

**MINORITY RIGHTS GROUP INTERNATIONAL**

**Contribution to the General Discussion on the preparation for General Comment No.36 Article 6 of the ICCPR: Right to life**

**Human Rights Committee**

**July 2015**

Minority Rights Group International (MRG) is an international non-governmental organisation working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. MRG works with over 150 organisations in nearly 50 countries. MRG has consultative status with the United Nations Economic and Social Council, observer status with the African Commission on Human and Peoples’ Rights, and is a civil society organisation registered with the Organization of American States.

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**INTRUDUCTION:**

In order to contribute to the discussion over the scope and nature of the duty to respect and ensure the right to life under the International Covenant on Civil and Political Rights (ICCPR), Minority Rights Group International (MRG) would like to share with the Human Rights Committee an extract from its Submission on the Merits in *African Commission on Human and Peoples' Rights v. Kenya* before the African Court of Human and Peoples' Rights ('ACtHPR'), in which MRG was the lead complainant before the African Commission on Human and Peoples' Rights ('ACHPR').[[1]](#footnote-1)

In this extract, MRG draws from the jurisprudence of regional human rights courts and from the work of the Committee on Economic, Social and Cultural Rights ('CESCR') to argue that right to livelihood is an integral part of right to life, and that this right implies an obligation for states not to deprive arbitrarily a population of access to the necessary conditions for a life in dignity.

In particular, in the case before the ACtHPR detailed hereafter, MRG argues that forced eviction of indigenous communities from their ancestral forest, which constituted their resource for food, shelter, traditional medicines and the seat of their cultural and religious rituals and ceremonies, amounts to a violation of their right to life protected under the African Charter on Human and Peoples' Rights.

MRG argues that this interpretation of right to life is in conformity with jurisprudence from the Inter-American Court for Human Rights ('IACtHR'), from the ACHPR, and with a general comment from theCESCR.

Indeed, the IACtHR held in *Yakye Axa Indigenous Community v. Paraguay* that:

“[right to life] includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated. One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it.”[[2]](#footnote-2)

The ACHPR also found in *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, that:

“the fallout from forcibly dispossessing indigenous peoples from their ancestral land could amount to an Article 4 violation (right to life) if the living conditions of the community are incompatible with the principles of human dignity”[[3]](#footnote-3)

With regard to the possible effects of forced evictions, the CESCR has also clearly recognised the link between forced evictions and the right to life, stating in its General Comment No. 7:

“The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.”[[4]](#footnote-4)

In light of these developments in human rights law and jurisprudence, MRG calls on the Human Rights Committee to reflect in its General Comment the fact that the “inherent right to life” that should be protected by law implies, beyond a protection against arbitrary deprivations of life, a protection against any arbitrary deprivation of access to the necessary conditions for a life in dignity.

**BACKGROUND OF THE CASE DISCUSSED HEREAFTER:**

The Ogiek are one of the last remaining forest-dwelling communities and one of the most marginalised indigenous peoples in Kenya. The Ogiek allege violation of their rights to life, property, natural resources, development, religion and culture by the Kenyan government under the African Charter on Human and Peoples' Rights, to which Kenya is a party.

For many years they have either been evicted or repeatedly threatened with eviction from their ancestral land by the Kenyan Government. The Ogiek’s ancestral land in the Mau Forest provided them with a constant supply of food, in the form of game and honey. It also provided them with shelter, traditional medicines, plants for traditional purposes , an area for cultural rituals and ceremonies, religious ceremonies, and indeed for social organisation.

MRG and the Ogiek community lodged a case at the ACHPR, challenging the Government’s gazetting and subsequent de-gazetting and excision of the Ogiek community from their land, their unlawful allocation of this land to other non-Ogiek individuals, and continuous threats of further eviction. The case was referred by the ACHPR to the ACtHPR in 2012, on the basis that it evinced serious and mass human rights violations.

The Applicant's merits submissions before the ACtHPR, *inter alia*, claimed that the right to life of the Ogiek communities had been violated by Kenya through these forced evictions. The case was heard by the ACtHPR in November 2014 and judgment is hoped for 2015.

**Extract from Minority Rights Group International’s Submission on the Merits**

***African Commission on Human and Peoples' Rights v. Kenya***

***(Application 006/2012)***

**African Court on Human and Peoples' Rights**

**November 2014**

**9. VIOLATION OF ARTICLE 4: THE RIGHT TO LIFE**

1. Article 4 provides as follows:

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

1. It is submitted that the Ogiek's right to life has been violated as a result of the Respondent State evicting them from the Mau Forest, the continued logging and clearance operations with the permission of the authorities, the parcelling and distribution of land in the Mau Forest to leading members of the Government and its political allies, and the failure to take any positive measures to protect the Ogiek way of life, thus threatening their very existence.[[5]](#footnote-5)
2. In light of the central and singular importance of the Mau's resources for the sustainability of the Ogiek's hunter-gatherer way of life, it is submitted that the Ogiek's right to life under Article 4 has been and continues to be interfered with, by the Respondent State arbitrarily depriving them of access to the necessary conditions for a life in dignity, in the name of sustainability and/or environmental necessity, as well as in order to parcel up and distribute forest land to third parties (including political allies)[[6]](#footnote-6). Any such interference should be strictly proportionate to the aim of such use of the Mau Forest, which it is not.

**The scope of the right to life**

1. The right to life is the first human right, the one on which the enjoyment of all others depends.[[7]](#footnote-7) The African Commission has emphasised this in its jurisprudence, stating

*“The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow”[[8]](#footnote-8)*

1. Although the right to life does not fall within the group rights protected in Part II of the Charter, Part I includes rights and duties applying to individuals and groups alike.[[9]](#footnote-9) So, any act which amounts to disrespect for the life and integrity of a person or group of persons, or an arbitrary denial of that right, will result in a violation of Article 4.[[10]](#footnote-10)
2. The right to life under the African Charter sets itself apart from the right to life as protected by other international treaties and covenants, in that it does not specifically lay down any exception to the right.[[11]](#footnote-11) However, in providing that “no one may be arbitrarily deprived of this right”, it may be concluded that a person may be deprived of this right provided it is not done in an arbitrary fashion.[[12]](#footnote-12) The scope of this provision therefore turns on the meaning of the word “arbitrarily”.
3. The International Court of Justice has stated that *“Arbitrariness is not so much something opposed to a rule of law, as opposed to the rule of law.... It is a wilful disregard of law, an act which shocks, or at least surprises, a sense of juridical propriety”.[[13]](#footnote-13)* The concept of arbitrariness would therefore seem to be something which involves injustice or inequity, and something more than just being illegal. This is further supported by Article 29 (2) of the Universal Declaration of Human Rights, which only allows limitations on rights and freedoms if they are *“determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”.*
4. The right to life is the supreme right from which no derogation is permitted even in times of public emergency.[[14]](#footnote-14) This approach has been repeatedly confirmed by the Commission in its jurisprudence, and specifically in relation to the rights of indigenous peoples in the *Endorois* decision:

*“The African Commission notes that the link to the right to life, in paragraph 219 above, is particularly notable, as it is a non-derogable right under international law.”[[15]](#footnote-15)*

**Rights and Obligations under Article 4**

1. As the first human right, it follows that the right to life under the African Charter, expansively interpreted, can give an effective content to all guaranteed rights – economic, civil, political, social and cultural.[[16]](#footnote-16) Therefore, it may be considered both as a civil right and as an economic and social right.[[17]](#footnote-17) As a civil right, it imposes an obligation on states to refrain from any infringement of this right or to prevent its possible infringement by a third party. As an economic and social right, it entails a positive obligation to ensure an adequate standard of living.
2. This approach has been confirmed by the African Commission in the *Endorois* decision which, although it did not consider a violation of Article 4 of the Charter, found the following:

*“One of the obligations that the State must inescapably undertake as guarantor to protect and ensure the right to life is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared towards fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority[[18]](#footnote-18)”.*

1. This approach was similarly adopted by the Commission in its decision in the *Ogoni* case[[19]](#footnote-19), in which the Commission considered the right to life in a wider context. The case concerned the environmental pollution of the Ogoni territory in Nigeria. The Commission stated that Article 4 implied a right to food, which required the Nigerian Government to protect existing food sources from (amongst other things) environmental pollution:

*“The communication argues that the right to food is implicit in the African Charter, in such provisions as the right to life (Article 4), the right to health (Article 16) and the right to economic, social and cultural development (Article 22). By its violation of these rights, the Nigerian Government trampled upon not only the explicitly protected rights but also upon the right to food implicitly guaranteed.*

*The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation. The African Charter and international law require and bind Nigeria to protect and improve existing food sources and to ensure access to adequate food for all citizens.”*

1. The finding of a violation based on environmental degradation and its threat to, and destruction of, Ogoni sources of livelihood was a positive step forward by the African Commission in the purposive interpretation of the right to life, marking a departure from other earlier decisions in which violations of the right to life were primarily based on summary executions, arrests and detention without trial, and the death penalty.
2. The approach has also been reflected in the African Charter on the Rights and Welfare of the Child, Article 5 of which protects the right of the child to survival and development. This means both the right not to be sentenced to death but also the right to be provided with adequate resources to survive.[[20]](#footnote-20)
3. Indeed the UN HRC has also stated “*The right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures.”*[[21]](#footnote-21)

**The right to integrity of person & livelihood**

1. As stated above, the right to life under Article 4 provides that “Every human being shall be entitled to respect for his life and the integrity of his person”.Accordingly, it is widely accepted that a violation of the right to life can take place even where there has been no deprivation of life. The Commission has clearly established this in its jurisprudence:

*“It would be a narrow interpretation of this right [to life] to think that it can only be violated when one is deprived of it. It cannot be said that the right to respect for one’s life and the dignity[[22]](#footnote-22) of his person, which this Article guarantees, would be protected in a case of constant fear and/or threats, as experienced by [the complainant]. [[23]](#footnote-23)*

1. In this context, it is worth further examining the concept of the right to integrity of person. The right can be broken down into two aspects: the right to physical integrity, and the right to moral integrity.[[24]](#footnote-24) The former is generally interpreted as a right to the protection of the body from any violation not freely consented to, such as mutilation.[[25]](#footnote-25) The right to moral integrity, meanwhile, is based on both an objective element – reputation – and also on a subjective element – honour.[[26]](#footnote-26) The right can also be interpreted as a right to respect for what lies at the root of moral being, for example, his culture: implying a link with Article 17 of the African Charter[[27]](#footnote-27). Such a purposive interpretation of Article 4, combining a reading of the Charter’s provisions on the right to life and the right to culture, is entirely in line with the Commission’s approach in similar cases, for example, the Ogoni case, in which it stated:

*“The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter.”[[28]](#footnote-28)*

1. This approach has been strictly followed by the IACtHR, which has found a violation of the right to life under the ACHR in a number of cases concerning denial of indigenous peoples’ rights over their ancestral land. In *Yakye Axa Indigenous Community v Paraguay*, the Court found that

*“Although restrictions may be permissible, states must be aware that in the case of indigenous property such limitations could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members’.*[[29]](#footnote-29)

1. Finding a violation of the right to life, the Court reasoned as follows:

*“The right to life is crucial in the American Convention, for which reason realization of the other rights depends on protection of this one. When the right to life is not respected, all the other rights disappear, because the person entitled to them ceases to exist... Essentially, this right includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated.[[30]](#footnote-30)*

*One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.”[[31]](#footnote-31)*

The Community was held to have been deprived of the “*possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clean water and to practice traditional medicine to prevent and cure illnesses. Furthermore, the State has not taken the necessary positive measures to ensure that the members of the Yakye Axa Community, during the period in which they have been without territory, have living conditions that are compatible with their dignity.”[[32]](#footnote-32)*

1. This approach was echoed in the case of [*Sawhoyamaxa Indigenous Community v. Paraguay*](http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf)*[[33]](#footnote-33),* in which it stated *“States must adopt any measures that may be necessary to create an adequate statutory framework to discourage any threat to the right to life; to establish an effective system of administration of justice able to investigate, punish and repair any deprivation of lives by state agents, or by individuals; and to protect the right of not being prevented from access to conditions that may guarantee a decent life, which entails the adoption of positive measures to prevent the breach of such right”[[34]](#footnote-34) . . .’*
2. Further, in *Xákmok Kásek Indigenous Community v Paraguay*, the Court found a violation of the right to life in relation to the living conditions of the Xákmok Kásek, including the lack of water, food and medical treatment, linking this situation to the community’s lack of access to lands and inability to provide for and support themselves, according to their ancestral traditions and cultural patterns.[[35]](#footnote-35)
3. This approach, incorporating aspects of indigenous community’s livelihood within the right to life and human dignity, has been firmly endorsed by the African Commission in the *Endorois* decision, which referred to the decision in *Yakye Axa v Paraguay:*

*“The Court found that the fallout from forcibly dispossessing indigenous peoples from their ancestral land could amount to an Article 4 violation (right to life) if the living conditions of the community are incompatible with the principles of human dignity”[[36]](#footnote-36)*

1. The CESCR has clearly recognised the link between forced evictions and the right to life, stating:

*“The practice of forced evictions is widespread and affects persons in both developed and developing countries. Owing to the interrelationship and interdependency which exist among all human rights, forced evictions frequently violate other human rights. Thus, while manifestly breaching the rights enshrined in the Covenant, the practice of forced evictions may also result in violations of civil and political rights, such as the right to life, the right to security of the person, the right to non-interference with privacy, family and home and the right to the peaceful enjoyment of possessions.”[[37]](#footnote-37)*

1. Further, in the *Ogoni* case, finding a violation of Article 4, the Commission held:

*“The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole*.”[[38]](#footnote-38)

**Violation of Article 4**

1. It is well established that, in common with other hunter-gatherer communities, the Ogiek relied upon their ancestral land in the Mau Forest to support their livelihoods, particular way of life and indeed their very existence.[[39]](#footnote-39)
2. The Ogiek’s ancestral land in the Mau Forest provided them with a constant supply of food, in the form of game and honey. [[40]](#footnote-40) It also provided them with shelter[[41]](#footnote-41), traditional medicines,[[42]](#footnote-42) plants for traditional purposes[[43]](#footnote-43), an area for cultural rituals and ceremonies, religious ceremonies,[[44]](#footnote-44) and indeed for social organisation.[[45]](#footnote-45) Indeed, the Respondent State acknowledges this intimate relationship: “Any destruction to this [Mau Forest] ecosystem will impact on the right to life of... the Ogieks[[46]](#footnote-46)”.[[47]](#footnote-47)
3. The African Commission’s Working Group on Indigenous Populations/ Communities has recognised the central role that access to ancestral lands plays in the maintenance of a certain way of life. Firstly, in relation to the Ogiek, it has found

*“While some Ogiek have taken up agriculture and some are livestock keepers, a large number of those who depend upon foraging and hunting have been left without any means of livelihood by the eviction. Some of the gazetted area is claimed to be protected for the customary territorial and foraging rights of the Ogiek, yet the Ogiek are kept away from the area. At the same time, no effort has gone into protecting the area against possible encroachment and logging. Instead, the government has allocated some of the forest to outsiders to be used for other purposes.”[[48]](#footnote-48)*

1. Further, in relation to indigenous peoples more generally, the Working Group has stated that indigenous peoples’ “very existence and way of life is under threat”[[49]](#footnote-49) “whose cultures and ways of life are subject to discrimination and contempt and whose very existence is under threat of extinction.”[[50]](#footnote-50) It further found that

*“The land alienation and dispossession and dismissal of their customary rights to land and other natural resources has led to an undermining of the knowledge systems through which indigenous peoples have sustained life for centuries and it has led to a negation of their livelihood systems and deprivation of their means. This is seriously threatening the continued existence of indigenous peoples and is rapidly turning them into the most destitute and poverty stricken.”[[51]](#footnote-51)*

1. In *Saramaka People v Suriname*, the IACtHR recognised this relationship, stating:

*“In order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter “development or investment plan”) within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.”[[52]](#footnote-52)*

1. As stated at paragraph 386 above, the Respondent State is under a duty not just to refrain from any action which might infringe the right to life, but also to take positive, concrete measures geared towards the fulfilment of the right to a decent life.
2. It is submitted that the Respondent State’s removal of the Ogiek from their ancestral, cultural home, and subsequent limited access to these lands, threatens to destroy the way of life of the Ogiek community.[[53]](#footnote-53) Their hunter-gatherer livelihood has been severely damaged by relegation to unsuitable lands, and their inability to access religious and cultural sites interferes with the practice and transmission of their culture.[[54]](#footnote-54) In spite of its claims that it “has taken steps to ensure that the Ogieks, in particular, are well provided for”[[55]](#footnote-55), it cannot possibly be concluded that the Government has taken any steps which could be seen as positive, concrete measures geared towards the fulfilment of the right to life and respect for integrity. Indeed, the TJRC Report stated, ‘the Commission finds that the expulsion of Endorois, Ogiek (…) and other communities from their ancestral lands, and the allocation of forest lands to other communities, have led to the destruction of the forests upon which the traditional livelihood of these communities depends, and has rendered it virtually impossible for hunter-gatherers to practise their culture.’[[56]](#footnote-56)
3. It is submitted that, to deprive the Ogiek of access to their ancestral lands, in the name of sustainability and/or environmental necessity, as well as in order to parcel up and distribute forest land to third parties (including political allies) cannot be seen as anything other than an arbitrary act, “an act which shocks, or at least surprises, a sense of juridical propriety”. As such, it falls within the ambit of Article 4 of the Charter.

**No justification for interference**

1. None of the human rights provided for by the African Charter carries an absolute guarantee. Article 4 of the Charter must be interpreted in the light of the general limitation clause set out in Article 27(2), known as the ‘claw-back clause’, which states that “the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.”
2. However, it is commonly accepted that this general limitation clause is worded in such a way as only to prevent the abuse by the individual of his rights and freedoms. Put simply, the qualifications it contains are intended to limit the exercise by the individual of his rights *rather than to precisely define the power of states to restrict such exercise*.[[57]](#footnote-57)
3. Indeed, the African Commission has clearly adopted this approach in its jurisprudence, finding that

*“The Commission is of the view that the ‘claw-back’ clauses must not be interpreted against the principles of the Charter. Recourse to these should not be used as a means of giving credence to violations of the express provisions of the Charter.... It is important for the Commission to caution against a too easy resort to the limitation clauses in the African Charter. The onus is on the state to prove that it is justified to resort to the limitation clause.”[[58]](#footnote-58)*

1. The parcelling up of Ogiek ancestral land and its distribution to third parties and/or the evictions of the Ogiek from the Mau Forest in the name of conservation, cannot in any way be said to be acts which have “due regard to the rights of others, collective security, morality and common interest”. Therefore, the claw-back clause set out in Article 27(2) does not apply.
2. Further, the principle of proportionality, as stipulated by the jurisprudence of the African Commission[[59]](#footnote-59) and the international law on human and people’s rights, requires that a restriction on a right must be the least restrictive possible to meet the legitimate aim. A very severe restriction on the right to life and integrity of person, such as that suffered by the Ogiek, must therefore have strong justifications as to its necessity.
3. Denying the Ogiek access to their ancestral land in the Mau Forest is a restriction of their right to life which is wholly disproportionate to any other aim. The need for sustainable forest management is something for which, as set out in paragraphs 83-94 above, the Ogiek are uniquely adapted. In any case, the parcelling of land in the area to third parties suggests, at least, that the Ogiek would, on balance, be a less intrusive presence in the forest. Such a restriction is not necessitated by a significant public security interest or other justification. At the very least, the Respondent State should be required to show that Ogiek land use practices could not be carried out in a manner consistent with the planned environmental protection and rehabilitation measures of the Mau Task Force. As has been repeatedly demonstrated at paragraphs 132-262 above, the Respondent State has failed to adequately consult with the Ogiek in accordance with the requirements of international law, that is, to ensure the effective participation of the Ogiek, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within Ogiek ancestral territory; to guarantee that the Ogiek will receive a reasonable benefit from any such plan within their territory, and thirdly, to ensure that no concession will be issued within Ogiek territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment.[[60]](#footnote-60)
4. Further, the Respondent State has not argued or established that taking measures to protect the Ogiek way of life in any way threatens law and order or interferes with the rights of others.

**Conclusion**

1. In light of the central and singular importance of the Mau's resources for the sustainability of the Ogiek's hunter-gatherer way of life, it is submitted that the Ogiek's right to life under Article 4 has been and continues to be interfered with by the Respondent State arbitrarily depriving them of access to the necessary conditions for a life in dignity. Any such interference should be strictly proportionate to the aim of any alternate use of the Mau Forest: which it is not.

It is therefore submitted that the Respondent State is in violation of Article 4 of the Charter.

1. The case was referred by the ACHPR to the ACtHPR in 2012, on the basis that it evinced serious and mass human rights violations [↑](#footnote-ref-1)
2. I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125.,para 161-162 [↑](#footnote-ref-2)
3. *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, (‘*Endorois*’) Communication 276/2003, at para 216 [↑](#footnote-ref-3)
4. United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 7, Article 11.1, *The Right to Adequate Housing: Forced Eviction*, 20 May 1997 (CESCR General Comment No. 7), para 4. [↑](#footnote-ref-4)
5. See further paragraphs 132-262 above [↑](#footnote-ref-5)
6. The Ndungu Report, supra note 248, at 152. Daily Nation, ‘Moi Mama Ngina in Ndungu Land Report’, (17 December 2004) <http://www.ogiek.org/news/news-post-04-12-7.htm> accessed 19 November 2013. [↑](#footnote-ref-6)
7. F. Ouguergouz,“*The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for the Human Dignity and Sustainable Democracy in Africa”*, (The Hague: Kluwer Law International, 2003), p. 91. (Henceforth referred to as: F. Ouguergouz,“*The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for the Human Dignity and Sustainable Democracy in Africa”*) [↑](#footnote-ref-7)
8. *Forum of Conscience v Sierra Leone*, (2000) AHRLR 293 (ACHPR 2000) Communication 223/98,para 19. [↑](#footnote-ref-8)
9. <http://www.un.org/esa/socdev/enable/comp303.htm> [↑](#footnote-ref-9)
10. See furtherthe *Ogoni* case, *supra* note 561,where a violation of Article 4 was found against an indigenous community. [↑](#footnote-ref-10)
11. Article 6 (2) ICCPR provides for capital punishment for serious crimes; Article 2 ECHR provides limited exceptions under which the deprivation of life by state officials may be justified; Article 4 American Convention similarly provides for capital punishment for serious crimes. [↑](#footnote-ref-11)
12. F. Ouguergouz, “*The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for the Human Dignity and Sustainable Democracy in Africa*”, *supra* note 656, pp. 92-93. [↑](#footnote-ref-12)
13. International Court of Justice, Case Concerning Elettronica Sicula S.p. A. (ELSI) (United States Of America v Italy)*),* ICJ reports 1989, para 128. [↑](#footnote-ref-13)
14. United Nations Human Rights Committee, General Comment No. 6, Article 6, *The right to life*, 30 April 1982 (CCPR General Comment No. 6), para 1. [↑](#footnote-ref-14)
15. *Endorois*, *supra* note 567, para 216; see also *Commission Nationale de Droits de l’Homme et des Libertés v Chad,* Communication 74/92, para 21. [↑](#footnote-ref-15)
16. An interesting line of jurisprudence has emerged from the Indian Supreme Court in this respect: see for example, *Mohini Jain v State of Karnataka AIR* (1981) Sup. Ct. 1864 (App 6), as referenced in Nwobike, Justice C, *The African Commission on Human and Peoples’ Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action center (SERAC) and the Center for Economic and Social rights (CESR) v Nigeria,* 1 Afr J Legal Stud 2 (2005) 129-146 at 135 [↑](#footnote-ref-16)
17. F. Ouguergouz,“*The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for the Human Dignity and Sustainable Democracy in Africa”*, *supra* note 656,p.91. [↑](#footnote-ref-17)
18. *Endorois*, *supra* note 567, para 217. [↑](#footnote-ref-18)
19. The *Ogoni* case*, supra* note 561 [↑](#footnote-ref-19)
20. <http://www.achpr.org/instruments/child/>, accessed 30.10.13. [↑](#footnote-ref-20)
21. United Nations Human Rights Committee, General Comment No. 6, Article 6, *The right to life*, 30 April 1982 (CCPR General Comment No. 6), para 5. [↑](#footnote-ref-21)
22. Sic: this is clearly a misprint for ‘integrity’: see further Malcolm Evans and Rachel Murray, *The African Charter on Human and Peoples’ Rights*, (Cambridge University Press, 2008), page 189; see further the Inter-American Court decisions of I/A Court H.R., *Sawhoyamaxa Indigenous Community v. Paraguay*. *supra* note 614, para 153 and I/A Court H.R., *Kichwa Peoples of Sarayaku Community v Ecuador*, *supra* note 559, para 234. [↑](#footnote-ref-22)
23. *Kazeem Aminu v Nigeria*, (2000) ACHPR Communication 205/97, para 18. [↑](#footnote-ref-23)
24. See further Article 7 (1) UNDRIP, which provides that indigenous people have the rights to life, physical and mental integrity, liberty and security of person”. [↑](#footnote-ref-24)
25. Ouguergouz, *supra* note 656, at page 102 [↑](#footnote-ref-25)
26. See debates on the elaboration of Article 12 of the Universal Declaration of Human Rights, as reported by A Verdoodt (Albert Verdoodt, *Naissance et signification de la Déclaration universelle des droits de l’homme* (Louvain: Warny, 1964)); Article 17 ICCPR also protects the individual against “unlawful attacks on his honour and person.” [↑](#footnote-ref-26)
27. See further paras 538 to 594 below [↑](#footnote-ref-27)
28. The *Ogoni* case, *supra* note 561, para 68. [↑](#footnote-ref-28)
29. I/A Court H.R.,*Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of June 17, 2005. Series C No. 125.,para 147. [↑](#footnote-ref-29)
30. *Ibid,* para 161. [↑](#footnote-ref-30)
31. *Ibid*, para 162. [↑](#footnote-ref-31)
32. *Ibid*, para 168. [↑](#footnote-ref-32)
33. I/A Court H.R.,*Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 614 [↑](#footnote-ref-33)
34. *Ibid*, para 153. [↑](#footnote-ref-34)
35. I/A Court H.R., *Xákmok Kásek Indigenous Community v Paraguay* Merits, Reparations and Costs. Judgment Merits and reparations. Judgment of August 24, 2010. Series C No. 214, paras 202-217. [↑](#footnote-ref-35)
36. The *Endorois* decision, *supra* note 567, at para 216 [↑](#footnote-ref-36)
37. United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 7, Article 11.1, *The Right to Adequate Housing: Forced Eviction*, 20 May 1997 (CESCR General Comment No. 7), para 4. [↑](#footnote-ref-37)
38. The *Ogoni case*, *supra* note 561, para 67. [↑](#footnote-ref-38)
39. See Affidavit of Thomas Museiyie, *supra* note 80, paras 4-5; see also Film Evidence taken from Ogiek communities and transcript, *supra* note 22 [↑](#footnote-ref-39)
40. See Affidavit of Joseph Cheruiyot Sigowo, *supra* note 10, para 6 and the Affidavit of Kiplangat A. Samoe Chebose, *supra* note 18, paras 5-6. See also paras. 1-94 above. [↑](#footnote-ref-40)
41. See Affidavit of Samson Kiptemboi Mutai, *supra* note 128, para 6 and the Affidavit of Jimmy Patiat Seina, *supra* note 10, para 8. [↑](#footnote-ref-41)
42. See Affidavit of Elijah Kiptanui Tuei, *supra* note 16, paras 6 and 10 and the Affidavit of Thomas Museiyie, *supra* note 80, para 4. [↑](#footnote-ref-42)
43. See Affidavit of Elijah Kiptanui Tuei *supra* note 16, paras 6 and 10. [↑](#footnote-ref-43)
44. See Affidavit of Joseph Cheriuyot Sigowo, *supra* note 10, para 7 and the Affidavit of Christopher Kipkones at para 9. [↑](#footnote-ref-44)
45. See the Affidavit of Samson Kipkemboi Mutai *supra* note 128, para 33 which states, ‘before the eviction, a clan would make important decisions as a group. We would come together when we needed to discuss an issue- for example, when someone from another clan proposed marriage to one of our daughters…Or we would come together to decide what to do if someone killed someone- we made this decision together.’ [↑](#footnote-ref-45)
46. Sic: should be Ogiek; Ogiot is the singular term, whilst Ogiek is the plural. [↑](#footnote-ref-46)
47. See Written Submissions by the Republic of Kenya dated 15 March 2010, at para 8.1.3. [↑](#footnote-ref-47)
48. *Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities*, *supra* note 159, p. 26. [↑](#footnote-ref-48)
49. *Ibid*, at p 86. [↑](#footnote-ref-49)
50. *Ibid*, at p 87. [↑](#footnote-ref-50)
51. *Ibid*, at p 106. [↑](#footnote-ref-51)
52. *Saramaka v Suriname, supra* note 560, para 129, (emphasis added). [↑](#footnote-ref-52)
53. See Affidavit of Samson Kipkemboi Mutai *supra* note 128, paras 34, 35 and 37; see also paras 132-262 above [↑](#footnote-ref-53)
54. See Affidavit of Linah Taploson, *supra* note 42, paras 11-12. [↑](#footnote-ref-54)
55. See Written Submissions by the Republic of Kenya dated 15 March 2010, at para 8.1.2 [↑](#footnote-ref-55)
56. TJRC Report, *supra* note 121, Vol. IV, p.46, para. 216 [↑](#footnote-ref-56)
57. F. Ouguergouz,“*The African Charter on Human and Peoples’ Rights: A Comprehensive Agenda for the Human Dignity and Sustainable Democracy in Africa”*, *supra* note 656, p. 429 (emphasis added). [↑](#footnote-ref-57)
58. *Amnesty International v. Zambia,* (1999) ACHPR, Communication 212/98, para 50. [↑](#footnote-ref-58)
59. *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, *supra* note 650, para 42. [↑](#footnote-ref-59)
60. *Saramaka People v Suriname*, *supra* note 560, Series C No. 172, para 129. [↑](#footnote-ref-60)