' Rights* Communication No. 223/98 14th Annual Activity Report 2000 to 2001 para 20.

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

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.

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

iii. 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 deprivation 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.

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

i. 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

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 para 216.

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 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.

ii. Respondent's submission

161. The Respondent contends that the Applicant has failed to adduce

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

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 pm and 9 am and that they are prohibited from carrying out certain activities, unless they have a licence permitting them to do so.

iii. 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 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

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 para 2.

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), UN GA Res 36/55, (1981).

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.

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,

44 Applicant's Submission on Merits page 184, paras 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*).

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

i. 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.

ii. 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 lifestyle 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.

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.

iii. 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 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

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 n49 Article 3, .

51 Preamble, paragraph 9 and Articles 3, 5 and 8(a) Cultural Charter for Africa. Organisation of African Unity on 5 July 1976

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, wellbeing 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]

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

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 paras 36 and 37.

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 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

55 Issa Konate Case paras 145 to 154.

56 On the same, see, case of the *Sawhoyamaxa Indigenous Community v Paraguay*, IACHR (29 March 29 2006) (Merits, Reparations and Costs) paras 73(3) to 73(5).

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 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

57 See *Issa Konate* Case paras 145 to 154.

58 See section on the Court's Assessment on Alleged Violation of Article 8 of the Charter.

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.

G. Alleged violation of Article 21 of the Charter

i. 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.

ii. Respondent's submission

194. The Respondent argues that it has not violated the rights of

59 Art 69 of the Constitution of the Republic of Kenya (2010).

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.

iii. 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 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

60 Report of the Rapporteur pages 4 to 5, paragraph 13, cited in F Ouguergouz *The African Charter of Human and Peoples' Rights. A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, (2003) 205, note 682.

61 See paras 3 and 8 of the preamble to the Charter.

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.

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

i. 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 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.

ii. 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.

iii. 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

i. 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.

ii. Respondent's submission

213. The Respondent made no submissions on the alleged violation of Article 1 of the Charter.

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 para 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 para 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.

iii. 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

A. 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.

B. 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.

C. 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

v. 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;
vi. 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;
vii. 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;
viii. Dismisses the objection to the admissibility of the Application on the ground of failure to exhaust local remedies;
ix. Declares the Application admissible.

On the merits

x. Declares that the Respondent has violated Articles 1, 2, 8, 14 17(2) and (3), 21 and 22 of the Charter;
xi. Declares that the Respondent has not violated Article 4 of the Charter;
xii. 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;
xiii. Reserves its ruling on reparations;
xiv. 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.