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Decision of the African Commission on Human and Peoples' Rights on Admissibility

Communication 763/21

William Sipai and 13 other representatives of the Keekonyokie clan of the Maasai people of Kitet (represented initially by Dr. Duncan Ojwang, later replaced by Jonhson & Partners Advocates LLP)

V

The Republic of Kenya

Adopted by the

African Commission on Human and Peoples' Rights

*During the 82nd Ordinary Session held in Banjul, from 25 February to 11 March 2025,
Banjul, The Gambia*



Hon. Commissioner Idrissa Sow
Chairperson to the African Commission
on Human and Peoples' Rights



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Communication 763/21 - William Sipai and 13 other representatives of the Keekonyokie clan of the Maasai people of Kitet (represented initially by Dr. Duncan Ojwang, later replaced by Jonhson & Partners Advocates LLP) v. Republic of Kenya

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received a complaint on 12 July 2021 lodged by William Sipai, Tobiko Ole Muntet, Kilelu Ole Kaleke, Mark Tinkoi, Malayen Ole Sereya, Enini Ole Kerenke, Yiatum Ole Maisiudo, Kasana Ole Kisaika, Tima Ole Kuronoi, Salaton Ole Koilel, Nyamalo Ole Karei, Rishan Ole Maisiudo, Ntirankoi Ole Kapian, Nalengoyo Turume, representatives of the Keekonyokie Clan of the Maasai People of Kitet (represented by Dr. Duncan Ojwang) (the Complainants) against the Republic of Kenya (Respondent State).¹
2. The Complainants are members of the Maasai Community of Kitet (Kedong), who live on a 75,769-acre plot of land in Kitet (Kedong), with land reference No. 8396 (L.R. 11977) situated in Kedong south of Naivasha, in Nakuru County, Kenya. They claim that the land referenced has been the historical territory and heritage of the Maasai Community, whose livelihoods depend on the cultivation of their land, including the propagation and sustenance of their vast livestock.
3. The Complainants allege that at the time of Kenya's independence, 75,000 acres of land belonging to the Maasai Community were assigned by the colonial authorities to Kedong Ranch Co. Limited under a 999-year perpetual lease. The Complainants argue that former Prime Minister Jomo Kenyatta had given assurances at the constitutional conference held in Lancaster House that the "tribal land" would be

¹ Kenya ratified the African Charter on Human and Peoples' Rights on 23 January 1992.





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"placed under the control of the tribal authority" and that no one could "appropriate land belonging to another tribe". They maintain that the alienated land was never transferred to the Maasai Community as promised by the Respondent State government.

4. The Complainants allege that the Maasai Community of Kitet (Kedong) faces the imminent risk of being evicted, thus suffering irreparable damage, as the authorities of the Respondent State are currently proceeding with the demarcation and sale of parts of their historical lands to third parties.
5. The Complainants allege that in 2020, with a view to establishing an industrial park within a Special Economic Zone, the Respondent State decreed the allocation, by announcement in the Official Gazette, of up to 1,000 hectares of Kedong Ranch, the disputed land, for the development of a special economic zone that will be known as the *Naivasha Industrial Park Special Economic Zone* (Naivasha Industrial Park Special Economic Zone). They argue that this land allocation was carried out without any prior involvement of the Maasai Community, and foreign direct investors were invited to sign contracts between the government and private investors and companies.
6. The Complainants also allege that the Respondent State, in a frenzy of major development, seems determined to secure the full acquisition of the Kedong lands for investments in energy, logistics, real estate and tourism – as its lands are attractive because it sits atop a highly attractive wildlife corridor and potential geothermal energy basin where the Respondent State has initiated geothermal projects – with little or no regard for the rights of the Maasai community living on these lands.
7. The Complainants allege that the Special Economic Zone Plan (the Naivasha Special Economic Zone Master Plan) does not recognize the Maasai Community as the owner of the land, nor does it recognize its community leadership, and as such, it is excluded from benefiting from these investments. They claim that the Respondent State carries out these projects in partnership with other governments and public-private partnerships, but without the consent or participation of local communities, or with manipulation of their consent, offering monetary incentives to certain leaders.
8. The Complainants argue that the Maasai community should be forced to relocate any time a new phase of the project begins. Thus, the authorities of the Respondent State burned and destroyed their shelters by constructing fences and digging ditches and foundations around the disputed area. The Complainants also point out that, for the time being, the only obstacle to the implementation of major projects is the continued





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presence of the Maasai in Kedong, an occupation that the state and its collaborators are determined to end.

9. In addition, the Complainants allege that there is an increase in the number of arbitrary arrests, harassment, imprisonment of community representatives, demolition of houses and destruction of property of the people of Kedong. Many human rights defenders have been arrested for trying to prevent workers from digging ditches around their ancestral lands, which has led to serious human rights violations. They claim that, with no other option available, the Maasai of Kitet (Kedong) have been forced to live in a populated area with much less fertile land around the periphery of their ancestral land.
10. The Complainants further state that, despite its best efforts, the Maasai Community has been unable, either through administrative or judicial proceedings brought in the Respondent State, to counter the concerted and coordinated effort by government and private actors such as Kedong Ranch Co. Limited and KENGEN to forcibly evict the community from their ancestral lands. They allege that Kedong Ranch Co. Limited, with the support of the Respondent State, is associated with various violations of the Maasai people's right to land and resources and is complicit in the arbitrary detentions and acts of harassment and torture of the Maasai in Kedong.
11. The Complainants allege that the current President of the Respondent State, in a concerted effort to further deprive the people of Kedong of their ancestral lands, granted 1000 acres of land to each of the leaders of Rwanda, Uganda and South Sudan for the construction of dry ports for their countries.
12. The Complainants further allege that representatives of Kedong Ranch Co. Limited have stated that the company will begin a new phase of evictions which, if carried out, will inevitably result in the displacement of the Maasai people from their ancestral lands without any consultation, notice or protection of the law.
13. Consequently, the Complainants allege that these actions by the Respondent State in association with other private companies, constitute a violation of their right to property, life, development and protection from arbitrary detention, harassment and torture, as enshrined in the African Charter.
14. The Complainants maintain that if the actions of Kedong Ranch Co. Limited and the Respondent State's plan to allocate land and establish heavy industries in the Naivasha/Kedong economic zone after the fencing and digging of ditches around the





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disputed lands are to continue, it will lead to an illegal eviction and displacement of more than 30,000 families from Kedong.

Alleged violations

15. The Complainant alleges that the Respondent States have violated Articles 1, 3, 4, 5, 6, 14, 17(2) and 22.

Prayers

16. The Complainants request the African Commission on Human and Peoples' Rights (the Commission) to:

- a. Issue a declaratory order that the Respondent State violates Articles 1, 4, 5, 14, and 17 of the African Charter on Human and Peoples' Rights;
- b. Grant the following interim measures:
 - i. Request that the Respondent State or its agents refrain from expelling or harassing the Complainants, their families and all other members of the Maasai Community residing on the land subject to the case in question, pending the determination of the Communication;
 - ii. Require the Respondent State or its agents to stop the implementation of the special economic zone plan or any related project initiated without the consultation and participation of the Complainants, their families and the Community they represent.

17. In their submissions on Admissibility and Merits, the Complainants request the Commission to:

- i. Declare that Articles 1, 3, 5, 14, and 17(2), 19 of the African Charter, as well as the following articles of the Constitution of the Respondent State, have been violated: 27(1), (2), (4), (5) and (6); 28; 29 (c) (d) (e) and (f); 40 (3) and (4); 42; 43 (a) (b) (c) and (f); 44; 47 (1) and (2); 57 (c) and 63;
- ii. Order:
 - i) the cessation of all activities or acts affecting the property of the Maasai in the Kedong ancestral lands by the Respondent State;





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- ii) the payment of reparations for damages caused and the expenses of this Communication,
- iii) A public apology;
- iii. Order any other remedies that the Commission deems appropriate.

Procedure

- 18. The Secretariat received the Complaint on 12 July 2021 and acknowledged receipt on 16 September 2021.
- 19. The Complaint was seized during the meeting of the Working Group on Communications (WGC) on 12 October 2021.
- 20. The Respondent State was notified of the seizure decision through a Note Verbale addressed to the Ministry of Foreign Affairs of the Republic of Kenya, on October 28, 2021. On the same date, the Complainants were also notified of the acceptance of the Complaint.
- 21. On 21 February 2022, the Complainants submitted their observations on admissibility and merits, which were transmitted to the Respondent State on 7 March 2022 to respond within sixty (60) days.
- 22. On 16 March 2022, the Secretariat informed the parties that the examination of the Communication had been granted, pending the observations of the Respondent State that had been Respondent by Note Verbale Ref: ACHPR/COMM/763/KEN/180/22 of 4 March 2022.
- 23. On 3 June 2022, the Secretariat informed the Respondent State that the deadline for submission of its observations on admissibility and merits expired on 4 May 2022.
- 24. On 19 August 2022, following the 72nd Ordinary Session, which took place from 19 July to 2 August 2022, the Secretariat informed the parties that the examination of the Communication had been postponed to the next session.
- 25. The Communication was declared admissible during the 73rd Ordinary Session of the Commission, which took place from 20 October to 9 November 2022.

Admissibility





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The complainant's observations on admissibility

26. The Complainants allege that the Communication satisfies all the requirements of Admissibility set out in Article 56 of the African Charter and present arguments in support of this statement.
27. Regarding Article 56 (1) of the African Charter, the Complainants clearly indicated who the complainants were.
28. With regard to Article 56 (2) of the African Charter, the Complainants contend that the Complaint is in accordance with the Charter insofar as the Communication is against an AU Member and a State Party to the ACHPR. In addition, the imminent eviction operation by the Respondent State violates the rights contained in the African Charter.
29. With regard to Article 56(3) of the African Charter, the Complainants allege that the Communication does not contain any outrageous or insulting terms.
30. In relation to Article 56(4) of the African Charter, the Complainants allege that the Complaint is not based solely on information from the media.
31. With regard to Article 56(5) of the African Charter, complainants argue that the principle of exhaustion of domestic remedies is based on the logic that the State party should have priority in dealing with a case by granting it the opportunity to rule on a matter before it is transferred to international courts.
32. The complainants further argue that in this way an international court is not considered a court of first instance. The Commission, however, "has never considered that the requirement of local remedies applies literally in cases where it is not practical or desirable for the complainant to go to national courts in the event of any breach."
33. The complainants further allege that the Commission has always considered that remedies at national level must be "available, effective and sufficient", so that "if the right is not well guaranteed, there can be no effective remedy or remedy". In this regard, remedies are considered to be "available if the applicant has access to them without hindrance", "effective if it offers a prospect of success" and "sufficient if it is able to remedy the damage".
34. The complainants allege that several cases related to the issue have been submitted to Kenyan courts by individuals, groups, etc. The previous case filed by the Kedong des Maasai community was in the form of an appeal to the High Court of Kenya. The





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previous case filed by the Kedong community of Maasai in the Nakuru High Court, challenging the ownership of Kedong's land, has been decided. Judge L.N. Waithaka ruled that the expansive ranch was owned by a legal entity known as Kedong Ranch Ltd.

35. The complainants also allege that a subsequent appeal, filed by the community living on the ranch, was rejected, and the Court of Appeal upheld the High Court's decision. At the height of state-sanctioned harassment and evictions in 2005, Parkire Stephen Munkasio and 14 others (who sued on behalf of herself, their families, and all members of the Maasai community) filed a complaint in the High Court.
36. The complainants further allege that the legal action was intended to enforce the property rights of the complainants (whose families are the subject of the imminent eviction that triggered this communication to the Honorable Commission) and to prevent them from being subjected to harassment or eviction by the government.
37. The complainants allege that the Constitutional Court dismissed the petition on the grounds that it violated several constitutional provisions; the basis of the allegation is that the property in question is the ancestral land of the complainants; land is private property, as defined by the Constitution; no violation of the right to property; no evidence of violation of the rights to dignity, torture, education, housing or health; no evidence of violation of the right to a clean and healthy environment; The petition was dismissed.
38. The complainants further allege that, in order to postpone the ongoing eviction and the project, the petitioners filed a case in the High Court, which was dismissed. In this sense, 30,000 occupants lost 76,000 land from the SGR, with the private company rejecting them as foreigners.
39. The complainants further allege that a previous case filed in the Nairobi High Court challenging land ownership was determined by Judge Sila Munyao of the Nakuru Environment and Land Court, who dismissed a petition alleging that the community's rights had been violated.
40. The complainants further allege that on October 19, 2019, Torome, Kerenke, and six other petitioners filed another case in the High Court against Kedong Ranch Company Limited, Kenya Railways Corporation, National Land Commission, and the Attorney General of the Republic of Kenya. The complainants applied for recognition of their collective land rights and the invalidation of the land lease of Kedong Ranch Company





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Limited. The case was filed on behalf of the 4,000 Maasai families, a total population of 35,000 people, who live at Kedong Ranch.

41. The complainants allege that the cases before the Kenya High Court and the Court of Appeal were all decided against the Kitel people and justified the interests of Kedong Ranch Company Limited and, by extension, the State. Despite Kenya's 2010 progressive constitution recognizing a wide range of human and peoples' rights, including the right to dignity, the High Court took a casual approach to the threat of eviction and the implications for victims' rights.
42. The complainants further state that in all these petitions, despite demonstrating the imminent danger of violation of residents' fundamental rights and freedoms, the inviolability of property titles and the rights of vulnerable members of the community, including children, the elderly and women, the courts have shown no willingness to apply the transformative human rights protections, as progressively provided for in the 2010 Constitution, to defend themselves against human rights violations.
43. The complainants further allege that there is a very high probability that the government will carry out evictions in violation of their rights to equal protection of the law and freedom from discrimination. In addition, the administration of justice in these cases was deliberately subverted, as detailed in the affidavit of the Kedong leaders and their lawyer.
44. The complainants state that, although they have sought to exhaust domestic remedies, the claimants in this Communication are convinced that the remedies that may exist in the Kenyan legal system are not available to them at all. The complainants are aware that while the Kenyan judiciary has generally been independent, following its decision to annul the results of the presidential election in 2017, the President of Kenya has threatened to "review judicial independence".
45. The complainants further allege that this statement was understood to mean that the executive would seek to reduce judicial independence through a range of tactics, including administrative harassment, budget cuts, and targeted persecution of judicial officials, in order to ensure that the judiciary complies with the executive's dictates. It is therefore reasonable to assume that, since the conservation of the Mau has been presented as a high-priority national project, evictions of the applicants are justifiable in the eyes of a compliant judicial system and would be allowed despite the serious and massive violations of victims' rights that they would entail.





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46. The applicants further argue that there is no need to exhaust domestic remedies, as the violations denounced in this Communication are widespread and massive and, as such, it is presumed that the State is aware of the existence of these violations and should have remedied them.
47. Regarding Article 56(6) of the African Charter, and taking into account the submissions, the Complaint was lodged within a reasonable time.
48. With respect to Article 56(7) of the African Charter, based on the Complainant's allegations, the Complaint has not been submitted to any international arbitration forum.

The Commission's analysis on admissibility

49. The present matter falls under Article 55 of the African Charter, and as such, must satisfy the seven (7) cumulative conditions of Article 56 of the African Charter relating to the Admissibility of Communications.

Indication of authors (Article 56 (1))

50. The Commission notes that the Respondent State had been duly notified by the Secretariat, requesting its observations on the Complainant's arguments on admissibility. However, the Respondent State did not submit its observations within the prescribed periods.
51. In the case of *the Institute for Human Rights and Development in Africa (on behalf of Mr. Esmaila Connateh and 13 others) v. Angola*², the Commission established that, in situations where a State Party does not submit its observations in accordance with the Rules of Procedure despite a notification to that effect, the Commission "has no option but to examine the Communication". In this respect, the Commission carries out the analysis on the basis of the information used.



² Communication Institute for Human Rights and Development in Africa (on behalf of Esmaila Connateh and 13 others) https://www.achpr.org/public/Document/file/English/achpr43_292_04_eng.pdf



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52. Article 56 (1) states that Communications must "indicate their authors even if they request anonymity". As recorded in the Complainant's submissions and in the procedure, the complainants were duly identified.

53. The Commission established a clear principle in the case of *Malawi African Association et al v. Mauritania*³, in which it considered that, according to Article 56(1), no other requirement is necessary than the simple indication of the names of those who submit. The Complaint is quite straightforward in that it identifies the Centre for Comparative and International Law (CCIL) and the Institute for Human Rights and Development in Africa (IDHDA), whose contact details are clearly provided, as complainants.

Compatibility with the African Charter and the Constitutive Act of the African Union (Article 56 (2))

54. "Article 56 (2) requires that Communications be "compatible with the Constitutive Act of the Organization of African Unity or with the present Charter".

55. As regards the compatibility of the complaint with the African Charter, the observations submitted have shown that the rights allegedly violated are enshrined in the African Charter. Moreover, the very reason why the matter was eventually referred to the Commission is linked to the fact that, after analysis, on the basis of the allegations, *prima facie violations were observed*. In reality, the analysis was made against the African Charter itself. In this respect, the Commission sees no objection to determining that the Complaint is compatible with the African Charter.

56. With regard to compatibility with the Constitutive Act, the Commission considered in the case of *Law Society of Zimbabwe et al v. Zimbabwe*⁴ that compatibility is based on its compatibility with the objectives and principles enshrined in the Act, namely whether the prayers requested in the Communication would violate the objectives or principles expressed in the Law". In other words, the Commission has established that the prayers requested by the Complainants must in no case be contrary to the objectives of the Constitutive Act.

³ Malawi Africa Association, Amnesty International, Ms. Sarr Diop, Union Inter africaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants Droit, Association Mauritanian Association for Human Rights v. Mauritania, <https://www.achpr.org/sessions/descions?id=114>

⁴ Communication 321/2006 - Law Society of Zimbabwe et al. v. Zimbabwe (2013), <https://www.achpr.org/sessions/descions?id=211>





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57. In view of the above, the Complainants request that the Commission issue a declaratory order that the Respondent State is in violation of Articles 1, 4, 5, 14, and 17 of the African Charter on Human and Peoples' Rights, request that the Respondent State or its agents refrain from expelling or harassing the Complainants, their families and all other members of the Maasai Community residing on the land subject to the present case, pending the determination of the Communication, and demand that the Respondent State or its agents stop the implementation of the special economic zone plan or any related project initiated without the consultation and participation of the Complainants, of their families and the Community they represent.
58. The Complainants merely request that, in the light of the allegations and evidence submitted to the Commission, the Commission determine that the Respondent State has indeed violated the rights of the Maasai community of Kitet (Kedong), and, furthermore, request the Respondent State to put an end to these violations. The Commission sees no challenge in declaring the complaint compatible with the Constitutive Act, since none of the prayers are contrary to its objectives.

Derogatory or insulting language (Article 56(3))

59. *Article 56 (3) requires that Communications "shall not be drafted in derogatory or insulting language directed against the State concerned and its institutions or against the Organization of African Unity."*
60. The issue around derogatory and insulting language in complaints lodged by individuals against States Parties has been well discussed and addressed within the framework of the African Human Rights System. In the Commission's view, two main factors must be taken into consideration. On the one hand, the Commission's analysis must take into account the freedom of expression of the individual when he or she expresses his or her claims, as provided for in Article 9(2) of the African Charter⁵, while on the other hand, it must consider the threshold established by the body itself.
61. In this regard, the Commission has clearly identified derogatory and insulting language as that which offends the integrity of the judiciary, unlawfully and intentionally violates the dignity, reputation or integrity of an official or judicial body. In addition, the Commission considers the language derogatory in such a way that it pollutes the minds of the population or deliberately seeks to devalue the status of the institution. *In the case of Zimbabwe Lawyers for Human Rights and the Institute for Human Rights*

⁵ Article 9(2) of the African Charter on Human and Peoples' Rights "Everyone has the right to express and disseminate his or her opinions within the framework of the law".





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*and Development in Africa v. Zimbabwe*⁶, the Commission determines that, in order to consider language to contain abusive or insulting vocabulary, Complainants must have a clear reason and intent to effectively contempt the institutions of the State and therefore humiliate its judiciary or even its political sovereignty.

62. As demonstrated above, the Commission, in setting the threshold, set the bar high, even though it acknowledged that in certain cases, certain language, which may appear derogatory or insulting, could simply be interpreted as the very expression of the complainants' opinion. In the case of *Eyob B. Asemie v. the Kingdom of Lesotho*⁷, the Commission stated that, despite the language used, which may have been interpreted as tarnishing the image of the institution, the Complainants merely expressed their opinion and perception of it.
63. In order to carry out a rigorous analysis of the language used in the complaint under consideration, a comparative exercise may be useful, as it may demonstrate the extent to which the threshold can be breached beyond what can be considered freedom of expression. In the case of *Uhuru Kenyatta and William Ruto (represented by Innocence Project Africa) v. Republic of Kenya*⁸, the Complainants referred to the institutions and the regime as "disgusting", "shampuppet", "demonisation", "fishing expedition". These expressions can be regarded as serious accusations against the Kenyan institutions and may, in the Commission's view, lead to the pollution of the minds of the population.
64. In addition to the Commission, the African Court on Human and Peoples' Rights has an equally well-established case law on the matter. The Court based its decision on the Commission's arguments, thus consolidating its position in both the case of *Actions pour la Protection des Droit de l'Homme (APDH) v. Republic of Côte d'Ivoire*⁹ (application 001/2014, Judgment, 18 November 2016, para. 82) and in the case of

⁶ Communication 294/04: Human Rights Lawyers of Zimbabwe and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v. Zimbabwe https://www.achpr.org/public/Document/file/English/achpreo6_294_04_eng.pdf

⁷ Communication 435/12 - Eyob B. Asemie v. the Kingdom of Lesotho https://www.achpr.org/public/Document/file/English/achpr16eos_decis_435_12_lesotho_eng.pdf

⁸ Communication 464/14 Uhuru Kenyatta and William Ruto (represented by Innocence Project Africa) v. Republic of Kenya <https://www.achpr.org/sessions/descions?id=219>

⁹ Actions Pour la Protection des Droit de l'Homme (APDH) v Republic of Côte D'Ivoire https://www.african-court.org/en/images/Cases/Judgment/JUDGMENT_APPLICATION%20001%202014%20-%20APDH%20V.%20THE%20REPUBLIC%20OF%20COTE%20D%20IVOIRE.pdf





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*Lohé Issa Konaté v. Burkina Faso*¹⁰ (application 004/2013, Judgment, 5 December 2014). paragraphs 64-73).

65. Thus, in view of the foregoing, the Commission can unequivocally state that it has not identified any derogatory or insulting language in this complaint. It simply describes objective facts and makes justifiable allegations, substantiated by the presentation of more evidence.

News disseminated through the media (Article 56 (4))

66. Article 56 (4) requires that Communications "are not based exclusively on news disseminated through the media".

67. The Commission notes that the facts presented are substantiated and corroborated by sworn statements by witnesses and reports from international organizations, including the United Nations (Human Rights Council). For these reasons, the Commission considers that the conditions of Article 56(4) have been met.

Depletion of local resources (Article 56(5))

68. Article 56(5) of the African Charter requires that Communications "be submitted after the exhaustion of local remedies, if any, unless it is obvious that this procedure is unduly prolonged".

69. The principle enshrined in the African Charter underlines the importance of the judicial sovereignty of the Respondent State, as it gives priority and opportunity to the Respondent State to deal with the matter and correct any alleged violation through national courts. The international dispute settlement process is then the last resort for any individual, when all administrative and judicial remedies at home have been exhausted. That is, in the context in which the national judicial system is the main means to request and obtain redress for human rights violations. It is also important to give the State the opportunity to be informed of alleged rights violations and to take appropriate corrective action on the basis of the determination of the applicable domestic judicial procedures. This same principle has been established by the Commission in the case of the *World Organization Against Torture, the Lawyers'*

¹⁰ Communication Lohé Issa Konaté v. Burkina Faso <https://www.african-court.org/en/images/Cases/Judgment/Judgment%20004-2013%20Lohé%20Issa%20Konaté%20v%20Burkina%20Faso%20-English.pdf>





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*Committee for Human Rights, Jehovah's Witnesses, the Inter-African Union for Human Rights v. Zaire*¹¹.

70. In the above-mentioned case, the Commission clearly stated that in order to refer a case to the institution about alleged human rights violations, the Complainants must effectively exhaust local remedies. However, without going into detail on the merits of the case, the Commission declared the Complaint admissible due to evidence of massive human rights violations, which constitutes an exceptional approach to the normal application of the principle of exhaustion of domestic remedies.
71. The Commission's aim is to assert its position, in harmony with international law, as a court of last resort, rather than to be seized as a court of first instance, unless circumstances so require, and under exceptional and specified conditions. From this point of view, the Commission stated in the case of *Mr Dawda K. Jawara*¹² that local resources should be exhausted if they are available, effective and sufficient. The implication of this is that, unless it is clearly established with convincing evidence demonstrating the unavailability, inefficiency or insufficiency of local resources, the Commission cannot relieve claimants of the obligation to demonstrate exhaustion of domestic remedies.
72. The Commission observes that since its jurisdiction is complementary to national mechanisms and acts when such mechanisms are unable or refuse to provide remedies, where the Commission replaces itself with national mechanisms (the main venue for obtaining remedies) by admitting communications without exhaustion of domestic remedies, it needs to be based on a very robust presentation, otherwise the Commission would be accused of acting as a court of first instance and thus of substituting itself for national judicial proceedings.
73. Therefore, before determining whether a complainant has effectively exhausted domestic remedies, it is essential to analyse the efforts made by complainants to exhaust those remedies by referring the case to national judicial proceedings.
74. In this case, the complainants allege that the Respondent State dealt with the matter extensively and sufficiently. Several members of the Kedong Maasa community appealed to all necessary judicial instances, without any form of objective success.

¹¹ Communication 25/89, 47/90, 56/91, 100/93 World Organization Against Torture, the Lawyers' Committee for Human Rights, Jehovah's Witnesses, Inter-African Union for Human Rights v. Zaire <http://hrlibrary.umn.edu/africa/comcases/Comm25-89.pdf>

¹² Communication 147/95-149/96: Mr. Dawda K. Jawara v. The Gambia file:///C:/Users/maulod/Downloads/achpr27_147.95_149.96_eng%20(2).pdf





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75. The first case was filed in the Nakuru High Court, challenging the ownership of Kedong's land. However, the judge stated that the ranch as a whole belonged to a legal entity known as Kedong Ranch Ltd. A subsequent appeal filed by the community living within the ranch was rejected, and the Court of Appeal upheld the High Court's decision. At the height of state-sanctioned harassment and evictions in 2005.
76. The Complainants further evoke that a petition was submitted to the Constitutional Court, alleging violation of several constitutional provisions, the basis of which is the allegation that the property subject to the case is the Petitioners' ancestral land, a private land, as defined by the Constitution. The petition was rejected, based on the absence of proof of violation of the right to property, rights to dignity, torture, education, housing or health, and all the other rights mentioned.
77. The Complainants state that on 19 October 2019, Torome, Kerenke and six other petitioners brought another case in the High Court against Kedong Ranch Company Limited, the Kenya Railway Company, the National Land Commission and the Attorney General of Kenya. The Petitioners demanded recognition of their collective land rights and the invalidation of the land lease agreement of Kedong Ranch Company Limited. The case was filed on behalf of the 4,000 Maasai families with a total of 35,000 individuals living within Kedong Ranch. The cases in Kenya's High Court and Court of Appeal have all been decided against the Kitelesh people.
78. The complainants state that the latter case was brought before the High Court by Parkire Stephen Munkasio and 14 others (suing on their own behalf and on behalf of their families and all members of the Maasai community living in this place. The process sought to assert the property rights of the applicants (whose families are subject to the imminent eviction that triggered this Communication before the commission) and to prevent the government from harassing or forcibly causing the removal of their property.
79. Based on the factual evidence described above, the community proactively turned to all national judicial bodies, including at the highest level, without any success. As such, the matter was dealt with extensively at national level, and it was given sufficient time to resolve the problem, which it did by dismissing all the cases submitted. The decision to refer the matter to the Commission is therefore within its rights, as it concerns Article 56 (5).
80. The African Court on Human and Peoples' Rights has explained the matter in relation to the sufficient time granted to the Respondent State to resolve a specific issue. Indeed, it stated in the case of *the African Commission on Human and Peoples' Rights*





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*v. the Republic of Kenya*¹³ that "Where an Applicant proves that a matter has passed through the appropriate domestic judicial procedures, the requirement of exhaustion of local remedies is presumed to be satisfied, even if the same Applicant before this Court has not brought the matter before the domestic courts".

81. It is clear that this is a matter that is sufficiently dealt with by the national judicial bodies, as opposed to measures focusing solely on whether or not the complainant himself has had recourse to all local remedies. In this regard, the Commission considers that the conditions of Article 56(5) have been met.
82. Apart from efforts to exhaust domestic remedies without success, the nature of communication seems to suggest that domestic remedies are insufficient, if not outright non-existent. This may be due to the difficulty, as illustrated by the various cases that members of affected communities have repeatedly submitted to the courts of the Respondent State, that complainants and communities in similar situations face in finding appropriate legal frameworks that effectively recognize and facilitate the legal enforcement of collective land ownership.

Submission within a reasonable time (Article 56(6))

83. Article 56(6) of the African Charter requires that Communications be "lodged within a reasonable time from the exhaustion of domestic remedies or from the date on which the matter was submitted to the Commission."
84. The Complainants allege and the Commission has clearly demonstrated that the effort to exhaust local resources was quite evident. However, all cases submitted to the Court of Appeal, the High Court and the Constitutional Court were dismissed.
85. The last case was filed with the High Court in October 2019, and the Commission received the complaint in July 2021, some twenty-one months after the case was filed. The issue at hand here would be whether or not these twenty-one months can be regarded as a reasonable period for referring a case to the Commission.
86. It has been well established, both by international human rights bodies such as the Inter-American Court of Human Rights and the African Commission itself, that the reasonable period during which a case must be submitted to the Commission after a final decision by the national judicial body is six months.

¹³African Commission on Human and Peoples' Rights v. Republic of Kenya <https://africanlii.org/afu/judgment/african-court/2021/28>





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87. In the case of *Majuru v. Zimbabwe*¹⁴, the Commission was quite explicit in determining that, after six months, the complainant should provide a plausible explanation for the admissibility of a case, notwithstanding its alleged non-compliance with the reasonable time. In the above-mentioned case, the Complainant lodged the Complaint with the Commission twenty-two months after the last decision, alleging both lack of resources and mental illness. In fact, the Complainant in the Majuru case alleged that he had sought assistance during the twenty-two months. The Commission maintained that the period was "beyond a reasonable man's comprehension of a reasonable period of time".
88. The above case law is justified as it concerns an individual who, despite his or her challenges, is considered to have had sufficient time to bring an action before the Commission. In the present case, the matter concerns fourteen individuals representing a community of 30,000 people. The nature of the case therefore differs from that case-law, since its complexity lies in the coordination of actions involving an entire community.
89. As seen from the facts, the Complainants claim that between 2014 and 2019, the government of Kenya, acting through the state-owned power generation company, Kenya Electricity Generation Company (Kengen), and without any consultation with the Maasai in Kedong, removed 1,700 acres from Kedong Ranch and established a Resettlement Area for individuals and families evicted from Olkaria to make way for the development of the Olkaria IV geothermal project. 1,000 people (350 families) were relocated to new two-bedroom houses, occupying an area of 0.41 hectares each, on land from the Resettlement Action Plan within Kedong.
90. In view of the above, the community is naturally dispersed; That is why concerted action can indeed be quite difficult. In this regard, the internal process itself demonstrates the disparity in the community, given the complexity of the case, based on the number of people involved.
91. In fact, the cases submitted to the national courts were brought by different Claimants seeking the same redress. The first case was filed with the Nakuru High Court by the Maasai community of Kedong. The second case was brought by Parkire Stephen Munkasio and 14 others (suing on their own behalf and on behalf of their families and all members of the Maasai community) in the High Court. The third case was brought in the High Court by Torome, Kerenke, and six other petitioners. Finally, the current

¹⁴ Communication 308/05: Michael Majuru v. Zimbabwe [file:///C:/Users/maulod/Downloads/achpr44_308_05_eng%20\(3\).pdf](file:///C:/Users/maulod/Downloads/achpr44_308_05_eng%20(3).pdf)





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case was brought before the Commission by Mr. William Sipai and 13 other representatives of the Keekonyokie Clan of the Maasai People of Kitet (represented by Dr. Duncan Ojwang).

92. In view of the above, the nature of the case and the circumstances surrounding it make the connection between all the actions almost impossible. To the extent that Claimants have been subject to the same violations, the size of the community leaves no room for coordinated action. In this regard, in this particular situation, the submission of the case within six months, i.e. the determination of an exact reasonable time limit for filing such a case would be contradictory, given that all the cases were submitted by different individuals (*African Commission on Human and Peoples' Rights v. Republic of Kenya, TAdHP*), notwithstanding the evident need to exhaust local remedies, as previously demonstrated.
93. In addition, two main arguments may further justify the long period of time taken to seize the Commission. In the first instance, considering that the cases at the national level were presented by different individuals, it can be assumed that other members of the community were patiently waiting for an outcome of these cases. In this case, the community hoped that the case brought in October 2019 would bear fruit, after which the absence of a response from the High Court on this particular matter led the Complainants to seize the Commission.
94. Secondly, the particular circumstances of the case must be put into perspective and therefore allow for a more careful analysis. Several members of the community were resettled against their will, houses burned, and individuals arrested for speaking out against the government's actions. The Commission would not qualify this as a safe environment in which to prepare a complaint effectively, since the majority of the inhabitants would have been affected.
95. The African Court took this position in the case of *Association pour le Progrès et la Défense des Droits des Femmes Maliennes and Institute for Human Rights and Development in Africa*¹⁵, where it held that "and secondly, given the climate of fear, intimidation and threats that characterized the period following the adoption of the law on 3 August 2009, it is reasonable to expect that the Claimants have also been affected by this situation". In this particular case, the complainants brought the case before the Court five (05) months after the enactment of a law by the Malian

¹⁵ Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and Institute for Human Rights and Development in Africa (IHDIA)
https://www.african-court.org/en/images/Cases/Case%20Summaries/Case_summary_46-2016.pdf





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government that violated several provisions of international human rights instruments ratified by the Respondent State.

96. Therefore, on the basis of this line of argument, the Commission notes that the conditions of Article 56(6) have been met.

Matters previously resolved (Article 56 (7))

97. The Commission's position on the above principle has been well elaborated and clarified in its case-law with regard to two main conditions. On the one hand, with respect to the nature of the organization, the Commission recognizes that Article 56(7) is not satisfied if the same complaint is submitted to a human rights body for consideration. On the other hand, as regards the nature of the decision, the Commission said in the case of *Haregewoin Gabre-Selassie and IDHDA (on behalf of former Dergue officials) v. Ethiopia*¹⁶ that the fact of "taking a decision that addresses the concerns, including the remedy sought by the complainant... [and that] it is not enough that the matter is simply discussed by these bodies".

98. This implies that when the complainant submits a complaint to the Commission, but it has already been lodged with another competent human rights body, this automatically renders the complaint inadmissible. In addition, when the Complainant files a Complaint that has already been the subject of a decision taken by a human rights body, the latter must have addressed the concerns, including redress.

99. It has been well demonstrated in this particular case that the complainants have only brought cases before the national courts. In this regard, the Commission considers that the conditions of Article 56(7) have been met.

African Commission Decision on Admissibility

100. In view of the above, the African Commission on Human and Peoples' Rights:
- declares the Communication admissible;
 - orders the notification of the parties of its decision in accordance with Article 118 (4) of its Rules of Procedure; and
 - requests the Complainants to submit his observations on the Merits within sixty (60) days of notification, in accordance with Rule 116 (1) of his Rules of Procedure.

Complainants' submissions on the merits

¹⁶ Communication 301/05 Haregewoin Gabre-Selassie and IDHDA (on behalf of former Dergue Officials v. Ethiopia)
<https://www.achpr.org/sessions/descions?id=242>





101. In the Complaint, the Complainants allege violation of Articles 1, 4, 5, 14, 17(2) and 22 of the African Charter, but made no observations in relation to Articles 5 of the African Charter. The remarks on the alleged violation of the right to education, provided for in Article 17(2) of the African Charter, appear in the middle of a sentence as a consequence of the eviction¹⁷.
102. The Commission notes that in what the Complainants call the Memorandum of Argument and Evidence, submitted after the Complaint was seized, they allege violation of Articles 1, 3, 5, 14, and 17(2), 19 of the African Charter and Articles 27 (1), (2), (4), (5) and (6); 28; 29 (c) (d) (e) and (f); 40 (3) and (4); 42; 43 (a) (b) (c) and (f); 44; 47 (1) and (2); 57(c) and 63 of the Constitution of Kenya. However, in their submissions on the merits, the Complainants make observations only on (i) the right to be recognized as an indigenous community, (ii) the right to property (Article 14), (iii) the right to life (Article 4), (iv) the right to self-determination (Article 20); and (v) the right to development (Article 22); and (vi) the right to reparations (Article 1).
103. The Commission notes that in the Memorandum referred to above, there are no specific submissions on the right to non-discrimination (Article 3), the right to dignity (Article 5), and the right to education (Article 17), all of the African Charter. The references to Article 3 appear in the context of the claims on the right to life¹⁸, the right to self-determination,¹⁹ and the right to reparations²⁰. Thus, the allegations of infringement of Articles 3, 5 and 17 of the African Charter disappear from the observations made in the pleadings on admissibility and merit.
104. On the basis of the above, the Commission will rule on the allegations of violation of (i) the right of the Maasai of Kedong to be recognized as an indigenous community; (ii) the right to property (Article 14); (iii) the right to life (Article 4); (iv) the right to self-determination (Article 20); (v) the right to development (Article 22); and (vi) the right to reparations (Article 1). The Commission will therefore only deal with reservations relating to these rights.

Alleged violation of the right to be recognised as an indigenous population

¹⁷ Para. 28 of the Complaint.

¹⁸ Para. 69.

¹⁹ Stop. 71, 73, 74 and 75.

²⁰ Paras. 86 and 88.





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105. The Complainants base the premise for their right to recognition as an indigenous community on Article 260 of the 2010 Constitution of Kenya, which defines "marginalized community" as being

A community which, owing to its relatively small population or for any other reason, has not been able to participate fully in the integrated social and economic life of Kenya as a whole; a traditional community which, out of necessity or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole; an indigenous community that has maintained and maintained a traditional lifestyle and livelihoods based on a hunter-gatherer economy; or pastoral people and communities, whether nomadic; or an established community which, due to its relative geographical isolation, has had only marginal participation in the integrated social and economic life of Kenya as a whole.

106. They allege that, pursuant to Article 2(5) of the Respondent State Constitution, 2010, any treaty or convention ratified by the Respondent State shall form part of its legislation. It affirms that the Respondent State has ratified international instruments, including the International Covenant on Economic Social and Cultural Rights (ICESCR) and the African Charter, which recognize indigenous peoples and their rights.
107. Citing the decision of the African Commission in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International, on behalf of the Endorois Welfare Council v. Kenya*, they argue that the Commission considered indigenous peoples to be communities that "... have not been accommodated by the dominant development paradigms and, in many cases, are being victimized by the dominant development policies and ideas, and their basic human rights are being violated.... Indigenous peoples, due to past and ongoing processes, have become marginalized in their own country and need recognition and protection of their basic human rights and fundamental freedoms.²¹
108. The Complainants state that in its fourth periodic report on the International Covenant on Civil and Political Rights (ICCPR) submitted to the United Nations Human Rights Committee (UNHRC) pursuant to Article 1 on self-determination, the Respondent State officially recognizes the existence of indigenous peoples in its territory, stressing that they are part of marginalized communities, and declares that they must be protected through specific affirmative action to ensure that they enjoy their human rights and fundamental freedoms on an equal footing with others.²²

²¹ Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003 Paragraph 148).

²² See the report.





109. They allege that since 2010, the human rights situation in the Respondent State has been reviewed three times by the United Nations (UN) Universal Peer Review (UPR) mechanism. These revisions were carried out in 2010, 2015 and, more recently, in 2020. In 2010, the Respondent State agreed to implement the recommendations and decisions of its own judicial institutions and the African Commission, in particular those related to the rights of indigenous peoples.
110. In 2015, among others, the Respondent State accepted the main recommendations on the situation of indigenous peoples and agreed to effectively strengthen the protection of indigenous peoples' rights, including the land rights of their ancestors; and continue to implement legislation on the protection of the rights of indigenous peoples and their lands. In the last review, it accepted a recommendation to adopt new measures to strengthen the meaningful participation of indigenous peoples in all issues affecting them.
111. The Complainants argue that in *Rangal Lemeiguran & Others v Attorney General & Others [2006] Eklr*, the High Court confirmed the existence of indigenous peoples in the Respondent State and ruled that they had the right to influence the formulation and implementation of public policy and to be represented by persons belonging to the same social background, cultural and economic than them. The High Court further noted that representation is a clear constitutional recognition of a positive right of the minority to participate in the political process of the state and to influence state policies.

Alleged violation of the right to property

112. The Complainants allege that the Commission has observed that Article 14 includes the right to individual and collective property, thus protecting traditional communities who hold land communally, in accordance with the "values of African civilisation". They submit that Article 14 provides general protection for (i) the rights of the Maasai people over the historical territory, including their collective ownership, (ii) economic interests over the land, (iii) resources from which they derive their livelihood, including their livestock, and sand from the earth.
113. They submit that Article 15 of the ILO Convention No. 169 (1989) on Indigenous and Tribal Peoples, establishes that the rights of the peoples concerned to the natural resources of their lands must be especially safeguarded. These rights include the





right of these populations to participate in the use, management and conservation of these resources.

114. They alleged that in cases where the State has ownership of mineral or subsoil resources, or rights to other resources belonging to the lands, governments shall establish or maintain procedures whereby they consult the peoples concerned, with a view to ascertaining whether and to what extent their interests would be harmed, before undertaking or permitting any programmes for the exploitation or exploitation of such resources belonging to their lands. The peoples concerned should, wherever possible, share in the benefits of such activities and receive fair compensation for any harm they may suffer as a result of such activities.
115. They also refer to the United Nations Declaration on the Rights of Indigenous Peoples, which outlines and defines the individual and collective rights of indigenous peoples, in particular Article 25, which states that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with the lands that traditionally belong to them; Article 26, which states that indigenous peoples have the right to the lands and territories that traditionally belong to them, to use and possess these lands as they wish, and that States must recognize and protect these lands.
116. The Complainants assert that indigenous property rights have been legally recognized as communal property rights. In the current international landmark case on this issue, *Mayagna (Sumo) Awas Tingni v Nicaragua*, the Inter-American Court of Human Rights (IACHR) recognized that the Inter-American Convention protected property rights "in a sense that includes, among others, the rights of members of indigenous communities in the context of communal property." They also affirm that the IACHR stated that land tenure should be sufficient for indigenous communities without real title to obtain official recognition of this property.
117. They allege that in *Endorois against the Respondent State* (which dealt with the situation of an indigenous people forcibly removed to make way for a national reserve and tourist facilities), the African Commission stated that traditional indigenous tenure constitutes property that States Parties to the African Charter are obligated under Article 14 not only to respect, but also to protect affirmatively.
118. They note that the acquisition of indigenous property by the colonial authorities was the subject of widespread condemnation. The Privy Council of the United Kingdom recognized that the historical association of indigenous people with specific lands should be considered a "continuing right of ownership".





119. The Complainants contend that between 2014 and 2019, the government of the Respondent State, acting through the *Kenya Electricity Generation Company* (Kengen), and without any consultation with the Maasai in Kedong, expropriated 1,700 acres of Kedong Ranch to establish a Resettlement Area for individuals and families evicted from Olkaria, as part of the development of the Olkaria IV geothermal project. One thousand (1,000) people and three hundred and fifty families (350) were relocated to new two-bedroom houses, occupying an area of 0.41 hectares each, on land from the Resettlement Action Plan within Kedong.
120. It is stated in the Affidavit that because the disputed lands are rich in geothermal energies, sand and gold, which has attracted companies such as *KenGen* and sand sellers. It is further claimed that the Respondent State has systematically deprived the Kedong Maasai community of their rights its and has usurped the claimed land by illegally granting 3 000 hectares to South Sudan and Uganda.
121. It is further stated in the Affidavit that the *Kedong Unlimited Company*, like the *Muguga Company*, are products of the groups linked to the first politicians of the Respondent State who alienated land to their relatives and attorneys as a way to seize indigenous land. The Complainants further contend that the Respondent State took with impunity another thousand acres (1,000) to build the Inland Dry Port Container and other enterprises, which has resulted in more than 22 families of the Maasai community of Kedong being forcibly evicted without consultation or compensation.

Alleged violation of right to life

122. For the complainants, the maintenance of a means of subsistence is fundamental for the realization of the right to life. The arbitrary harassment, evictions, and fencing off of the boundaries of Kedong Ranch to restrict access to land and resources by the Kedong Maasai community, perpetrated jointly by the Respondent State and its collaborators, constitute an affront to the right to life of the Kedong Maasai.
123. They note that the applicants rely predominantly on pastoralism. They submit that their cattle represent their most important livelihood. Therefore, the program carried out by Kedong Ranch Company with the acquiescence and support of the Respondent State is making it impossible for the community to make a living from their land, endangering the very survival of the families and the entire group. They claim that the genocidal intent of the program implemented by *Kedong Ranch* against the Maasai is a continuation of the colonial project articulated by Charles Elliot when





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he referred to the Maasai as the Ismailis of East Africa who "will be satisfied... until they met with a crushing defeat."

124. They claim that the expulsion of the Maasai from Kedong violates international law, which recognises that forced displacement will inevitably tear families apart, undermine social and cultural ties, disrupt educational opportunities, deprive displaced populations of access to vital necessities such as food, shelter and medicine, and expose innocent people, especially children, to acts of violence such as attacks on camps, disappearances and rapes.
125. They argue that the purpose of international law governing displacement is to prevent and avoid "situations that may lead to the displacement of persons". International law extends to everyone the right to be "protected against arbitrary displacement from their home or habitual place of residence" and after exploring the lack of "viable alternatives" and still proceeding with displacement in a way that minimizes its adverse effects. They aver that the Kampala Convention for the Protection and Assistance of Internally Displaced Persons requires States to avoid "as far as possible" displacement caused by development projects.
126. For the Complainants, these rules prohibit forced displacement as a fundamental principle, but in circumstances where it may be permitted, the displacement must take place following a fair process, including the consent of the victims, and after sufficient safeguards have been put in place to prevent serious violations of rights and to prevent the most vulnerable among internally displaced persons, including children. They allege that the Respondent State has not taken any steps consistent with its obligations under international law in the way it is dealing with the issue of the Kedong Maasai.
127. They state that there are a number of international legal regimes that have been created to guarantee the rights of these groups of people, including the 1948 UN Declaration on Human Rights (UDHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR); International Labour Organization (ILO) Conventions 107 and 169 of 1957 and 1989, respectively, and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007. Other international legal documents include the African Charter; and the African Charter/Treaty of the East African Community.
128. According to the Complainants, the UDHR stresses the need for consultation, participation and prior and informed consent in activities of any kind that have an impact on indigenous peoples, their property or territories. It also sets out the





requirement for fair and adequate compensation for the violation of the rights recognised in the Declaration. Article 3 of the instrument establishes that indigenous peoples have the right to self-determination.

129. The complainants cite several provisions of international human rights instruments, such as the articles of the ICCPR: Article 2 (1), which stresses that each State Party to the Covenant must respect the rights of all individuals on its territory, without distinction of any kind; Article 14 (1), which states that everyone has the right to a fair and public hearing by a competent, independent and impartial tribunal established by law; Article 27, which states that ethnic minorities shall not be denied the right to enjoy their own culture.
130. They allege that agents of the Respondent State dug a trench around the disputed lands to prevent entry and exit from them; and that the ditch dug, because it was extremely dangerous, caused the death of schoolchildren who crossed it to go to school.

Alleged violation of the right to self-determination

131. The Complainants allege that self-determination refers to the fact that human beings, individually and collectively, should have the right to control their own destiny and choose their own system of government. It is further described as a precept of human right that states that all people have the same right to control their own destinies.²³ *Irene Daes* attributes its effectiveness to "sustainable self-determination", the important ability of indigenous peoples to pass on their traditions and culture to future generations.²⁴ Ideally, self-determination should protect these five principles: "non-discrimination; cultural integrity; control of land and resources; welfare and social development; and self-government."
132. The Complainants maintain that the fundamental right to self-determination is guaranteed in Article 1(1) of the Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by the Respondent State on 1 May 1972, and in Article 1(1) of the International Covenant on Civil and Political Rights (ICCPR), ratified by the Respondent State on 1 March 1972. Under these instruments, the State must respect

²³ See UNESCO experts on self-determination summary report p 10. Justice Michael Kirby, identifies a people as: a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) racial or ethnic identity; (c) cultural homogeneity (d) linguistic unity; (e) religious ideological affinity; (f) territorial connection; (g) common economic life.

²⁴ See Erica-Irene A. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, 3 *Transnat'l L. & Contemp. Prob.* 342 (1998).

See Robert A. Williams, Jr., *Columbus' s Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Rights option*, 8 *Ariz. J. Int'l L. & Comp. L.* 51 (1991).





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and defend the right to self-determination and protect and safeguard the social, cultural and economic development of all peoples.

133. They argue that denying indigenous peoples the same internationally recognized right to self-determination that other people enjoy constitutes another manifestation of racism and cultural chauvinism that has characterized the historical disregard for international law by indigenous peoples. Moreover, limiting the application of self-determination to the post-World War II decolonization movement and excluding its application to the current Indigenous rights movement requires the illogical claim that the indigenous peoples of the colonizing states were not victims of European colonization. Consequently, indigenous peoples and the State must have interrelations, which have nothing to do with State territories.
134. They claim that *Ortiga* has established criteria that should be used to examine how the proposed solutions will contribute to solving the problems of the Kekenyokia Maasai. Ortiga's six criteria are as follows:
- 1) Land tenure regime: the nature of the land right that has been recognised, which can range from direct ownership (fee simple), through various types of restricted ownership, to rights of simple use (usufruct);
 - 2) Territorial recognition: recognition of land in a form that corresponds to the concept of indigenous territory, as defined by ILO 169;
 - 3) Rights over natural resources: the types of rights over the ownership, management and use of natural resources granted as a consequence of the right to land;
 - 4) Security of tenure: the degree of security of the type of land title;
 - 5) Autonomy: the degree of autonomy in the management of its own affairs that is granted to an indigenous group as a consequence of its land rights, including legal recognition as an indigenous group and its ability to use its own traditional legal and judicial systems;
 - 6) Legal recourse: the legal actions they take to defend their land.

The alleged violation of the right to development

135. The Complainants submit that the massive development programs initiated by the Respondent State, through its state agencies and in collaboration with private sector actors, in particular the resettlement of over 1000 people evicted from the Olakria IV and V geothermal development camps by KENGEN on 17000 acres of land belonging to the Kedong Maasai, are all in total disregard for the rights of the Complainants who were neither consulted nor compensated. The complainants claim that the entire state program to transform Kedong Ranch into a large special





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economic zone with mega development projects covering various sectors was carried out without the involvement, participation or consent of the Kedong Maasai community.

136. They state that in *Endorois*, the African Commission stressed that "the right to development is a two-pronged test: that it is constitutive and instrumental, or useful as a means and as an end." The Commission focused on two main issues: the extent to which the community was consulted prior to development; and whether this development brings benefits to the community concerned. They allege, therefore, that the aggressively imposed developments by the government and its collaborators on the lands belonging to the Maasai of Kedong, in particular, the plan contained in the Master Plan to transform Kedong into a special economic zone, flagrantly violate the right of the Maasai of Kedong to development.
137. According to the Complainants, the World Bank considers that "indigenous peoples are generally among the poorest and most vulnerable segments of society." As a result, indigenous peoples have been the target of a wide range of initiatives, efforts and programmes to help them achieve economic development. However, they argue most of the time, the strategies adopted to achieve this noble goal have been developed externally and based on modernization. These efforts, they state, have failed miserably to improve the economic situation of indigenous peoples and, at the same time, have undermined their traditional way of life, leaving them less self-sufficient and therefore worse off than before.
138. They affirm that indigenous groups, by virtue of their existence, have the right to live freely in their own territory. They submit that the close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival.
139. The Complainants emphasise that, given that the land is communal property, it is therefore highly suspicious that the High Court of the Respondent State dismissed the case based on an out-of-court agreement signed by representatives of a minority with Kedong Company Limited.
140. These developments are not made in consultation and constitute a threat to the continuation of their culture that gives them identity and a sense of belonging and deprives them of the opportunity to have a say in matters that affect their own development. This discrimination and domination threaten the continuation of their





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culture, which gives them identity and a sense of belonging, and deprives them of opportunities to have a say in matters that affect their own development.²⁵

141. They allege that the Committee on the Elimination of Racial Discrimination, in General Recommendation 23 on the Rights of Indigenous Peoples, calls on State Parties to recognize and respect the distinct culture, history, language and way of life of indigenous peoples as an enrichment of the State, cultural identity and the promotion of their preservation. States must also ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity. They must also provide indigenous peoples with conditions that allow them to develop economically and socially sustainably and commensurate with their cultural characteristics.

Alleged right to reparations

142. The Complainants allege the right of victims of violations to redress and the obligation of the Respondent State to provide such remedies in accordance with the principle of responsibility. In support to this, they invoke the instruments of the United Nations.²⁶ In support of this, they invoke the UN Guiding Principles on Business and Human Rights (A/HRC/17/31), which were unanimously adopted by the Human Rights Council in June 2011, which they consider relevant to the human rights impact of business activities.
143. They maintain that the obligation to protect, respect and fulfil human rights implies a duty on the part of the State not only to refrain from violating human rights, but to exercise due diligence to prevent and protect individuals from abuses committed by non-State actors.²⁷
144. They maintain that the Committee on the Elimination of Racial Discrimination, in General Recommendation 23 on the Rights of Indigenous Peoples, calls in particular on States Parties to recognise and protect the rights of indigenous peoples to own,

²⁵ In the Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, Communication 276/2003 (Para 277. See also, See M Salomon and A Sengupta, The right to development: obligations of states and the rights of minorities and indigenous peoples (Minority Rights Group International, 2003).

²⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, G.A. Res. 60/147, U.N. GAOR, 60th Sess. U.N. Doc. A/RES/60/147 ¶15 (Mar. 21, 2006).

²⁷ See for example Human Rights Committee, General Comment no. 31 para. 8). See also 1. The Universal Declaration of Human Rights, for example, states that "(e)veryone has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law." Universal Declaration of Human Rights, art. 25, G.A. Res. 217, U.N., GAOR 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948). See also International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI) A, art. 2, U.N. Doc. A/RES/2200 (XXI) A (Dec. 16, 1966); Convention on G.A. Res. 39/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984); and International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 2106 (XX), art. 6 U.N. Doc. A/RES/2106 (XX) (Dec. 21, 1965).





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develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or inhabited or used without their consent free and informed, so that they take action to return these lands and territories. Only when this is not possible for factual reasons, the Complainants submit, should the right to restitution be replaced by the right to fair, equitable and prompt compensation. Such compensation should, as far as possible, take the form of land and territory.

145. They argue that the Kampala Convention for the Protection and Assistance of Internally Displaced Persons requires States to avoid "as far as possible" displacement caused by development projects. In sum, these rules prohibit forced displacement as a fundamental principle, but in circumstances where it may be permissible, displacement should take place following due process, including the consent of the victims and after sufficient safeguards have been put in place to prevent serious rights violations and prevent the most vulnerable among the IDPs, including children. The Kenyan Government has not taken any steps consistent with its obligations under international law in the way it is dealing with the Kedong Maasai issue.

The Commission Analysis

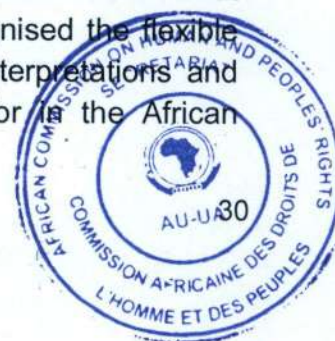
146. The alleged violation of the rights of the Kedong Maasai is based on the status of the Maasai as an indigenous population, hence the need for them to be classified as a people first, and an indigenous people second, before proceeding to the analysis of the allegations of violations of the rights in question.

Allegation that Maasai community of kedong are indigenous people

147. The Commission notes that before pronouncing on the question of whether the Maasai of Kedong are an indigenous people or community, and for the purposes of the provisions of the African Charter for groups or collectives, it must rather define what a people is.

a) Kedong Maasai as a people

148. In Endorois, the Commission acknowledged that there is no consensus on what a people is for the purposes of the African Charter. It also recognised the flexible nature of the African Charter and its openness to innovative interpretations and concluded that people refer to the collective rights provided for in the African





Charter²⁸. The Commission had previously made a similar pronouncement in the case of *Front for the Liberation of the State of Cabinda vs Angola*, when it recognized the right to equality between different communities in the same State²⁹.

149. The Commission notes that the Court, for its part, has recognised the lack of definition of the term people in the African Charter. Following the same line of reasoning as the Commission, it considered that the reference to peoples in the African Charter should not be restricted to the concept of people for the purposes of external self-determination (independence) but also from the perspective of internal self-determination which does not entail secession, which would be contrary to the principle of the inviolability of borders laid down in Article 4(b) of the Constitutive Act of the Union. The Court concluded that intra-State communities are peoples for the purposes of the collective rights provided for in the African Charter³⁰.
150. The Commission observes that the collective rights provided for in the African Charter cannot be restricted to peoples as a constituent element of the State as a sovereign entity. This is because one of the distinctive features of the African Charter is that it takes into consideration the virtues "of historical traditions and the values of African civilization that should inspire and characterize its reflections on the conception of human and peoples' rights".³¹
151. The Commission recalls the words of Keba Mbaye that in traditional African society "... law is rather considered as a set of rules protecting the community of which the individual is a part." However, according to the same author, "[t]his conception of law and human rights should not be interpreted as reducing the rights of the individual to nothing. On the contrary, in traditional African society, if the privileged subject of the law is the community, the individual keeps his freedom and the specificities of his rights." Indeed, the Commission notes that the African Charter could not ignore the foundation on which African States are based, all of which are organised around ethnic, tribal and other types of affinities.
152. Based on the above, the Commission is therefore of the opinion that the concept of the people for the purposes of the collective rights provided for in the African

²⁸ Communication No 276/03 : Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, ACHPR (2009), paras. 147 - 150.

²⁹ Communication 328/06, *Front for the Liberation of the State of Cabinda against the Republic of Angola*, November 5, 2015, para. 114.

³⁰ Case No. 006/2012. Judgment of 26 May 2017, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, paras. 198 - 199.

³¹ Paragraph 5 of the Preamble of the Charter.





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Charter also refers to historically organised ancestral communities such as the Maasai of Kedong.

b) Kedong Maasai as an indigenous people

153. The Commission notes that since the Maasai of Kedong are a people, it is now necessary to determine whether they are an indigenous people. The Commission notes that the African Charter, although it refers to group rights, in particular in Articles 19 to 24, it does not provide a definition of whether it is an indigenous people or population. However, the Commission recalls that its Working Group on Indigenous Populations/Communities presented a report on the issue³². Based on this Report, the Commission issued an Opinion to the United Nations Declaration on the Rights of Indigenous Peoples, in which it presents the following criteria for identifying indigenous populations:

- i. *Self-identification;*
- ii. *special connection to their traditional land through which their land and their ancestral territories assume fundamental importance for their collective physical and cultural survival as a population;*
- iii. *A situation of subjugation, marginalization, usurpation, exclusion or discrimination because these populations have cultures, ways of life or modes of production that are different from the hegemonic and dominant national model.* ³³

154. In the Report entitled *Indigenous Peoples in Africa: Forgotten Peoples?*, the Commission indicated that it does not intend to give "a definition of indigenous peoples, since there is no global consensus on a single universal definition, nor would such a definition be desirable or necessary." The Commission also considered that the issue of "aboriginality or 'who came first' is not a significant feature to identify indigenous peoples".³⁴

155. In the same document, however, the Commission considered that the general characteristics of groups identifying themselves as indigenous peoples are that their cultures and ways of life differ considerably from those of the dominant society; that their cultures are threatened with extinction in some; that the survival of most of them depends on access to and rights to their traditional lands and the natural resources

³² Report of the African Commission Working Group on Indigenous Populations/Communities adopted by the "Resolution on the Rights of Indigenous Populations/Communities in Africa" during the 28th Ordinary Session, 23 October to 6 November 2000, in Cotonou, Benin.

³³ Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples adopted by the African Commission on Human and Peoples' Rights during its 41st Ordinary Session, held in May 2007, in Accra, Ghana, page 4.

³⁴ Indigenous populations in Africa: forgotten people? The work of the African Commission on indigenous peoples in Africa (2006), p. 10 and 11.





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on them; that they suffer from discrimination because they are considered less developed and less advanced than other more dominant sectors of society.

156. In the document mentioned above, the Commission emphasizes that these communities often live in inaccessible and geographically isolated regions, making them vulnerable to various forms of marginalization, both politically and socially. Indigenous people are frequently subjected to domination and exploitation within national political and economic systems. These issues—discrimination, domination, and marginalization—pose a threat to the survival of their cultures and way of life. Additionally, such conditions prevent indigenous people from being able to participate meaningfully in decisions regarding their own future and development.³⁵
157. The Commission notes that similar definitions have been given by the United Nations Special Rapporteur on Minorities³⁶ and by the International Labour Organization's Convention on Autochthonous and Tribal Peoples, No 16937. The African Court, for its part, adopted the Commission's definition referred to above³⁸.
158. In the Ogiek case, the African Court, after considering the definition adopted by the United Nations Commission and Special Rapporteur on Minorities and by the International Labour Organisation's Convention on Autochthonous and Tribal Peoples, No 169, took the view that

For the identification and understanding of the concept of native populations, the relevant factors to be considered are the temporal precedence in relation to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinction, which may include aspects of language, social organization, religious and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by state authorities that are a distinct

³⁵ Page 11.

³⁶ Report of the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities E/CN.4/Sub.2/1986/7/Add.4, paragraph 379, which defines as "indigenous communities, peoples and nations with historical continuity with the pre-invasion and pre-colonial societies that developed in their territories, consider themselves distinct from the other sectors of societies currently prevailing in those territories or in parts thereof. They form non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories and ethnic identity, as the basis of their continued existence as a population, in accordance with their own cultural patterns, social institutions and legal systems".

³⁷ "This Convention shall apply to;

(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other segments of the national community and whose situation is governed in whole or in part by their own customs or traditions or by special legislation or regulations;

b) peoples in independent countries considered indigenous by the fact that they descend from populations that lived in the country or geographic region in which the country was inserted at the time of its conquest or colonization or the establishment of its current borders and that, regardless of their legal status, maintain some of the

their own social, economic, cultural, and political institutions or all of them."

³⁸ Case No. 006/2012. Judgment of 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya), paras. 106.





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*collective; and an experience of subjugation, marginalization, usurpation, exclusion or discrimination, whether such conditions persist or not.*³⁹

159. In the *Endorois* case against the Respondent State, the Commission, while noting that the terms "peoples" and "indigenous community" give rise to emotive debates, considered that some marginalized and vulnerable groups in Africa suffer from specific problems since

*... Many of these groups have not been embraced by the dominant development paradigms and in many cases are falling victim to the dominant development policies and thinking, and their fundamental human rights are being violated. The African Commission is also aware that indigenous peoples, due to past and ongoing processes, have been marginalized in their own country and need recognition and protection of their basic human rights and fundamental freedoms.*⁴⁰

160. In the Communication referred to above, the Commission described the *Endorois* community as an indigenous people. The Commission based this classification on several factors: cultural, religious, and traditional ties to their ancestral lands; their self-identification as an indigenous group; their exclusion from society and the deprivation of their rights as equal citizens; and their determination to preserve, develop, and pass on their ancestral territories and ethnic identity to future generations. This decision reflects the importance of these factors in recognizing a group as indigenous, particularly their strong connection to their lands and the challenges they face in maintaining their identity and rights in the face of societal exclusion.⁴¹

161. The Commission also notes that the very constitution of the Respondent State, in its Article 260, provides for what it calls a "marginalized community," which covers:

- (a) *relatively small population or for any other reason, has not been able to participate fully in the integrated social and economic life of Kenya as a whole;*
- (b) *a traditional community which, out of necessity or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;*

³⁹ Case No. 006/2012. Judgment of 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya, para. 107.

⁴⁰ Communication No 276/03 : Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya, ACHPR (2009), para. 148

⁴¹ Communication No 276/03 : Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) / Kenya, ACHPR (2009), para. 150 - 152.





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(c) an indigenous community that has maintained and maintained a traditional lifestyle and livelihoods based on a hunter-gatherer economy; or pastoral people and communities, whether nomadic; or an established community which, due to its relative geographical isolation, has had only marginal participation in the integrated social and economic life of Kenya as a whole.

162. In the present case, the Commission observes that, in the absence of any contrary information provided by the Respondent State, it has no grounds to contest the facts used by the complainants to justify their request to recognise the Maasai community of Kedong as an indigenous people.
163. The Commission recalls that the Maasai of Kedong, like other indigenous peoples, exhibit a cultural identity, which includes their own language, social organisation, religious, cultural and spiritual values, ways of life that differentiate them from dominant groups and other indigenous populations, and are recognised as such by other groups and by the authorities of the Respondent State⁴².
164. The Commission here does not refer to the number of people in the Maasai community, but rather in terms of ways of life, since most of the population of the Respondent State has converted to the way of life inherited from the colonial period. Therefore, the Maasai who still live according to their ancestors, present themselves as a group that resists the dominant way of life in the country.
165. The Commission notes that the Complainants' observations indicate that the Maasai of Kedong maintain a special attachment to the land they claim, which are of fundamental importance for the physical and cultural survival of the community. According to the same observations, the lands in question serve "the economic interests and resources derived from them, such as grass, salt pans, watercourses and sand, from which they derive their livelihood, including the propagation and sustenance of their vast herds of livestock."
166. The Commission recalls that for the indigenous populations, the lands also serve as a burial ground for their dead, a place of various rituals, worship,⁴³ and connection with the ancestry of which the community is hereditary and protective, in order to guarantee the perpetuation of the tradition in time and space, that is, in the traditional lands they inhabit.

⁴² Case No. 006/2012. Judgment of 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya, para. 180.

⁴³ Communication No 276/03 : Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, ACHPR (2009), para. 156; See also Case No. 006/2012. Judgment of 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya, paras. 182-186.





167. The Commission recalls that, according to the Complainants' submissions, the struggle for the conservation of the lands claimed comes from the colonial time, which resulted in the signing of a treaty with the colonial power. The continuity of this struggle for the conservation of the lands in question is expressive of the determination of the Maasai of Kedong to conserve their lands, essential for the maintenance of their tradition, culture and way of life, unlike the rest of the population.
168. The Commission considers that the Complainants' observations indicate that the Maasai of Kedong have been consistently dispossessed of their land for more than five decades, and this has accelerated in the last decade. They claim that in a frenzy of development, the government seems determined to secure the full appropriation of their lands for investments in the energy, logistics, real estate and tourism sectors, with little or no regard for the Maasai community's rights to this land.
169. The Commission notes that, although this is not an, absolutely, necessary criterion, it should be noted that the Complainants' observations indicate that the Maasai community of Kedong has temporal precedence over the occupation and use of the claimed lands, occupying them from the pre-colonial period, through the entire colonial period, and persisting to this day. In fact, as the Complainants point out, Charles Elliot referred to the Maasai as the Ismailis of East Africa who "will be satisfied ... until they suffered a crushing defeat." This passage is expressive about the precedence of the Maasai in the lands claimed, thus fulfilling the first criterion.
170. The Commission recalls that, following a mission to Kenya, the Working Group on Indigenous Populations and Minorities (WGIPM) produced a report in which they described the Maasai as one of the indigenous communities in Kenya, alongside other communities, including the Ogiek, Endorois, etc.⁴⁴
171. For all the foregoing, the Commission is of the opinion that the Maasai community of Kedong fulfils the criteria to be considered as indigenous populations for the purposes of the protection they have under the African Charter and other applicable human rights instruments.

Alleged violation of the right to property

172. The Commission notes that Article 14 of the African Charter provides that "[t]he right to property shall be guaranteed and may be affected only by public necessity or

⁴⁴ Visit to Kenya 1 to 19 March 2010, the report of which was adopted by the African Commission on Human and Peoples' Rights on its 50th Ordinary Session, from 24 October to 5 November 2011.





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in the general interest of the community, in accordance with the provisions of appropriate legal provisions."

173. This provision of the African Charter has been interpreted broadly, including not only individual but also collective ownership⁴⁵, but also that land is susceptible to private appropriation⁴⁶. The inclusion of collective property vested in a community, is not strange to the African context. As mentioned above, traditional African society is structured around communities or nations, in which land ownership is usually vested in the community, which conserves and transmits it from generation to generation until today.
174. The Commission notes that the right to property includes use, enjoyment and disposal, a regime which also applies to collective property⁴⁷. In the case of indigenous populations, the right to dispose of the land belongs to the group, not to its members individually, including in their relationship with the government or other entities⁴⁸.
175. The Commission emphasizes that in indigenous communities, the disposition of lands—meaning the ability to sell, transfer, or otherwise dispose of land—is not aligned with the land's primary purpose. For indigenous communities, land is crucial for their survival, as it sustains their way of life and culture. This explains why indigenous peoples often have a strong attachment to their ancestral lands, which are seen as inseparable from their identity and traditions. Unlike other communities that may freely sell or transfer their lands, indigenous groups typically view their land as essential for the preservation of their culture and future generations.
176. The Commission has expressed its opinion on several occasions on the property rights of indigenous peoples, in which it has considered that land is susceptible to private appropriation⁴⁹; whereas it includes not only the right of use, enjoyment and

⁴⁵ Case No. 006/2012. Judgment of 26 May 2017, African Commission on Human and Peoples' Rights v. Republic of Kenya), para. 123.

Application No. 001/2013. Decision of 15/3/2013, *Ernest Francis Mtingwi v. Republic of Malawi* (hereinafter referred to as "*Ernest Francis Mtingwi v. Malawi Decision*"), para. 14.

⁴⁶ Communications Nos. 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98 (2000) - Malawi African Association and Others v. Mauritania, ACHPR (2000), para. 128.

⁴⁷ Communication No 155/96 : Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) / Nigeria (ACHPR) (2001), para. 61.

⁴⁸ In the same sense, *Mayagna (Sumo) Awas Tingni v Nicaragua cited by the Complainants*.

⁴⁹ African Association of Malawi and Others v. Mauritania, African Commission on Human and Peoples' Rights, Communications Nos. 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98 (2000), para. 128. See also Communications 54/91 et al v Mauritania, 13th Activity Report, para. 128.





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disposal, but also the prohibition of invasion by third parties⁵⁰, including the State itself⁵¹; that the ownership of land includes its resources⁵².

177. The Commission has considered that States Parties have the obligation to recognise the right of indigenous peoples to communal property and to provide for internal mechanisms to protect this right in accordance with international law, and such protection cannot be perceived as discriminatory⁵³; that the system of trust land was inadequate for indigenous populations; that forced eviction is presumed to massively violate the right to property⁵⁴; that the right of access to land alone is insufficient, because it makes indigenous populations vulnerable, and that property is the safest way to protect indigenous populations from the encroachments of indigenous peoples. third parties⁵⁵.
178. The Commission considers that the ownership of land by indigenous peoples cannot depend on the existence of a title deed. Moreover, the owners of land in traditional African societies have never recognized each other based on title deed but based on actual occupation or temporal precedence over a given territory. However, the obligation of formal recognition of ownership of ancestral lands and the consequent demarcation and attribution of title deed, would constitute the obligation of the States Parties to protect indigenous populations from the attacks of third parties who normally form dominant classes.
179. The Commission notes that in the present case, it is called upon to rule on the Maasai's right of ownership of the claimed lands; and (b) the possibility of affecting the property.

(a) The acquisition of land by means of original occupation or by time immemorial

⁵⁰ Ogoni case Communication No. 225/98 v Nigeria, 14th Annual Report, para. 52.

⁵¹ Communications 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98.

⁵² Ogoni case Communication No. 225/98 v Nigeria, 14th Annual Report, para. 186, citing the European Court of Human Rights, in the case of Dogan and Others v. Turkey, European Court of Human Rights, applications 8803-8811/02, 8813/02 and 8815-8819/02 (2004), paras. 138-139.

⁵³ Communication No 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) / Kenya, para. 196.

⁵⁴ Communication No 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) / Kenya, para. 200.

⁵⁵ Communication No 276/03: Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) / Kenya, para. 204.





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180. The Commission notes that there are several ways of acquiring land ownership, namely by original occupation or for an immemorial period, acquisition through occupation for a certain period (adverse possession), purchase, inheritance, gift, or assignment by the competent authorities.
181. In the present case, the relevant form of acquisition is the original occupation or by time immemorial, in the sense that the owners precede anyone else in the occupation of the land in question, or that they occupy it for times that no one can locate in time.
182. The Commission notes that in the present case, the Complainants' submissions indicate that the Maasai of Kedong have occupied the land claimed since the pre-colonial period and have resisted its occupation and appropriation by the colonial State, which resulted, according to the Complainants' submissions, in the signing of a treaty of recognition of ownership of the land claimed here between the British Empire and the Maasai.
183. The Commission note that by the terms of the Affidavit signed by William Sipai, in his own name and in the name of 30,000 Maasai, the Maasai of Kedong have lived on the lands claimed since time immemorial, and even after the arrival of the British in the 19th century, they are not aware of any other people who have occupied the lands in question. Mr. Sipai further states that under Anglo-Maasai terms, the British never used the land claimed here for agriculture and ownership of the land was recognized by the Maasai of Kedong.
184. The Commission considers that it has no reason to dispute the veracity of the facts reported by Affidavit, in the Complainants' submissions and in the Anglo-Maasai Agreement of 1904, under which a portion of the territory was reserved for the Maasai of Kedong. The Commission considers, however, that the ownership of the Maasai of Kedong does not depend on the validity of the agreement in question. The reference to the agreement here is only in the sense of the precedence or duration of the occupation of the lands in question.
185. Basis of the above, the Commission acknowledges the property right of the Kedong Maasai over the disputed lands, and the inherent right to a communal title deed that recognizes all the inherent rights, including the use, enjoyment and disposal, as well as the obligation of protection of the owners by the Respondent State against any unauthorized or unconsented external interference, in accordance with the African Charter and applicable international standards.

(b) The possibility of affecting the property





186. The Commission notes that the right to property, including that of indigenous peoples, is not absolute. Moreover, Article 14 of the African Charter admits that the right to property " may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws." However, the referral clause for domestic law is not without limits. It is not a *carte blanche* for States Parties to do whatever they want. It aims to enable States Parties, considering their specific characteristics and within the limits of existing standards in international law, including applicable jurisprudence, to organize the process of encroaching communal property.
187. The Commission recalls that it has already expressed its views on the matter on several occasions and has made it clear that rights provided for in the African Charter can be encroached in line with the general rule laid down in Article 27(2) of the African Charter, which provides that "[t]he rights and freedoms of each individual shall be exercised with due respect for the rights of others, collective security, of morality and the common interest."
188. The Commission notes that this provision has been interpreted by itself and the Court as meaning that the restriction or effect on rights must be made on the basis of pre-existing law⁵⁶, respect the principle of proportionality⁵⁷, necessity in a democratic society and the rule of law⁵⁸, which includes the involvement of the parties concerned in the process affecting their rights, and that the restriction authorised by Article 27(2) of the African Charter "must never have the consequence of rendering one's own illusory"⁵⁹ or discriminatory⁶⁰. In the case of the property of indigenous communities, as mentioned above, the Commission is of the view that the involvement of their representatives is necessary, so that consent is prior and free.
189. The Commission notes that the question that arises in this Communication is whether, in accordance with Article 14 of the African Charter, property has been encroached on the basis of (i) a law; (ii) if the encroachment is intended to satisfy a

⁵⁶ Communication 313/05, Kenneth Good/Botswana, May 26, 2010. African Court on Human Rights and Human and Peoples' Rights, In the case of Lohé Issa Konaté v Burkina Faso, App. No. 004/2013, Judgment on the merits, 5 December 2014, para. 125.

⁵⁷ African Court on Human and Peoples' Rights, In the case of Lohé Issa Konaté v Burkina Faso, App. No. 004/2013, Judgment on the merits, December 5, 2014, paragraph 153.

⁵⁸ Resolution on the adoption of the Declaration of Principles of Freedom of Expression in Africa, 2002, para. II.2, and IV.

⁵⁹ Communications Nos 105/93, 128/94, 130/94 and 152/96, Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project against Nigeria (ACHPR) October 1998; Communications Nos. 140/94, 141/94, 145/95, Constitutional Rights Project, CLO and Media Rights Agenda against Nigeria, 5 November 1999, para. 42.

⁶⁰ Communication No. 255/02, Garreth Anver Prince v. South Africa, 7 December 2004, paras. 43-44.





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public interest or the general interest of the community; (iii) whether concerned parties were consulted; and whether (iv) the general conditions of Article 27(2) of the African Charter have been respected.

190. The Commission notes that the Complainants do not dispute the existence of a national law allowing for the encroachment of property, therefore this question does not arise.
191. Regarding the public interest test, the Commission notes that the Complainants' submissions indicate that the land has been allocated to the resettlement of displaced populations from other areas, the development of geothermal projects, the development of an industrial park in the special economic zone and the construction of a dry port, as well as the allocation of 3,000 hectares to each of leaders of Rwanda, Uganda and South Sudan for the construction of dry ports for their countries. The Commission notes that the public or community interest in the use of the land of the Maasai community of Kedong by the Respondent State seems evident.
192. The Commission notes that the question arises as to whether the allocation of property was made prior to consultation with the interested parties, in this case the concerned community. To this end, the Commission notes that the information available in the file does not detract from the out-of-court settlement that was allegedly signed with two (2) of the complainants before the Kenyan courts. However, the Commission notes that the Complainants representing their communities in this case claim that they were not consulted prior to the signing of the out-of-court settlement agreement. In fact, they say they have tried, unsuccessfully, to annul such agreement.
193. On the other hand, the Commission has no reason to doubt that the Complainants in this Communication were not consulted. It is in this context that the Commission considers that the right of the Complainants to be consulted in advance and to give their consent has not been respected. If the land affected by the agreement reached with two (2) of the fourteen (14) Complainants before the national authorities includes the land claimed by the Complainants in this Communication, the Commission considers that the land has been affected in violation of Article 14 of the African Charter, as the legitimate representatives of the Kedong Maasai in this Communication have not been consulted.
194. Regarding compliance with the conditions of Article 27(2) of the African Charter, namely proportionality, necessity and appropriateness in a democratic society, non-discrimination or restriction having rendered the right illusory, the Commission notes that the issue does not arise in this case, as the Complainants have not made



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submissions on the matter. The Commission therefore will not consider those conditions for the encroachment of property.

195. Based on the above, the Commission concludes that Article 14 of the African Charter has been violated due to the fact that the disputed lands have been affected without prior consultation and consent of the Maasai of Kedong.

The alleged violation of right to life

196. Article 4 of the African Charter provides that "[t]he human life is inviolable. Every human being has the right to respect for his life and to the integrity of his person. No one can be arbitrarily deprived of this right.
197. The Commission, in its General Comment on Article 4 of the African Charter, considers that the prohibition of arbitrary deprivation of life is of *cogent* nature, and ought not be interpreted restrictively, since in order to guarantee a dignified life for all, the right to life requires the realisation of all the human rights recognised in the African Charter, including civil, political, economic, social and cultural rights and the rights of peoples, including the right to peace.
198. From the above, the Commission is of the view that States have the responsibility under the African Charter to respect, protect, promote and realise the right to life, as well as to adopt measures to prevent arbitrary deprivations of life and to carry out prompt, impartial, thorough and transparent investigations into violations of the right to life committed, holding the perpetrators accountable.⁶¹
199. In line with a holistic view of the right to life, the Commission considered the right to food, in the sense of a source of food for the victims⁶², the right to water⁶³, considering its essentiality for human existence, flow from the right to life.
200. In the present case, a reading of Article 4 of the African Charter includes the specific living conditions of the Maasai of Kedong, a pastoral community whose way of life is closely linked to their lands which they use for various purposes, including economic, cultural and religious purposes, the burial of their dead and the practice of acts of initiation such as circumcision.

⁶¹ General Comment No. 3, para. A (5) – (7). General Comment No. 3 on the African Charter African Charter on Human and Peoples' Rights, the Right to Life (Article 4), adopted during the 57th Ordinary Session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2010 in Banjul, The Gambia.

⁶² 155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, para. 66.

⁶³ Press release on the situation of the Bushmen in the Central Kalahari Game Reserve in Botswana.





201. The Commission notes that the right to life, in the context of indigenous communities such as the Maasai of Kedong, should be read holistically, in line with the General Comments mentioned above. In this regard, the practice of encroaching lands through expropriation, the blocking of access to and exit from lands through the construction of trenches around the disputed lands, which has caused the death of schoolchildren, constitutes an obstacle that negatively interferes with the living conditions of community members.
202. The Commission considers that these acts of the Respondent State are incompatible with its obligation to respect, protect, promote and realize the right to life provided for in Article 4 of the African Charter.

The alleged violation of the right to self-determination

203. Article 20 of the African Charter provides that
1. *All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.*
 2. *Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.*
204. The Commission recalls that self-determination can be seen from both an internal and external perspective. Internal self-determination operates within the borders of a given State, and external self-determination leads to secession. In this regard, the Commission considered that self-determination can be exercised in the form of "... self-government, local government, federalism, confederalism."⁶⁴
205. In this communication, the Complainants claim that self-determination is the fundamental right of individuals and communities to control their own destiny and to choose their government. They stress that this allows indigenous peoples to pass on their traditions and culture to future generations. They argue that self-determination,

⁶⁴ Communication No. 75/92: Katangese People's Congress v. DRC (ACHPR) (1995), para. 4.





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ideally, should protect five principles: non-discrimination, cultural integrity, control over land and resources, social welfare, and self-government. They believe that self-determination would be the essential remedy for indigenous peoples to overcome the discrimination of the past.

206. The Commission considers that the Complainants' submissions indicate that they claim internal self-determination, since they do not intend to secede from the Respondent State, but rather to have their own autonomy to organize their community and live according to their choices, in line with their ancestral cultural traditions, and to preserve them for future generations.
207. The Commission notes that the self-determination claimed by the Complainants is inherent to the existence of indigenous communities, because it is necessary not only for their organisation as a community, but also for their ability to participate in an organised way in their relationship with the central government, in particular in discussions regarding conditions under which the government can intervene in their land.
208. La Commission notes that the distinctive aspect about these communities is also the way they are organized and live accordingly. This right of the indigenous community to self-organization is intrinsically linked to the ancestral territory of the community where they live. Outside this territory, self-determination can be irremediably called into question, because it does not exist without land of its own.
209. In the present case, the Commission notes that the violation of the property rights of the Maasai of Kedong, by way of deprivation of their ancestral lands which they use to practice of pastoralism and for the practice of their cultural and religious traditions, as concluded above, constitutes a consequential violation of the right to self-determination provided for in Article 20 of the African Charter, since the exercise of this right is inherent to the maintenance of land ownership and its use without undue interference from third parties, including the Respondent State itself, of which they are an integral part.

On the alleged violation of right to development

210. The Commission notes that Article 22 of the African Charter provides that
1. *All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.*





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2. *States shall have the duty, individually or collectively, to ensure the exercise of the right to development.*

211. The Commission notes that, at first sight, the right to development relegates the development of peoples as elements of a State as a whole. However, this reading would be reductive and merely political, since the rights provided for in the African Charter belong to individuals or groups of individuals or communities, so the right to development includes the rights of individuals and groups⁶⁵.
212. The Commission notes that this provision of the African Charter conceives the right to development from a holistic perspective, encompassing not only the economic aspect, which includes the enjoyment of community property, but also the social, identity, and cultural aspects, all in accordance with the free choices made by the community itself. The preamble of the African Charter reflects this view, stating that "... it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."⁶⁶
213. In the same vein, the Commission considered the non-recognition of the Dioula of Côte d'Ivoire as a national community ⁶⁷and the displacement of populations in Darfur⁶⁸ violates the right to development. In the context of the rights of indigenous peoples, economic development encompasses the right to enjoy community property, including ancestral lands, as well as the integration of social, cultural, and identity components into the development process. This must be done in accordance with the free choices made by the community, as outlined in Article 20 of the African Charter.
214. The Commission notes that self-determination is not an end in itself, rather, it aims to ensure that the indigenous population can promote and participate in its own development. As such, Article 22 of the African Charter must be read in conjunction with Article 20 and other relevant provisions, particularly those relating to health, family, culture, and education.
215. Based on the foregoing, the Commission concludes that the right to development of the Kedong Maasai under Article 22 of the African Charter has been violated.

⁶⁵ Communication 318/06, Open Society Justice Initiative c. Côte d'Ivoire (ACHPR) (2016), para. 183.

⁶⁶ Para. 8 of the Preamble of the African Charter.

⁶⁷ Communication No 318/06, Open Society Justice Initiative against Côte d'Ivoire, (ACHPR) (2016), paras. 185 to 186.

⁶⁸ Communication No 279/03/296/05, Sudan Human Rights Organisation and Centre for the Right to Housing and Evictions (COHRE) / Sudan, (ACHPR) (2009), para. 224.





On reparations

216. The Commission reiterates that it emanates from Article 1 of the African Charter that there is a duty to provide reparation whenever a State Party violates the rights of individuals and thereby causes them harm⁶⁹. The Commission notes that in the present case, it has found a violation of Articles 4, 14, 20 and 22 of the African Charter.

217. In *El-Sharkawi v. Egypt*, the Commission found that full and effective remedies include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition, and compensation for any economically assessable harm, such as physical or mental harm; lost opportunities, including employment, education, and social benefits; property damage and loss of earnings, including loss of earning potential; moral damage; and costs necessary for legal or specialized assistance, medicine and medical services, and psychological and social services.⁷⁰

218. In the present case, the Complainants, in addition to the general request to the Commission to order any other remedies that it deems appropriate, specifically request that the Commission to order: (a) the cessation of all activities or acts affecting the property of the Maasai in the Kedong ancestral lands by the Respondent State, (b) the payment of reparations for damages caused, (c) the payment of expenses for this Communication, (d) apologizing. These types of remedies requested by the Complainant are considered below.

a) On the request for cessation of all activities on the ancestral lands of the Maasai of Kedong by the Respondent State

219. The Commission notes that the Complainants request that the Respondent State be ordered to cease all activities on the ancestral lands of the Maasai of Kedong, including refraining from any act of eviction or acts of criminalization of pastoralism on the claimed lands. The Commission notes that the natural remedy for the violation of the Maasai Kedong ' right to property over their ancestral lands under Article 14 of the African Charter is the cessation of the violations and the restoration of the situation that would have existed if there had not been the violation, i.e., restitution.

220. Accordingly, the Commission accedes to the Complainants' request and considers that the Respondent State should cease all activities on the ancestral lands of the Kedong Maasai, unless the latter decides otherwise.

⁶⁹ Communication No 318/06 – Open Society Justice Initiative v. Côte d'Ivoire (2015) ACHPR, for 198.

⁷⁰ Communication No. 396/11 – El-Sharkawi v. Republic of Egypt (ACHPR) (2000), para. 344.





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b) On the request for compensation for damage caused

221. The Commission notes that the Complainant seeks reparations for damage caused, which may be material and non-material. The Commission recalls that to determine reparations, it is necessary to determine the (i) victims, (ii) the damage and (iii) the causal link between the violations found and the damage caused.

i) The Victims

222. The Commission recalls that it defined the victim as "persons who, individually or collectively, suffer harm, including physical or psychological harm, due to acts or omissions that constitute violations of the African Charter⁷¹. In this Communication, the victims are the Maasai of Kedong, whose lands were expropriated without prior consultation and consent. In the case of a community, the victims include members who belong to the community, even if they are not living in the area covered by this Communication.

ii) The amount of damage

223. The Commission observes that to compensate the victims for the damage suffered, which may be both moral and material, it is necessary to determine the amount of the damage. In the case of non-material damages, the Commission considers that the extent of the suffering and the corresponding amount of compensation must be demonstrated by the Complainants, for example, through medical certificates or other means capable of proving the severity of the suffering, such as trauma, anguish, stress, depression, or other mental illnesses resulting from the trauma of rape.

224. In this case, the Commission notes that the Complainants have not provided such evidence. However, the Commission believes that such evidence is best presented at the national level during the process of determining financial compensation.

225. Regarding the amount of reparations for material damage, the Commission notes that the Complainants, apart from the land they claim, do not claim any specific

⁷¹ General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Reparation for Victims of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 5) Section III, para. 16, adopted at the 21st Special Session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, Gambia. In the same vein, UN Basic Principles and Guidelines on the Right to Reparation for Victims of Serious Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005), § 8: Victim is defined as persons who individually or collectively have suffered physical or mental harm, emotional distress, economic loss, and the victim also includes the immediate family or dependents of the direct victim and persons who have suffered harm to the victim. intervene to help victims in distress or to prevent victimisation.





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amount for material damage. They merely made a general request to the Commission to award any other damages it deemed appropriate.

iii) The causal link and the damage caused

226. The Commission notes that there must be a causal link between the violations found and the non-material and material damage claimed. With regard to moral damages, the Commission shares the opinion of the African Court in *Zongo*, in which it considered that whenever there is a violation, there will be moral damage, as an automatic consequence, without the need for any proof or demonstration.⁷² In the present case, where the violation of the African Charter has been found, non-material damage is presumed and the causal link is also established automatically.

227. With respect to material damage, the Commission notes that the Complainants claim the expropriated land and any other reparation that the Commission deems appropriate. Regarding the land claimed, the Commission considers that the expropriation of land from the Maasai of Kedong (damage) is the natural consequence of the violation of Article 14 of the African Charter, and therefore the causal link is thus established.

228. In relation to other material damages arising from the violations found, because the Complainants do not specifically claim them, their demonstration and the respective causal link will be made at the national level.

c) On the apology

229. The Commission notes that the Complainants ask for an apology from the authorities. The Commission notes that the apology is one of the forms of satisfaction, normally ordered in the context of violations that jeopardize the honor and reputation of individuals, or massive violations of a certain level of gravity. However, the Complainants do not make a specific demonstration of the need for an apology.

230. The Commission, without calling into question the seriousness of the violations found, considers that there are no grounds for ordering an apology, since the other forms of reparations ordered in the current case are sufficient. However, the Commission, on its own initiative, considers appropriate for this Decision to be

⁷² Beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabè des Droits de l'Homme et des Peuples v Burkina Faso (reparations) (2015) 1 AfCLR 258, § 55.







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published on the websites of the government and the judiciary, as well as its summary in the newspapers with the largest circulation in the country.

Decision of the Commission on the merits

231. In view of the above, the African Commission on Human and Peoples' Rights:

- i. Declares that the Respondent State has violated Articles 4, 14, 19 and 22 of the African Charter;
- ii. Calls on the Respondent State to cease all activities on the ancestral lands of the Maasai of Kedong, including refraining from any act of expulsion or acts of criminalisation of pastoralism on the claimed lands;
- iii. Calls on the Respondent State to pay monetary compensation for the moral and material damages, including expenses incurred by the Complainants in connection with this Communication;
- iv. Dismisses the request for a public apology;
- v. Calls on the Respondent State to publish this decision on the websites of the government or the judiciary, as well as its summary in the country's most widely circulated newspapers;
- vi. In accordance with Article 125(1) of the 2020 Rules of Procedure, it requests the Respondent State to submit to it a written report, within one hundred and eighty (180) days of notification of this Decision, on the measures taken to implement this Decision.

Done at Banjul, The Gambia, at the 82nd Ordinary Session, held from 25 February to 11th March 2025

