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

THE MATTER OF

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

V.

REPUBLIC OF KENYA

APPLICATION No. 006/2012

JUDGMENT
(REPARATIONS)

23 JUNE 2022

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The Court composed of: Imani D. ABOUD, President; Blaise TCHIKAYA, Vice-President, Rafaâ BEN ACHOUR, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO – Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9 (2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Ben KIOKO, member of the Court and a national of Kenya, did not hear the Application.

In the Matter of:

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

Represented by:

i. Hon. Solomon DERSSO, Commissioner, ACHPR
ii. Mr. Bahame Tom NYANDUGA, Counsel
iii. Mr. Donald DEYA, Counsel

Versus

REPUBLIC OF KENYA

Represented by:

i. Mr. Kennedy OGETO , Solicitor General
ii. Mr. Emmanuel BITTA, Principal Litigation Counsel
iii. Mr. Peter NGUMI, Litigation Counsel

after deliberation,

renders the following judgment

I. BACKGROUND TO THE MATTER

1. In its Application, filed on 12 July 2012, the African Commission on Human and Peoples' Rights (hereinafter referred to as “the Applicant” or “the Commission”) alleged that, in October 2009, the Ogiek, an indigenous minority ethnic group in the Republic of Kenya (hereinafter referred to as “the Respondent State”), had received a thirty (30) days eviction notice, issued by the Kenya Forestry Service, to leave the Mau Forest. The Commission filed this Application after receiving, on 14 November 2009, an application from the Centre for Minority Rights Development and Minority Rights Group International, both acting on behalf of the Ogiek of Mau Forest. In the Application, the Commission argued that the eviction notice failed to consider the importance of the Mau Forest for the survival of the Ogiek leading to violations of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”).

2. The Court delivered its judgment on merits on 26 May 2017. In the operative part of its judgment, the Court pronounced itself as follows:

> On the Merits
> i) Declares that the Respondent has violated Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter;
> ii) Declares that the Respondent has not violated Article 4 of the Charter;
> iii) Orders the Respondent to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six (6) months from the date of this judgment;
> iv) Reserves its ruling on reparations;
> v) Requests the Applicant to file submissions on Reparations within 60 days from the date of this judgment and thereafter, the Respondent shall file its Response

thereto within 60 days of receipt of the Applicant's submissions on Reparations and Costs.

II. SUBJECT OF THE APPLICATION

3. In conformity with Rule 69(3) of the Rules, and in implementation of the operative part of its judgment on merits, the Parties filed their submissions on reparations within the times permitted by the Court.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

4. On 30 May 2017, the Registry transmitted to the Parties, the African Union Commission and the Executive Council of the African Union certified copies of its judgment on merits.

5. On 10 August 2017, the Registry received an application for leave to participate in the proceedings as *amici curiae* from the Human Rights Implementation Centre of the School of Law at the University of Bristol (hereinafter referred to as “the HRIC”) and Centre for Human Rights, University of Pretoria (hereinafter referred to as “the CHR”). On 30 November 2017, the Court granted them leave to act as *amici curiae,* after duly notifying the Parties of their application .

6. On 23 October 2017, the Registry received the Applicant’s submissions on reparations. These were transmitted to the Respondent State on 25 October 2017, requesting it to file its Response within thirty (30) days of receipt.

7. On 30 January 2018, the *amici curiae* filed their combined brief and on 31 January 2018, this was transmitted to the Parties for their information.

8. On 13 February 2018, the Respondent State filed its submissions on reparations and these were transmitted to the Applicant on 16 February 2018 giving it thirty (30) days to file a Reply, if any. On 21 March 2018, the Respondent State filed its further submissions on reparations which were transmitted to the Applicant on 29 March 2018 for Reply, within thirty (30) days of receipt thereof.

9. On 9 May 2018, the Registry received the Applicant's Reply and this was transmitted to the Respondent State on 11 May 2018, for its observations, if any, within thirty (30) days of receipt of the Notice.

10. On 13 June 2018, the Registry received the Respondent' State's observations and these were transmitted to the Applicant for information on 14 June 2018.

11. On 20 September 2018, the Registry notified the Parties of the closure of the written proceedings effective on that date.

12. On 16 April 2019, the Registry received two applications, one from Wilson Barngetuny Koimet and 119 others, and the other from Peter Kibiegon Rono and 1300 others for leave to join the proceedings as interested parties. These applications were jointly considered by the Court and dismissed on 4 July 2019.[1]

13. On 29 August 2019, the Registry received an application for review of the Court's decision of 4 July 2019. This application was considered by the Court and dismissed on 11 November 2019.[2]**.**

14. On 10 October 2019, the Registry received an "application to intervene at the reparations stage" filed by Kipsang Kilel and others, being members of the Ogiek

[1] *African Commission on Human and Peoples' Rights v Kenya*, AfCHPR, Application No. 006/2012, Order (Intervention) 4 July 2019.
[2] *Application for review by Wilson Barngetuny Koimet and 114 others of the Order of 4 July 2019* (Order) 11 November 2019.

Community residing in the Tinet Settlement Scheme. This Application was considered by the Court and dismissed on 28 November 2019.[3]

15. On 22 November 2019, the Registry informed the Parties and the *amici curiae* of the Court's decision to hold a public hearing which was scheduled for 6 March 2020. The Parties and the *amici curiae* were also sent a list of issues to which their responses were required by 15 January 2021.

16. The Parties and the *amici curiae* all filed their responses to the list of issues within the time permitted by the Court.

17. On 3 March 2020, the Registry informed the Parties and the *amici curiae* of the Court's decision, under Practice Direction 34, to adjourn the hearing scheduled for 6 March 2020 to 5 June 2020 due to the non-availability of the Parties.

18. On the Court's request, two independent expert submissions were filed, one on 2 April 2020 by Dr Elifuraha Laltaika, former expert member of the United Nations Permanent Forum on Indigenous Issues and the other on 30 April 2020 by Victoria Tauli-Corpuz, the then United Nations Special Rapporteur on Rights of Indigenous People. These submissions were duly transmitted to the Parties and the *amici curiae* for their information.

19. On various occasions, in the course of 2020 and 2021, the Court attempted to convene the public hearing but was unable to do so largely due the COVID-19 Pandemic.

20. On 25 June 2021, the Court issued an Order adjourning the public hearing *sine die* and further directed that the reparations phase of the Application would be

[3] Application No. 001/2019, *Application for intervention by Kipsang Killel and others* , (Order) Intervention 28 November 2019.

"disposed of on the basis of the Parties' written pleadings and submissions." This Order was notified to the Parties and the *amici curiae* on 29 June 2021.

21. The Court acknowledges that the Parties filed several submissions in this matter including their responses to the list of issues developed by the Court.

IV. PRAYERS OF THE PARTIES

22. The Applicant prays the Court to order the Respondent to:

i. Undertake a process of delimiting, demarcation and titling of Ogiek ancestral land, within which the Ogiek fully participate, within a timeframe of 1 year of notification of the reparations order;

ii. Establish and facilitate a dialogue mechanism between the Ogiek (via the Original Complainants), KFS [Kenya Forest Service] (where relevant) and relevant private sector operators in order to reach mutual agreement on whether commercial activities on Ogiek land should cease, or whether they will be allowed to continue but operating via a lease of the land and/or royalty and benefit sharing agreement between the Ogiek communal title holders and the commercial operators, in line with provisions 35 to 37 of the Community Land Act, 2016, such dialogue to have concluded within a timeframe of 9 months of notification of the reparations order …;

iii. Pay the sum of US$297 104 578 in pecuniary and non-pecuniary damage into a Community Development Fund for the Ogiek within no more than 1 year of the Court's Order on Reparations;

iv. Take all the necessary administrative, legislative, financial and human resource measures to create a Community Development Fund for the benefit of the members of the Ogiek people within 6 months of notification of the Court's Order on Reparations;

v. Adopt legislative, administrative and other measures to recognize and ensure the right of the Ogiek to be effectively consulted, in accordance with their traditions and customs and/or with the right to give or withhold their free prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land, and implement adequate safeguards to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Ogiek;

vi. Provide for full consultation and participation of the Ogiek, in accordance with their traditions and customs, in the reparations process as a whole, including all steps that the Respondent State and its agencies take in order to comply with the requested Court order to restitute Ogiek land, provide the Ogiek with compensation, and provide other guarantees of satisfaction and non-repetition …;

vii. Introduce specific legislative, administrative and other measures that are necessary to give effect to the obligations of the Respondent State with respect to the restitution, compensation and other guarantees of satisfaction and non-repetition herein sought, as well as with respect to consultation and participation of the Ogiek, which become apparent as the implementation process takes place, and as set out in this brief, with such processes to be completed within 1 year of the date of the Court's order on reparations, and the Applicant accordingly submits that the Respondent State must take appropriate action to comply with the same;

viii. Fully recognize the Ogiek as an indigenous people of Kenya, including but not limited to the recognition of the Ogiek language and Ogiek cultural and religious practices; provision of health, social and education services for the Ogiek; and the enacting of positive steps to ensure national and local political representation of the Ogiek; and

ix. Publicly issue a full apology to the Ogiek for all the violations of their rights as identified by the Judgment, in a newspaper with wide national circulation

and on a radio station with widespread coverage, within 3 months of the date of the date of the Court's order on reparations; and

x. Erect a public monument acknowledging the violation of Ogiek rights, in a place of significant importance to the Ogiek and chosen by them, the design of which also to be agreed by them, within 6 months of the date of the date of the Court's order on reparations.

23. The Respondent State prays the Court to:

i. Find that it remains committed to the implementation of the Court's judgment as evidenced by its establishment of a multi-agency Task Force to oversee the implementation of the Court's judgment;

ii. Order that guarantees of non-repetition together with rehabilitation measures are the most far reaching forms of reparations that could be awarded to redress the root and structural causes of identified human rights violations;

iii. Order that the Court should use its offices to facilitate an amicable settlement with the Ogiek Community on the issue of reparations;

iv. Hold that restitution, for the Applicants, can be achieved by reverse action of guaranteeing and granting access to the Mau Forest, save where encroachment in the interest of public need or in the general interest of the community in accordance with the provisions of the appropriate law and that the modalities of how this can be undertaken to be advised by the Taskforce;

v. Find that demarcation and titling is totally unnecessary for purposes of access, occupation and use of the Mau Forest by the Ogiek; and further that the right to occupy and use the Mau Forest would suffice as adequate

restitution to the Ogiek and that the individual demarcation and titling would undermine common access and use of the land by other people i.e. nomadic groups that have seasonal access to the Mau Forest;

vi. Hold that the Respondent State's 2010 Constitution creates a legal super structure that is meant to address the structural and root causes of violations of Article 2 and that by virtue of the existing laws, the same have been substantially remedied and what is left can be attained by administrative interventions and guarantees of non-repetition;

vii. Find that the Court did not determine that the Ogiek were the owners of the Mau Forest. Additionally, that ownership is not a *sine qua non* for the utilization of land;

viii. Reject the community survey report submitted by the Applicant as not credible and the claim for US$ 297,104,578, as compensation, as being premised on speculative presumptions which are neither fair nor proportionate. Further, that no evidence has been led to prove that the survey was actually conducted;

ix. Find that any compensation due to the Applicants cannot be computed in United States Dollars for a claim involving a country whose currency is not the United States Dollar;

x. Order that the Respondent State's general liability for violations of the Charter can only be computed from 1992, the year when the Respondent became a party to the Charter. Specifically in relation to the eviction of the Ogiek from Mau Forest, that its liability can only be computed from 26 October 2009, when the notice of eviction from South Western Mau Forest was issued;

xi. Find that the Gazette Notice appointing the Task Force to give effect to the decision of the Court suffices as a public notice acknowledging violations of the Charter and should be deemed to be just satisfaction;

xii. Hold that there is no basis for ordering the erection of a monument for the Ogiek commemorating the violation of their rights since the Ogiek have no practice of monument erection and there is no evidence that the same would be of any significance to their community especially as the Respondent State already acknowledged its wrong and is actively taking steps to redress the same;

xiii. Find that any award of reparation made by the Court must take into account the situation of the Respondent State as a country so as not to cause it undue hardship.

xiv. Hold that the jurisprudence of the Inter-American Court of Human Rights is not binding on this Court and cannot be the basis for a claim for restitution before the Court;

xv. Hold that neither Minority Rights Group International not the Ogiek Peoples' Development Program are representative of the Ogiek and that only the Ogiek Council of Elders is recognised as the body that can speak on behalf of the Ogiek;

xvi. Find, overall, that the Applicant's claims are unsubstantiated and the Court should carefully assess all claims so as to exclude speculative claims.

V. RESPONDENT STATE'S OBJECTIONS

24. Before dealing with the claims for reparations, the Court considers it pertinent to

begin by addressing three objections raised by the Respondent State.

A. Liability for activities before 1992

25. The Respondent State contends that there is no basis for a claim for compensation for any violations before the year 1992 when it became party to the Charter. It further contends that "any claim for financial compensation can only be computed from 26 October 2009 and only in relation to the notice given to the Ogiek to vacate the South Western Mau Forest."

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26. The Court recalls that this issue was already resolved in its merits judgment when it confirmed its temporal jurisdiction in this Application.[4] Additionally, the Court takes notice of the fact that the violations alleged by the Applicant, which the Court established in its judgment of 26 May 2017, remain unaddressed up to date.

27. In the circumstances, the Court holds that comprehensive reparations need to take into account not only events after 10 February 1992 but also events before that so long as the same can be connected to the harm suffered by the Ogiek in relation to the infringement of their rights as established by the Court. This would ensure that reparations awarded comprehensively address the prejudice suffered by the Ogiek as a result of the Respondent State's conduct. The Court holds, therefore, that there is nothing barring it from considering events that occurred prior to 10 February 1992 in determining the reparations due to the Ogiek.

[4] See, *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 64-66.

B. The proposal for an amicable settlement

28. The Respondent State submits that the present Application is a proper case for an amicable settlement in line with Article 9 of the Protocol. According to the Respondent State, "a negotiated settlement is the best solution in the peculiar circumstance of this case".

29. The Applicant opposes the Respondent State's submission. It argues that a ruling on reparations is necessary in order to provide clear guidance on reparations to the Respondent State and to ensure the realisation of the Ogiek's rights and guarantee an effective remedy for violations. The Applicant also points out that previous attempts for an amicable settlement have failed. According to the Applicant, therefore, a genuine and efficient amicable settlement procedure is extremely doubtful but may also seriously undermine the possibility of the Ogiek being offered a fair deal and risks prolonging the human rights violations they have already suffered.

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30. The Court observes that Article 9 of the Protocol provides that "the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter." It further observes that Rule 29(2)(a) of the Rules provides that "in the exercise of its contentious jurisdiction, the Court may (a) promote amicable settlement in cases pending before it in accordance with the provisions of the Charter and the Protocol".[5] The Court's powers to facilitate an amicable settlement are further clarified in Rule 64.[6]

[5] Rule 26 (1) (c) Rules of Court, 2 June 2010.

[6] Rule 64, in so far as is material, provides as follows: 1. Pursuant to Article 9 of the Protocol, the Court may promote amicable settlement of cases pending before it. To that end, it may invite the parties and take appropriate measures to facilitate amicable settlement of the dispute; 2. Parties to a case before the Court, may on their own initiative, solicit the Court's intervention to settle their dispute amicably at any time before the Court gives its judgment. (Formerly, Rule 56, Rules of Court 2 June 2010).

31. In the context of the present Application, the Court recalls that at the merits stage of the proceedings, it initiated a process for the possible amicable settlement of this matter. Although both Parties, initially, indicated willingness to participate in the envisaged amicable settlement, this process collapsed when the Parties could not agree on the issues to be covered by the settlement. It was as a result of the preceding that on 7 March 2016, the Court wrote both Parties conveying its decision to proceed with a judicial consideration of the matter especially given the Parties' failure to agree on an amicable settlement.

32. From the totality of the Parties' submissions on reparations, it is clear that they hold opposing views on the possibility of an amicable settlement. The Court stresses in this regard that a key prerequisite for an amicable settlement is that the Parties must be willing to engage in the process. Given the failure of the previous attempt at an amicable settlement in this matter, and also recalling that the provisions of the Protocol and Rules, on amicable settlement, are not mandatory, the Court finds that the prerequisites for an amicable settlement are not met. The Court, therefore, dismisses the Respondent State's prayer.

C. The involvement of the "original complainants" in the proceedings

33. The Respondent State questions the involvement of the Centre for Minority Rights Development (hereinafter referred to as "CEMIRIDE"), Minority Rights Group International (hereinafter referred to as "MRGI") and the Ogiek People's Development Programme (hereinafter referred to as "OPDP") in the present proceedings on the basis that these organisations are not representative of the Ogiek. It argues that the present matter could be resolved amicably if "rent seeking western funded organisations" are excluded from the negotiations. The Respondent State further argues that the Rules "do not provide for parties described as original complainants other than the applicant before this Court." The Respondent State invites the Court to "invoke the provisions of either Rules 45 or 46 of the Rules to ascertain the fact of whether the named non-

governmental organisations have the mandate from the Ogiek Council of Elders to speak on their behalf and whether they consulted and obtained by way of a resolution or consent of the said Council of Elders the permission to purport to act for them."

34. The Applicant submits that "the Ogiek have been and remain clear on who should represent them throughout the 9 year journey that this case has been pending before the Commission and then the Court, namely OPDP." In the Applicant's view, this was confirmed to the Respondent State's Attorney General and others by way of letters dated 11 July 2017 and 8 October 2017. The Ogiek, through the OPDP, it is argued, also clarified representation issues in a letter to the Ministry of Environment and Natural Resources dated 7 December 2017, accompanied by a power of attorney signed by forty (40) Ogiek elders from all locations in the Mau Forest, confirming that OPDP should continue to represent them within discussions on reparations and implementation of the Judgment. The Applicant thus submits that the OPDP, which is among the "original complainants" in this case, truly represents the Ogiek Community.

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35. The Court recalls that the question of the representation of the Ogiek in this Application is not arising for the first time. During the merits stage, the Respondent State raised an objection relating to the involvement of the "original complainants" before the Commission in the litigation before this Court.[7] As against this background, the Court reiterates that the Applicant before it is the Commission rather than the "original complainants" that filed the case, on behalf of the Ogiek, before the Commission. As pointed out in the judgment on merits, since the "original complainants" are not appearing before the Court as Parties[8] the Court holds that it has proper Parties before it to enable it dispose of the

[7] *ACHPR v Kenya* (merits) §§ 84-85.
[8] *ACHPR v Kenya* (merits) § 88.

Application.

VI. REPARATIONS

36. The Court recalls that the right to reparations for the breach of human rights obligations is a fundamental principle of international law.[9] A State that is responsible for an international wrong is required to make full reparation for the damage caused. The Permanent Court of International Justice (hereinafter referred to as "the PCIJ") ably restated the position in the following words:[10]

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.

37. This fundamental principle has been consistently reiterated by the Court in its case law.[11] For example, in *Reverend Christopher Mtikila v United Republic of Tanzania* the Court stated as follows: [12]

> One of the fundamental principles of contemporary international law on State responsibility, that constitutes a customary norm of international law, is that, any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation.

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[9] Cf. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 - https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx.

[10] PCIJ: *The Factory at Chorzow (Jurisdiction)* Judgment of 26 July 1927 p.21; See also: *Idem* (Merits), Judgment of 13 September 1928, Series A, No. 7, p. 29.

[11] *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples Rights v Burkina Faso* (Reparations) (5 June 2015) 1 AfCLR 258 §§ 20-30; and *Lohe Issa Konate v Burkina Faso* (Reparations) (3 June 2016) 1 AfCLR 346 §§ 15-18.

[12] (14 June 2013) 1 AfCLR 72 §§ 27-29.

38. The Protocol aligns itself with this well-established principle of international law by providing, in Article 27(1), that "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including payment of fair compensation or reparation."

39. The above principles are reiterated, with a focus on indigenous peoples, in the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter referred to as "the UNDRIP"). For example, Article 28 provides as follows:[13]

> Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
> Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

40. The Court recalls that it is a general principle of international law that the Applicant bears the burden of proof regarding the claim for reparations.[14] Additionally, it is not enough for the Applicant to show that the Respondent State has violated a provision of the Charter, it is also necessary to prove the damage that the State is being required to indemnify.[15] As pointed out in *Zongo and others v Burkina Faso* the existence of a violation of the Charter is not sufficient, *per se*, for reparation to accrue.[16] There must, therefore, be a causal link between the wrongful act that has been established and the alleged prejudice.

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[13] It also bears pointing out that the provisions of Article 28 of the UNDRIP find resonance in Articles 8(2), 11(2) and 20(2) of the same Declaration, where the emphasis is on the right to reparations for violation of indigenous peoples' rights.
[14] *Mtikila v Tanzania* § 40.
[15] Ibid § 31.
[16] *Zongo and others v Burkina Faso* (Reparations) § 24. See also, *Konate v Burkina Faso (Reparations*) § 46.

41. In terms of the damage that reparations must cover, the Court notes that, according to international law, both material and moral damages have to be repaired. [17] While reparations serve multiple functions, fundamentally their objective is to restore an individual(s) to the position that he/she would have been in had he/she not suffered any harm while at the same time establishing means for deterrence to prevent recurrence of violations.[18]

42. In terms of quantification of the reparations, the applicable principle is that of full reparation, commensurate with the prejudice suffered. As stated by the PCIJ in *The Factory at Chorzow*, the State responsible for the violation needs to make effort to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[19]

43. The Court observes that whenever it is called upon to adjudicate on reparations, it takes into account not only a fair balance between the form of reparation and the nature of the violation, but also the expressed wishes of the victim.[20] Further, the Court supports a wide interpretation of "victim" such that, in an appropriate case, not only first line heirs can claim damages but also other close relatives of the direct victim. In this connection, the Court notes that in *Zongo and others v Burkina Faso*, it cited with approval the definition of a victim proposed in the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. [21]

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[17] *Zongo and others v Burkina Faso* (Reparations) § 26.
[18] D Shelton *Remedies in international human rights law* (2015) 19-27
[19] PCIJ: *The Factory at Chorzow (Merits*), Judgment of 13 September 1928, Series A, No. 17, p 47.
[20] *Ingabire v Rwanda* (Reparations) § 22.
[21] "Victim" is defined as "… persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" § 8.

44. In its understanding of a “victim/s” of human rights violations, the Court remains alive to the fact that the notion of “victim” is not limited to individuals and that, subject to certain conditions, groups and communities may be entitled to reparations meant to address collective harm.[22]

45. In the present Application, the Court recalls that the wrongful acts generating the international responsibility of the Respondent State is the violation of Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter. All the reparation claims, therefore, have to be considered and assessed in relation to the violation of the earlier mentioned provisions of the Charter. It is against the above outlined principles that the Court will consider the prayers for both pecuniary and non-pecuniary reparations.

A. Pecuniary reparations

46. The Court notes that the Applicant has requested the award of sums of money as compensation for material harm and moral harm.

i. Material prejudice

47. The Applicant prays for compensation to be awarded to the Ogiek as a result of the violations that the Court found. The Applicant submits that for compensation to the Ogiek to be proportional to the circumstances, the compensation should be awarded for all damage suffered as a result of the violations including the payment of pecuniary damages to reflect the violation of their right to development and the loss of their property and natural resources.

[22] Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth Session, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Final report submitted by Mr Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, 2 July 1993 §§ 14-15.

48. As to the violations that should inform the compensation, the Applicant avers that the encroachments on the Ogiek's land is the basis for the claim for compensation. Specifically, the Applicant submits that the eviction of the Ogiek from their land and the resulting loss of their non-movable possessions on the land, including dwellings, religious and cultural sites and beehives, the lack of prompt and full compensation to the Ogiek for the loss of their ability to use and benefit from their property over the years and the denial of benefit, use of and interest in their traditional lands since eviction, including the denial of any financial benefit from the lands resources, such as that generated by logging concessions and tea plantations should inform the award of compensation.

49. In a bid to substantiate its claim, the Applicant submits a report from a community survey (Annex E to the Applicant's submissions on reparations) that was supposedly undertaken among the Ogiek. According to the Applicant, for quantification of pecuniary loss, one hundred and fifty-one (151) members of the Ogiek community, each representative of a distinct household, were interviewed through a questionnaire focused on the pecuniary loss suffered as a direct result of the violation of Article 14 and 21 of the Charter. The Applicant submits that the community survey was complemented by a desk-based analysis to quantify the loss to the Ogiek as a result of denial of financial benefits from the resources on the Ogiek ancestral land.

50. In connection to the community survey, the Applicant further submits that the quantification of pecuniary damage, and even non-pecuniary damage, simply represents the "best efforts of the Applicant to provide the evidentiary elements for the Court to have confidence to set a compensation award for the Ogiek …" The Applicant concedes that calculating the pecuniary, and even non-pecuniary damage, occasioned to the Ogiek over the years is challenging given, among other things, the number of Ogiek involved in the forcible evictions, the passage of time and the dying of some members of the community as well as the peculiar nature of the Ogiek traditional life style which makes it difficult to preserve specific

records and proof of lost property. The Applicant thus submits that the Court should "acknowledge the efforts of the Applicant to quantify the compensation it believes is owed to the Ogiek and accept that some aspects of the quantification may require the Court to speculate and base the award on principles of equity in light of the context in which the human rights violations have occurred."

51. Overall, the Applicant contends that the material loss survey was designed to determine the extent of the loss across the broader Ogiek population. Given the preceding, the Applicant submits that the pecuniary damages due to the Ogiek, as a result of the violations established by the Court, should amount to at least US$204,604,578 (Two hundred and four million, six hundred thousand and four, and five hundred seventy eight United States Dollars). and accordingly prays for this amount to be awarded.

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52. The Respondent State submits that pecuniary damages cannot be awarded on the basis of the "best efforts" of an Applicant which are premised on speculative presumptions but only on legal evidentiary standards based on verifiable empirical data. According to the Respondent State, "pecuniary reparations ought not to be speculative but must be based on cogent proof, the legal and evidential [burden] which squarely falls on the shoulders of the Applicant and to have it otherwise would have no basis in law."

53. The Respondent State also submits that the Applicant's claim for pecuniary damages is fanciful, has no basis in law or practice, and if it were to be awarded alongside other forms of reparations it would be manifestly disproportionate and would constitute unjust enrichment contrary to principles for reparations under international law.

54. Specifically, the Respondent State further submits that the claims on account of loss of farm buildings (US$ 18,029,915 – Eighteen million twenty nine thousand and nine hundred fifteen United States Dollars) and loss of livestock (US$ 97,923,370 – Ninety seven million nine hundred twenty three thousand three hundred seventy United States Dollars) are a clear departure from the Applicant's pleadings and submissions at the merits stage about the Ogiek way of life and are without basis.

55. The Respondent State also submits that, for loss of housing, the principle of causality requiring a causal link between the violation found, the harm produced and the reparation sought is missing because the Applicant failed to demonstrate the materials used in building the houses and to show a clear nexus between the same and the losses occasioned.

56. The Respondent State submits that the claim for US$14,777,233 (Fourteen million seven hundred seventy seven thousand two hundred thirty three United States Dollars), on account of loss of revenue generated from the Mau forest, is fanciful and not premised on any evidence.

57. Overall, the Respondent State opposes the admission into evidence of the community survey report submitted by the Applicant. According to the Respondent State, the community survey report has no probative value, its methodology is flawed, its analysis is faulty and there is no proof that actual interviews were conducted among the Ogiek to inform the report. Further, the Respondent State also opposes the Applicant's computation of damages in United States Dollars when the claim at issue involves an African country and it is before a court sitting in Africa.

58. The Respondent State further submits that any award for compensation, in case the Court decides to award compensation, should not be such as to cause any unjust enrichment and the Court should be careful not to put the Respondent

State into a situation of disproportionate hardship.

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59. The Court acknowledges that compensation is an important means for effecting reparations. For example, in the *Mtikila v Tanzania* the Court reiterated the fact that a State that has violated rights enshrined in the Charter should "take measures to ensure that the victims of human rights abuses are given effective remedies including restitution and compensation".[23]

60. As acknowledged by the Court, however, it is not enough for an Applicant to show that the Respondent State has violated a provision of the Charter, it is also necessary to prove the damage that the State is being required to indemnify.[24] The Applicant, therefore, bears the duty of proving the causal nexus between the violations and the damage suffered. Additionally, all material loss must be specifically proved. In insisting on proof of material loss, however, the Court is alive to the fact that victims of human rights violations may face challenges in collating evidence in support of their claims for various reasons. As such, the Court proceeds on a case by case basis paying attention to the consistency and credibility of the Applicant's assertions in the light of the whole Application.[25]

61. In attempting to prove the pecuniary loss occasioned to the Ogiek, the Applicant relied on a community survey report which was submitted as Annex E to its submissions on reparations. In its further submissions, the Applicant offered clarification about the methods and processes that were used in developing the community survey report especially data collection and analysis. The Court notes, however, that the Respondent State opposes the admission into evidence of this report.

[23] *Mtikila v Tanzania (Reparations)* § 29.
[24] Ibid §§ 31-32.
[25] *Anudo Ochieng Anudo v United Republic of Tanzania* ACtHPR Application No. 012/2015 Judgment of 2 December 2021 (reparations) §§ 31-32.

62. In so far as the community survey report is concerned, the Court notes that the Applicant has conceded some limitations in the process of developing and executing the survey which limitations have the potential of affecting the outcomes. For example, the Applicant posits that the "methodological and logistical challenges of ascribing a precise monetary value to the collective harms suffered by the Ogiek community are numerous."

63. The Court, therefore, while noting the Applicant's effort to deploy a scientific method for determining the compensation due to the Ogiek, holds that the best way forward is to make an equitable award while being mindful of the general challenges of assessing compensation, with mathematical precision, in cases involving violation of indigenous peoples' rights. Resultantly, the Court does not consider itself bound by the community survey report submitted by the Applicant.

64. Specifically, the Court recalls that the claim for compensation by the Applicant relates to the violation of Articles 14 and 21 of the Charter and specifically in relation to the following: the loss of non-moveable possessions from Ogiek land, both houses($59 736 172); and farm buildings ($18 029 915) the loss of livestock reliant on the land from which the Ogiek were evicted ($97 923 370); the loss of household income generated from activities on Ogiek land ($14 137 888); and the loss of revenue generated from activities using the Mau Forest due to the eviction of the Ogiek ($14 777 233). The detailed breakdown for the amounts claimed in respect of each head of loss are contained in Annex E to the Applicant's submissions on reparations, and the total claim is US$204,604,578 (Two hundred and four million, six hundred and four thousand, and five hundred seventy eight United States Dollars).

65. Notwithstanding the limitations with the community survey report submitted by the Applicant, it is incontrovertible that the actions of the Respondent State resulted in a violation of the rights of the Ogiek under Articles 14 and 21 of the

Charter, among other Charter provisions.[26] Given that the Respondent State is responsible for the violation of the rights of the Ogiek, it follows that it bears responsibility for rectifying the consequences of its wrongful acts.

66. The Court, however, acknowledges that the length of time over which the violations occurred, the number of people affected by the violations, the Ogiek way of life and the general difficulties in attaching a monetary value to the loss of resources in the Mau Forest, among other factors, make a precise and mathematically exact quantification of pecuniary loss difficult. It is for the preceding reasons, among others, that the Court must exercise its discretion in equity to determine what amounts to fair compensation to be paid to the Ogiek.

67. In choosing to proceed by way of making an award in equity, the Court does not thereby subject the final award to its absolute and unregulated discretion.[27] The Court has paid particular attention to all the submissions, and the supporting documents, filed by the Parties, the *amici curiae* and also the independent experts in order to inform its decision on the equitable award due to the Ogiek. The Court's award, therefore, though premised on the exercise of its equitable discretion is nevertheless informed by the submissions before it and the applicable law.

68. In terms of the currency in which the moneteray awards must be made, the Court recalls that the Applicant has pegged all its claims in United States Dollars. The Respondent State, however, opposes this approach and insists that any award, if it is made, should be made in its currency.

69. In relation to this issue, the Court recalls that in *Ingabire Victoire Umuhoza v Republic of Rwanda* it held that where an Applicant is residing in the territory of

[26] *ACHPR v Kenya* (merits) § 201.
[27] Cf. IACtHR, *Case of The Kichwa Indigenous People of Sarayaku v. Ecuador* Judgment of June 27, 2012 (Merits and reparations) § 314 available at https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf.

the Respondent State, the amount of reparation should be calculated in the currency of the said State.[28] In the present case, therefore, the Court holds that the currency of any monetary award issued to the Applicant must be in the currency of the Respondent State since the Ogiek, for whose benefit this Application was commenced, are all resident in the territory of the Respondent State and all the violations happened within the territory of the Respondent State.

70. The Court takes particular cognisance of the fact that the claim for compensation relates to the right to property and also the right to freely dispose of wealth and natural resources. The Court is aware that the violations at issue herein have been ongoing for a long time and that they affect a particularly vulnerable section of the Respondent State's population. The award of compensation must, therefore, and in so far as is possible, operate to ameliorate the overall condition of the Ogiek..

71. Given the Parties' contrasting submissions about the relevance of comparative international law, the Court wishes to reiterate that it is not bound by decisions and statutes from other regional human rights systems. Nevertheless, in appropriate cases, it can draw inspiration from pronouncements emerging from other supranational human rights bodies and also distinguish the emerging principles as appropriate.

72. It is against this background that the Court considers the *Case of the Saramaka People v Suriname*[29] , also involving an indigenous community, in which the Inter-American Court of Human Rights ordered the respondent to pay, into a development fund for the benefit of the applicants, the sum of US$75, 000 (Seventy five thousand United States Dollars) as compensation for the material prejudice suffered by the applicants.[30] In this particular case, the material

[28] *Ingabire v Rwanda (Reparations)* § 45. See also, *Anudo Ochieng Anudo v United Republic of Tanzania*, ACtHPR, Application 012/2015, Judgment of 2 December 2021(Reparations) § 21 and *Amir Ramadhani v United Republic of Tanzania,* ACtHPR, Application 010/2015, Judgment of 25 June 2021 (Reparations) § 14.
[29] Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs).
[30] http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

damage suffered by the applicants consisted primarily of the illegal exploitation of their lands and natural resources.

73. The Court also notes that in the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* also involving an indigenous community, the Inter-American Court found that the sum of US$90 000 (Ninety thousand United States Dollars) was adequate compensation in equity for the pecuniary prejudice suffered by the Sarayaku People.[31] In coming up with this award, the Court took into consideration the fact that the Sarayaku incurred expenses in commencing domestic proceedings to enforce their rights, that their territory and natural resources were damaged, and that their financial situation was affected when their production activities were suspended during certain periods.

74. In so far as distinguishing the earlier referred to cases from the Inter-American System is concerned, and in a non-exhaustive way, the Court takes notice of the fact that the violations at issue in the present Application are not all fours with those established in the the *Case of the Saramaka People* or even the *Case of The Kichwa Indigenous People of Sarayaku*. The Court acknowledges that the violations of the rights of the Ogiek have spanned a long period of time during which the Respondent State has failed/neglected to implement measures meant to safeguard their rights.

75. The Court is aware that the Ogiek have suffered violations that involve multiple rights under the Charter. This points to a systemic violation of their rights.

76. Given the communal nature of the violations, the the Court finds it inappropriate to order that each member of the Ogiek community be paid compensation individually or that compensation be pegged to a sum due to each member of the Ogiek Community. The Court is reinforced in its preceding finding given not only the communal nature of the violations but also due to the practical

[31]IACtHR *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* Judgment of June 27, 2012 (Merits and reparations) § 317 available at https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf.

challenges of making individual awards for a group numbering approximately 40 000 (forty thousand).

77. Taking all factors into consideration, the Court decides, in the exercise of its equitable jurisdiction, that the Respondent State must compensate the Ogiek with the sum of KES 57 850 000. (Fifty seven million, eight hundred and fifty thousand Kenya Shillings) for the material prejudice suffered.

ii. Moral prejudice

78. The Applicant prays for the payment of compensation for the moral prejudice as a result of violations related to the principle of non-discrimination (Article 2), the right to religion (Article 8), the right to culture (Article 17) and the right to development (Article 22) of the Charter.

79. According to the Applicant, the Ogiek have suffered routine discrimination at the hands of the Respondent State including the non-recognition of their tribal or ethnic identity and their corresponding rights. The Ogiek have not been able to practice their religion including prayers and ceremonies intimately connected to the Mau Forest, to bury their dead in accordance with traditional spiritual rituals, and access sacred sites for initiation and other ceremonies. They have also been denied access to an integrated system of beliefs, values, norms, traditions and artefacts closely linked to the Mau Forest and have had their right to development violated due to the Respondent State's failure to consult with or seek their consent about their shared cultural, economic, and social life within the Mau Forest.

80. The methodology used by the Applicant to quantify the non-pecuniary loss is contained in the compensation analysis report earlier referred to. According to the Applicant, bearing in mind the number of human rights violations found by the Court, the seriousness of the violations, the number of victims at stake and

the anxiety, inconvenience and uncertainty caused by the violations, the sum of US$92 500 000 (ninety two million five hundred thousand United States Dollars) would be adequate to compensate the Ogiek for their moral loss.

81. In coming up with the amount of US$92 500 000, the Applicant has referred the Court to the following cases –*the case of the Kichwa Indigenous People of Sarayaku v Ecuador* (2012) [1200 victims, compensation awarded US$1 250 000], the *Case of the Xakmok Kasek Indigenous Community v Paraguay* (2010) [268 victims, compensation awarded US$700 000], the *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (2006) [407 victims, compensation awarded US$ 1 000 000] and the *Case of the Yakye Axa Indigenous Community v Paraguay* (2005) [319 victims, compensation awarded US$950 000].

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82. The Respondent State disputes the Applicant's claims for moral loss. Specifically, it reiterates its objection to the admissibility of the compensation analysis report filed by the Applicant and avers that all the information contained in the report is incorrect and without any factual basis.

83. In respect of the alleged violation of Article 2 of the Charter, the Respondent State avers that its Constitution of 2010 provides a solid legal super structure which seeks to address the structural and root causes of violations of Article 2 and that the Ogiek's principal grievance lay with the period before the 2010 Constitution was adopted. As for the violation of Article 8 of the Charter, the Respondent State submits that that "the Court in its judgment proposed reparation by means of allowing access to the Mau Forest and government interventions including sensitizing campaigns, collaboration towards maintenance of sites, waiving fees, which the Respondent State has demonstrated willingness to observe and is only structuring the how to."

84. As for the violation of Article 17 of the Charter, the Respondent State submits that it has already addressed the issue of eviction and access to the Mau Forest. In relation to the violation of Article 21 of the Charter, the Respondent submits that the Applicant has misinterpreted the Court's judgment on merits. According to the Respondent State, "the Court did not determine that the Ogiek were the owners of Mau Forest …" and that the Applicants have misapprehended the findings of the Court and placed emphasis on ownership rather than the right to access, use and occupy the land.

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85. The Court notes that, in its judgment on merits, it established that the Respondent State violated the Ogiek's rights under Article 2 of the Charter by failing to recognise the Ogiek as a distinct tribe like other groups;[32] Article 8 of the Charter by making it impossible for the Ogiek to continue practising their religious practices;[33] Article 17(2) and (3) of the Charter by evicting the Ogiek from the Mau Forest area thereby restricting them from exercising their cultural activities and practice; and Article 22 of the Charter due to the manner in which the Ogiek have been evicted from the Mau Forest.[34]

86. The Court confirms that moral prejudice includes both the suffering and distress caused to the direct victims and their families, and the impairment of values that are highly significant to them, as well as other changes of a non-pecuniary nature, in the living conditions of the victims or their family.[35]

87. In so far as the question of causation for moral prejudice is concerned, the Court recalls that in *Zongo and others v Burkina Faso* it held that the causal link

[32] *ACHPR v Kenya* (merits) § 146.
[33] Ibid § 169.
[34] Ibid § 210.
[35] Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala* (Reparations and costs) § 84, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_77_ing.pdf; and *Case of Forneron and daughter v. Argentina* § 194, available at: https://corteidh.or.cr/docs/casos/articulos/seriec_242_ing.pdf.

between the wrongful act and the moral prejudice suffered, may result from the violation of a human right, as an automatic consequence, without any need to prove otherwise. [36] In terms of quantification of damages for moral harm, the Court, reaffirmed that such a determination should be done equitably taking into account the specific circumstances of each case. [37]

88. The Court confirms, therefore, that international law requires that the determination of compensation for moral damage should be done equitably taking into account the specific circumstances of each case.[38] The nature of the violations and the suffering endured by the victims, the impact of the violations on the victim's way of life and length of time that the victims have had to endure the violations are among the factors that the Court considers in determining moral prejudice.

89. In the circumstances of the present Application, it is not contested that members of the Ogiek Community have suffered from the lack of recognition as an indigenous group; from the evictions from their ancestral land; the denial of enjoyment of the benefits emanating from their ancestral land; the failure to practice their religion and culture as well as the right to fully and meaningfully participate in their economic, social and cultural development.

90. While it is not possible to allocate a precise monetary value equivalent to the moral damage suffered by the Ogiek, nevertheless, the Court can award compensation that provides adequate reparation to the Ogiek. In determining reparations for moral prejudice, as earlier pointed out, the Court takes into consideration the reasonable exercise of judicial discretion and bases its decision on the principles of equity taking into account the specific circumstances of each case.[39]

[36] *Zongo and others v Burkina Faso (reparations)* § 55.
[37] D Shelton (n 17 above) 346-348.
[38] Ibid.
[39] *Zongo and others v Burkina Faso (Reparations)* § 61 and *Ingabire v Rwanda (Reparations)* § 20.

91. The Court notes that in the *Case of Sawhoyamaxa Indigenous Community v. Paraguay*[40], the Inter-American Court of Human Rights awarded the sum of "US$ 1,000,000.00 (One million United States Dollars) for moral prejudice to be paid into a fund, which would be used to implement educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure, for the benefit of the members of the Community."[41]

92. The Court also notes that in *the Case of the Kalina and Lokono Peoples v. Suriname* [42] the Inter-American Court of Human Rights ordered that the Respondent should allocate the sum of US$1 000 000 (One million United States Dollars) to a fund established for the benefit of the applicants to cover for the Applicants' moral prejudice.[43] The case involved the responsibility of the State of Suriname for a series of violations of the rights of members of the Kalina and Lokono indigenous peoples. Specifically, the violations related to the absence of a legal framework recognising the legal personality of the indigenous communities; the failure to recognise collective ownership of the lands, territories and natural resources of the Kalina and Lokono peoples; and the granting of concessions and licences to carry out mining operations on lands belonging to the Kalina and Lokono without consulting them.

93. The Court is mindful that the violations established in the present Application relate to rights that remain central to the very existence of the Ogiek. The Respondent State, therefore, is under a duty to compensate the Ogiek for the moral prejudice they suffered as a result of the violation of their rights. Taking into account the exercise of its reasonable discretion in equity the Court, orders the Respondent to compensate the Ogiek with the sum of KES100 000 000 (One hundred million Kenyan Shillings) for the moral prejudice suffered.

[40] Judgment of March 29, 2006 (Merits, Reparations and Costs).
[41] Ibid § 224.
[42] Judgment of November 25, 2015 (Merits, Reparations and Costs).
[43] http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf § 298.

B. Non-pecuniary reparations

94. The Applicant prays the Court to order several non-pecuniary reparations. The Court now considers the Applicant's prayers in respect of each of the non-pecuniary claims as follows:

i. Restitution of Ogiek ancestral lands

95. The Applicant, relying on the Court's finding of a violation of Article 14 of the Charter, submits that a natural consequence thereof is the restitution of the Ogiek ancestral lands. In the Applicant's view, this violation can be remedied by the recovery of the ancestral lands through delimitation, demarcation and titling or otherwise clarification and protection of all such land. The Applicant submits that all processes in this regard should be undertaken within a timeframe of one (1) year of notification of the reparations order with the full participation of the Ogiek.

96. The Applicant also submits that the legal framework in the Respondent State already possesses legislation that can be used to effect restitution of Ogiek ancestral land including the Community Land Act 2016, the Forest Conservation and Management Act, 2016 and the 2010 Constitution of the Respondent State. According to the Applicant, the Respondent State's laws have established a class of lands known as "community lands" (Article 61, Constitution) and one sub-category of community lands is ancestral lands and lands traditionally occupied by hunter gatherer communities (Article 63(2)(d)(ii), Constitution). The Community Land Act 2016 lays out the procedure to be followed by communities seeking to secure formal title over their lands. The Applicant further submits, with the support of an expert report, that these provisions can be used positively to facilitate restitution of Ogiek ancestral land.

97. The Applicant identified the Ogiek ancestral land to be restituted back to the Ogiek through communally held titles, subject to delimitation, delineation and demarcation, as follows:

    a. The entire Public Forest area, which comprises the Mau Forest Complex, in all its parts, currently defined as public Forest, as well as the Maasai Mau Forest Block. (These lands have been delineated in Annex A to the Applicant's submission on reparations)
    b. Additional areas of Ogiek ancestral land: Kiptagich tea estate and tea factory in South West Mau near Tinet,; the Sojanmi Spring Field flower farm in Njoro area (East Mau) and land owned by a logging company in East Mau (south west of Njoro) measuring about 147 acres.

98. In relation to the ongoing commercial activities on the Ogiek ancestral land, the Applicant submits that the Respondent State should establish and facilitate dialogue mechanisms between the Ogiek (via the original complainants), Kenya Forestry Service (where relevant) and relevant private sector operators in order to reach mutual agreement on whether they will be allowed to continue their activities but operating via a lease of the land and/or royalty and benefit sharing agreement between the Ogiek communal title holders and the commercial operators, in line with Sections 35 to 37 of the Community Land Act 2016. Such dialogue, it is further submitted, must be concluded within a time frame of nine (9) months of notification of the reparations judgment.

99. As to the details of the restitution process, the Applicant submits that the Ogiek should be returned all twenty-two (22) forest blocks within the Mau Forest Complex by means of twenty-four (24) communally held titles. Each community, it is submitted, will hold title according to the procedure set out in the Community Land Act 2016 and will manage the forested areas as community forests under the Forest and Conservation Management Act 2016.

100. The Applicant also prays for the rescission of such titles and concessions found to have been illegally granted with respect to the Ogiek ancestral land; and such land to be returned to the Ogiek with common title within each location. Accordingly, the Applicant submits that the Respondent State should enter into a dialogue with the Ogiek, via the "original complaints", regarding the land to be returned from non-Ogiek to the Ogiek.

101. In so far as the restitution of Ogiek ancestral land is concerned, the Applicant filed a Road Map which it submitted should guide the restitution. According to the Applicant's Road Map, the Court should order a process of restitution that revolves around four elements: first, the appointment of an independent gender balanced panel of experts to oversee the settlement of all claims; second, reclassification of the Mau Forest into three categories depending on the difficulty of resettlement; thirdly, the Court to remain seized of the case until both the merits and reparations are fully implemented and, lastly, the Court to play an active role in overseeing the process of implementation of its judgments.

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102. The Respondent State opposes the Applicant's prayer for restitution of Ogiek ancestral land by means of delimitation, demarcation and titling.

103. The Respondent State reiterates its position that the Applicant has misinterpreted the findings of the Court in relation to the ownership of the Ogiek ancestral land. It emphasises that the Court's judgment on merits did not pronounce that the Ogiek were/are the owners of the Mau Forest. In the Respondent State's view, the Applicant has erroneously emphasised ownership rather than the rights of access, use and occupation which the Court granted the Ogiek in its judgment on merits. According to the Respondent, ownership is not a *sine qua non* to the utilisation of land and any process of demarcating forests and titling for indigenous communities will set a dangerous precedent across the

world.

104. The Respondent State also submits that guarantees of non-repetition together with rehabilitation measures are the most far-reaching forms of reparation that can be awarded to redress human rights violations since they address the root and structural causes of the violations. These remedies, the Respondent State submits, would best address the human rights violations suffered by the Ogiek including those relating to their ancestral land.

105. In relation to Article 14 of the Charter, the Respondent State submits that the Court's finding was that the violation of Article 14 was occasioned by the denial of access to the Mau Forest. According to the Respondent State, therefore, restitution for this violation can be achieved by the reverse action of guaranteeing and granting access to the Mau Forest for the Ogiek, save where encroachment is necessary in the interest of public need or in the general interest of the community.

106. The Respondent State further submits that demarcation and titling is unnecessary for purposes of access, occupation and use of the Mau Forest because such action is inimical with the character of the Ogiek as hunter and gatherer communities who do not have possession based land tenure systems.

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107. The Court observes that, in the context of indigenous peoples' claims to land, demarcation is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground.[44]. Demarcation is important and necessary because

[44] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights *Indigenous peoples and their relationship to land: final working paper* prepared by the Special Rapporteur, Erica-Irene A. Daes – available at https://digitallibrary.un.org/record/419881?ln=en.

mere abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the land is determined and marked. This serves to remove uncertainty on the part of the concerned indigenous people in respect of the land to which they are entitled to exercise their rights.

108. As has been noted:[45]

> The jurisprudence under international law bestows the right of ownership rather than mere access. …. if international law were to grant access only, indigenous people would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous people can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.

109. The Court takes special notice of the fact that the protection of rights to land and natural resources remains fundamental for the survival of indigenous peoples.[46] As confirmed, the right to property includes not only the right to have access to one's property and not to have one's property invaded or encroached upon but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.[47]

110. The Court thus finds that , in international law, granting indigenous people privileges such as mere access to land is inadequate to protect their rights to land. [48] What is required is to legally and securely recognise their collective title

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[45] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v Kenya* available at: https://www.achpr.org/sessions/descions?id=193. § 204.

[46] Report of the African Commission's Working Group Report on Indigenous Populations/Communities, Adopted by the African Commission on Human and Peoples' Rights at the 28th Session, p. 11.

[47] *Social Economic Rights and Accountability Project v Nigeria*; available at: https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2010/109.

[48] See, for example, *Case of the Saramaka People v Suriname*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of 28 November 2007 §§ 110 & 115; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, (Merits, Reparations and Costs), Judgment of August 31 2001, Series C No. 79, § 153; *Case of the Indigenous Community Yakye Axa v. Paraguay*, (Merits, Reparations and Costs) Judgment

to the land in order to guarantee their permanent use and enjoyment of the same.

111. The Court wishes to emphasise though that given the unique situation and way of life of indigenous people, it is important to conceptualise and understand the distinctive dimensions in which their rights to property like land can be manifested. Ownership of land for indigenous people, therefore, is not necessarily the same as other forms of State ownership such as the possession of a fee simple title.[49] At the same time, however, ownership, even for indigenous people, entails the right to control access to indigenous lands. It thus behoves duty bearers, like the Respondent State, to attune their legal systems to accommodate indigenous peoples' rights to property such as land..

112. The Court acknowledges that "among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community".[50] Indigenous people, therefore, have, by the fact of their existence, the right to live freely in their own territory.[51] The close ties that indigenous peoples have with the land must be recognised and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival.[52]

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of June 17 2005 Series C No.125, §§ 143 & 215; *Case of the Moiwana Community v. Suriname*.(Preliminary Objections, Merits, Reparations and Costs) Judgment of June 15, 2005. Series C No. 124, § 209.

[49] A Erueti "The demarcation of indigenous peoples' traditional lands: Comparing domestic principles of demarcation with emerging principles of international law" (2006) 23 (3) *Arizona Journal of International and Comparative Law* 543 544.

[50] *Mayagna (Sumo) Awa Tingni v Nicaragua* §149.

[51] Ibid.

[52] *Yakye Axa Indigenous Community v Paraguay* §131. See also, UN Committee on Racial Discrimination *General Comment No. 23* § 5 - Also relevant here is ILO Convention 169 especially Article 14 which provides as follows: 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect; 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession; 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

113. The Court recalls that in its judgment on merits it confirmed that the right to property, as guaranteed in Article 14 of the Charter, applies to groups or communities and can be exercised individually or collectively. The Court also held that in determining the applicability of Article 14 of the Charter to indigenous peoples, comparable international law, such as the UNDRIP, was applicable. As the Court further held, rights that can be recognised for indigenous peoples on their ancestral lands are variable.[53]

114. Given all of the above the Court reiterates its position that the Ogiek have a right to the land that they have occupied and used over the years in the Mau Forest Complex. However, in order to make the protection of the Ogiek's right to land meaningful, there must be more than an abstract or juridical recognition of the right to property.[54] It is for this reason that physical delineation, demarcation and titling is important.[55] This delineation, demarcation and titling must be premised on, among others, the Respondent State's Community Land Act, 2016, and the Forest Conservation and Management Act, 2016, without undermining any of the protections accorded to indigenous people by the applicable international law.

115. In the circumstances, the Court holds that the Respondent State should undertake an exercise of delimitation, demarcation and titling in order to protect the Ogiek's right to property, which in this case revolves around their occupation, use and enjoyment of the Mau Forest Complex and its various resources. The Court does not agree with the Respondent State's submission that delimitation, demarcation and titling is inimical to the ways of life of indigenous people. While the Court recognises that the Ogiek way of life, like that of many indigenous people, has not remained stagnant, the evidence before it demonstrates that they

[53] *ACHPR v Kenya* (merits) 123-127.
[54] Ibid § 143.
[55] In this context, demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground - Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights *Indigenous peoples and their relationship to land: final working paper* prepared by the Special Rapporteur, Erica-Irene A. Daes

have maintained a way of life in and around the Mau Forest that distinguishes them as an indigenous people. Securing their right to property, especially land, creates a conducive context for guaranteeing their continued existence.

116. The Court, therefore, orders the Respondent State to take all necessary measures be they legislative or administrative to identify, in consultation with the Ogiek and/or their representatives, to delimit, demarcate and title Ogiek ancestral land and to grant *de jure* collective title to such land in order to ensure the permanent use, occupation and enjoyment, by the Ogiek, with legal certainty. Where the Respondent State is unable to restitute such land for objective and reasonable grounds, it must enter into negotiations with the Ogiek through their representatives, for purposes of either offering adequate compensation or identifying alternative lands of equal extension and quality to be given for Ogiek use and/or occupation. This process must be undertaken and concluded within two (2) years from the date of notification of this judgment.

117. The Court further orders that , where concessions and/or leases have been granted over Ogiek ancestral land to non-Ogiek and other private individuals or corporations, the Respondent State must commence dialogue and consultations between the Ogiek and/or their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek in line with the Community Land Act. In cases where land was allocated to non-Ogiek and where it proves impossible to reach a compromise, the Respondent State must either compensate the concerned third parties and return the land to the Ogiek or agree on appropriate compensation for the Ogiek.

ii. Recognition of the Ogiek as an indigenous people

118. The Applicant prays for the full recognition of the Ogiek as an indigenous people, including but not limited to the recognition of the Ogiek language and

Ogiek cultural and religious practices; provision of health, social and education services for the Ogiek; and the enacting of positive steps to ensure national and local political representation of the Ogiek.

119. The Applicant further prays for the Respondent State to immediately engage in dialogue with the Ogiek's representatives, in accordance with their traditions and customs, to grant full recognition of the Ogiek, such processes to be completed within one (1) year of the date of the Court's order on reparations.

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120. The Respondent State submits that it has constituted a Task Force to formulate further administrative interventions to redress the violations suffered by the Ogiek including their non-recognition as an indigenous people.

121. The Respondent State further submits that its Constitution of 2010 provides a solid legal superstructure which seeks to address the structural and root cause of the violations suffered by the Ogiek and that the same have been substantially remedied and what is left can be attained by administrative interventions and guarantees of non-repetition.

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122. The Court recalls that in its judgment on merits it found that the Respondent State violated Article 2 of the Charter by failing to recognize the Ogiek's status as a distinct tribe like other similar groups and thereby denying them the rights available to other tribes. [56]

123. The Court notes that the Respondent State, on 23 October 2017, established a multi-agency Task Force with an initial period for operation of six (6) months, to implement its decision on merits. The Court also notes that on 25 October 2018 the Respondent State again appointed a Task Force for the implementation of the Court's judgment, albeit with a different composition from

[56] *ACHPR v Kenya* (merits) § 146.

the one set up on 23 October 2017. The Court observes that while the Respondent State has stated that the Task Force appointed in October 2018 conducted extensive consultations with the Ogiek and other communities likely to be affected by its judgment, the Applicants have seriously questioned the composition of the Task Force as well as the methods it employed.

124. Notwithstanding the Parties' lack of agreement on the utility of the Task Force, the Court notes, from the Respondent State's report to the Court of 25 January 2022, that the Task Force submitted its report to the appointing authority in October 2019. The Court, however, has not been able to access any publicly available record(s) of the findings and recommendations of the Task Force. The Court thus finds that whatever interventions may emerge from the Task Force, the processes afoot this far have not contributed meaningfully to the implementation of its judgment on the merits.

125. Separately, but again from the report filed by the Respondent State on 25 January 2022, the Court notes that the Respondent State, at least from 2019, has recognised the Ogiek as a sub-group of the Kalenjin, for purposes of its Population and Housing Census.

126. In its judgment on the merits, the Court already recognised the Ogiek as an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability.[57] Following from this recognition, the Court, therefore, orders that the Respondent State must take all necessary legislative, administrative and other measures to guarantee the full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition and protection to the Ogiek language and Ogiek cultural and religious practices within twelve (12) months of notification this judgment.

[57] *ACHPR v Kenya* (merits), § 112.

iii. Public apology

127. The Applicant submits that the Respondent State should be ordered to publicly issue a full apology to the Ogiek for all the violations of their rights as identified by the Court, in a newspaper with wide national circulation and on a radio station with widespread coverage, within three (3) months of the date of the Court's order on reparations.

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128. The Respondent State submits that the Gazette Notice appointing the Task Force to give effect to the decision of the Court suffices as a public notice acknowledging violations of the Charter and would constitute just satisfaction for the violations suffered by the Ogiek.

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129. The Court, recalling its jurisprudence, holds that a judgment can constitute a sufficient form of reparation and also a sufficient measure of satisfaction.[58] In the instant case, the Court believes that its judgments, both on the merits and reparations, are a sufficient measure of satisfaction and that, therefore, it is not necessary for the Respondent State to issue a public apology.

iv. Erection of public monument

130. The Applicant submits that the Respondent State should be ordered to erect a public monument acknowledging the violation of Ogiek rights, in a place of significant importance to the Ogiek within six (6) months of the date of the Court's order on reparations.

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[58] *Mtikila v Tanzania (Reparations)* § 45; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 477 § 194 and Application No. 005/2015 *Thobias Mang'ara Mango and another v Tanzania*, ACtHPR, Application No.005/2015, Judgment of 2 December 2021 (merits and reparations) § 106.

131. The Respondent State submits that there is no justification for the erection of a monument as a form of reparations and that the Ogiek have no practice of monument erection and there is no evidence that the same would be of any significance to their community. It further submits that there is no evidence that the erection of a monument would be of any significance to the Ogiek Community especially given that it has "already acknowledged its wrongs and is actively taking steps to redress the same."

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132. Commemoration of victims of human rights violations by way of erecting a memorial or even by way of other acts of public acknowledgment of the violations, is an accepted form of reparations in international law.[59] In the main, this serves as a way of dignifying the victims and also to create a reminder of the violations that occurred and thus, hopefully, spur undertakings not to repeat the violations. The erection of a monument to victims of human rights violations, therefore, is a symbolic gesture which simultaneously acknowledges the violations while deterring further violations.

133. As the Court has established, however, a judgment itself can constitute sufficient reparation.[60] In the present Application, having considered all the circumstances of the case, especially the other orders on reparations that the Court has made, the Court holds that it is not necessary for the Respondent State to erect a monument for the commemoration of the violation of the rights of the Ogiek. Resultantly, the Court dismisses the Applicant's prayer.

[59] Cf. *Gonzales and others (Cotton Field) v Mexico* § 471 (16 November 2009).
[60] *Mtikila v Tanzania (reparations)* § 37.

v. The right to effective consultation and dialogue

134. The Applicant submits that the Court had, in its judgment on merits, found that the Respondent State repeatedly failed to consult with the Ogiek resulting in a violation of Article 22 of the Charter.

135. The Applicant prays the Court to make an order directing the Respondent State to adopt legislative, administrative and other measures to recognise and ensure the right of the Ogiek to be effectively consulted, in accordance with their traditions and customs and/or with the right to give or withhold their free, prior and informed consent, with regard to development, conservation or investment projects on Ogiek ancestral land, and implement adequate safeguards to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Ogiek, with such processes to be completed within one (1) year of the date of the Court's order on reparation.

136. The Applicant further prays the Court for an order requiring the Respondent State to fully consult and facilitate the participation, in accordance with their traditions and customs, of the Ogiek in the reparation process as a whole, including all steps that the Respondent State and its agencies take in order to comply with the Court's order.

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137. The Respondent State submits that it intends to engage directly with the Ogiek through the Ogiek Council of Elders which it views as the generally accepted body mandated to speak on behalf of the Ogiek community. In the same vein, the Respondent State reiterates its willingness and commitment to offer a comprehensive and long-lasting solution to the predicament of the Ogiek of the Mau Forest in line with the Court's judgment on the merits.

138. The Respondent State, however, has also categorically submitted that "it is opposed to engagement with self-serving third parties …who have been a stumbling block to all attempts to meaningful engagement with the Ogiek Community to resolve this long standing issue."

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139. The Court recalls that in its judgment on merits it found that the Ogiek had been continuously evicted from the Mau Forest without being effectively consulted.[61] As the Court further held, the evictions have adversely impacted on the Ogiek's economic, social, and cultural development. The Court also found that the Ogiek have not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.

140. The Court observes that the Respondent State has not, generally, opposed the establishment of mechanisms and processes which could facilitate engagement with the Ogiek especially in relation to remedying the various violations of their human rights. So far as the Court has been able to discern, from the Respondent State's submissions, its major objection relates to engagement with the complainants that filed this Application before the Commission. In this regard, the Court wishes to reiterate its earlier finding that the complainants that filed this case before the Commission are not Parties to the present case, the only Applicant before it is the Commission.

141. The Court also observes that in its various submissions before it, the Respondent State has expressed its willingness to engage the Ogiek to solve the land problem in the Mau Forest. However, apart from the establishment of the Task Force, the Respondent State has not been forthcoming with information about the concrete steps that it has been taking towards the implementation of the judgment on merits. This seems to contradict the Respondent State's own

[61] *ACHPR v Kenya* (merits) § 210.

submissions in relation to its commitment to engagement towards the resolution of the differences that it has with the Ogiek.

142. As against the above background, the Court reiterates its position, as reflected in the judgment on merits, that it is a basic requirement of international human rights law that indigenous peoples, like the Ogiek, be consulted in all decisions and actions that affect their lives. In the present case, therefore, the Respondent State has an obligation to consult the Ogiek in an active and informed manner, in accordance with their customs and traditions, within the framework of continuing communication between the parties. [62] Such consultations must be undertaken in good faith and using culturally-appropriate procedures. Where development programmes are at stake, the consultation must begin during the early stages of the development plans, and not only when it is necessary to obtain Ogiek's approval. In such a case, it is also incumbent on the Respondent State to ensure that the Ogiek are aware of the potential benefits and risks so they can decide whether to accept the proposed development or not. This would be in line with the notion of Free Prior and Informed Consent which is also reflected in Article 32(2) of the UNDRIP.

143. The Court observes that it is not strange for indigenous peoples to self-organise along lines of national, regional and sometimes even international networks covering non-governmental organisations and other civil society organisations. In the case of the Ogiek, it is clear that they have several bodies that represent their interests. It is thus incumbent on the Respondent State, in line with the obligation to consult in good faith, to create space for engagement with all actors that represent the interests of the Ogiek. This engagement, for the avoidance of doubt, must follow culturally appropriate procedures and processes. In case challenges arise in identifying organisations/bodies to represent the Ogiek, in consultations and engagement with the Respondent, the

[62] IACtHR *Case of The Kichwa Indigenous People of Sarayaku v. Ecuado*r Judgment of June 27, 2012 (Merits and reparations) § 177.

Respondent State must facilitate the creation of civic space, and time, where the Ogiek must be allowed to resolve all representation-related challenges.

144. The Court, therefore, grants the Applicant's prayer and orders that the Respondent State must take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs, and/or with the right to give or withhold their free, prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land and to implement measures that would minimise the damaging effects of such projects on the survival of the Ogiek.

145. Given that the Court has established that the violation of the Ogiek's rights was partly due to the Respondent State's failure to consult the Ogiek, the Court further orders that the Respondent State to ensure the full consultation and participation of the Ogiek, in accordance with their traditions/customs, in the reparation process as a whole including specifically all the steps taken in order to comply with this judgment.

vi. Guarantees of non-repetition

146. The Applicant prays that the Court make an order that the Respondent State guarantees non-repetition of the violation of the rights of the Ogiek People.

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147. The Respondent State does not contest the Applicant's prayer and has submitted that guarantees of non-repetition together with rehabilitation measures are the best means for addressing human rights violation especially where the objective is to address the root and structural causes of the violations.

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148. Guarantees of non-repetition are aimed at ensuring that further violations do not occur. As a form of reparations, they serve to prevent future violations, to cease on-going violations and to assure victims of past violations of the harm they suffered and of action to prevent the repetition thereof.The overall aim of guarantees of non-repetition is to "break the structural causes of societal violence, which are often conducive to an environment in which [human rights violations] take place and are not publicly condemned or adequately punished."[63]

149. The Court recalls that it is trite that a State that is a party to an international human rights instrument thereby undertakes to honour the terms of the instrument including through the modification of its domestic laws to align them with the obligations that it has assumed. In this Application, the Court observes that the Parties are not in dispute on the need for guarantees of non-repetition.

150. In the present case, the Court orders the Respondent State to adopt legislative, administrative and/or any other measures to avoid a recurrence of the violations established by the Court including, inter alia, by the restitution of the Ogiek ancestral lands, the recognition of the Ogiek as an indigenous people, and the establishment of mechanisms/frameworks for consultation and dialogue with the Ogiek on all matters affecting them.

C. Development fund for the Ogiek

151. The Applicant has requested the Court to order the Respondent State to take "all necessary measures administrative, legislative, financial and human resource measure to create a Community Development Fund for the benefit of the members of the Ogiek people within 6 months of notification of the Court's Order on Reparation."

[63] African Commission on Human and Peoples' Rights *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment* (Article 5) § 45 – available at: https://www.achpr.org/public/Document/file/English/achpr_general_comment_no._4_english.pdf.

152. According to the Applicant, a community development fund provides "the governance framework for the allocation of funds to projects of a collective interest to the indigenous community such as agriculture, education, food security, health housing, water and sanitation projects, resource management and other projects that the indigenous community consider of benefit …"

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153. The Respondent State's submissions did not address this issue.

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154. The Court recalls that it has ordered the Respondent State to pay compensation to the Ogiek for violation of their rights. The Court is aware that the members of the Ogiek in the Mau Forest area number approximately forty thousand (40, 000). Given that the violations leading up to this judgment have been experienced by many members of the Ogiek Community and over a substantial expanse of time, the Court considers it very important that any benefit, as a result of this litigation, should be extended to as many members of the Ogiek Community as possible.. In the circumstances, the establishment of a fund is one mechanism to ensure that all Ogiek benefit from the outcome of this litigation.

155. The Court thus orders the Respondent State to establish a community development fund for the Ogiek which should be a repository of all the funds ordered as reparations in this case. The community development fund shall be used to support projects for the benefit of the Ogiek in the areas of health, education, food security, natural resource management and any other causes beneficial to the well-being of the Ogiek as determined from time to time by the committee managing the fund in consultation with the Ogiek. The Respondent State must, therefore, take the necessary administrative, legislative and any other measures to establish this Fund within twelve (12) months of the notification of this judgment.

156. In terms of administration of the community development fund, the Court orders that the Respondent State should coordinate the process of constituting a committee that will oversee the management of the fund. This Committee must have adequate representation from the Ogiek with such representatives being chosen by the Ogiek themselves.

VII. COSTS

157. None of the Parties made any submissions in respect of costs.

158. The Court, however, recalls that in terms of Rule 32 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."[64]

159. In the present case, the Court sees no reason to depart from the above general principle and accordingly orders each party to bear its own costs.

VIII. OPERATIVE PART

160. For these reasons:

THE COURT,

Unanimously,

On the Respondent State's objections

i. *Dismisses* all the Respondent State's objections;

[64] Rule 30 of the Rules of Court 2 June 2010.

On pecuniary reparations

ii. *Orders* the Respondent State to pay the sum of KES 57 850 000. (Fifty seven million, eight hundred and fifty thousand Kenya Shillings), free from any government tax, as compensation for the material prejudice suffered by the Ogiek;

iii. *Orders* the Respondent State to pay the sum of KES 100 000 000 (One hundred million Kenya Shillings), free from any government tax, as compensation for the moral prejudice suffered by the Ogiek;

On non-pecuniary reparations

iv. *Orders* the Respondent State to take all necessary measures, legislative, administrative or otherwise to identify, in consultation with the Ogiek and/or their representatives, and delimit, demarcate and title Ogiek ancestral land and to grant collective title to such land in order to ensure, with legal certainty, the Ogiek's use and enjoyment of the same.;

v. *Orders* the Respondent State, where concessions and/or leases have been granted over Ogiek ancestral land, to commence dialogue and consultations between the Ogiek and their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek in line with all applicable laws. Where it proves impossible to reach a compromise, the Respondent State is ordered to compensate the concerned third parties and return such land to the Ogiek;

vi. *Orders* that the Respondent State must take all appropriate measures, within one (1) year, to guarantee full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition to the Ogiek language and Ogiek cultural and religious practices;

vii. *Dismisses* the Applicant's prayer for a public apology;

viii. *Dismisses* the Applicant's prayer for the erection of a monument to commemorate the human rights violations suffered by the Ogiek;

ix. *Orders* the Respondent State to take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs in respect of all development, conservation or investment projects on Ogiek ancestral land;

x. *Orders* the Respondent State to ensure the full consultation and participation of the Ogiek, in accordance with their traditions/customs, in the reparation process as ordered in this judgment;

xi. *Orders* the Respondent State to adopt legislative, administrative and/or any other measures to give full effect to the terms of this judgment as a means of guaranteeing the non-repetition of the violations identified;

xii. *Orders* the Respondent State to take the necessary administrative, legislative and any other measures within twelve (12) months of the notification of this judgment to establish a community development fund for the Ogiek which should be a repository of all the funds ordered as compensation in this case;

xiii. *Orders* the Respondent State, within twelve (12) months of notification of this judgment, to take legislative, administrative or any other measures to establish and operationalise the Committee for the management of the development fund ordered in this Judgment;

On implementation and reporting

xiv. *Orders* that the Respondent State must, within six (6) months of notification

of this judgment, publish the official English summaries, developed by the Registry of the Court, of this judgment together with that of the judgment of 26 May 2017. These summaries must be published, once in the official Government Gazette and once in a newspaper with widespread national circulation. The Respondent State must also, within the six (6) months period earlier referred to, publish the full judgments on merits and on reparations together with the summaries provided by the Registry of the Court on an official government website where they should remain available for a period of at least one (1) year;

xv. *Orders* the Respondent State to submit, within twelve (12) months from the date of notification of this Judgment, a report on the status of implementation of all the Orders herein;

xvi. *Holds,* that it shall conduct a hearing on the status of implementation of the orders made in this judgment on a date to be appointed by the Court twelve (12) months from the date of this judgment.

On Costs

xvii. *Decides* that each party shall bear its own costs;

Signed:

Imani D. ABOUD, President;

Blaise TCHIKAYA, Vice-President;

Rafaâ BEN ACHOUR – Judge;

Suzanne MENGUE – Judge;

M-Thérèse MUKAMULISA – Judge;

Tujilane R. CHIZUMILA – Judge;

Chafika BENSAOULA – Judge;

Stella I. ANUKAM – Judge;

Dumisa B. NTSEBEZA – Judge;

Modibo SACKO – Judge;

and

Robert ENO, Registrar.

In accordance with Article 28 (7) of the Protocol and Rule 70(1) of the Rules, the Separate Opinion of Judge Blaise TCHIKAYA is appended to this Judgment.

Done at Arusha, this 23rd Day of the month of June in the year Two Thousand and Twenty-Two, in English and French, the English text being authoritative.