Communication 588/15 Minority Rights Group International and Environnement Ressources Naturelles et Développement (on behalf of the Batwa of Kahuzi-Biega National Park, DRC) v. Democratic Republic of Congo (DRC)

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat) received on 7 November 2015, a complaint filed by **Minority Rights Group International (MRG) and Environnement Ressources Naturelles et Développement (ERNB)** (the Complainants), on behalf of the Batwa of Kahuzi-Biega National Park (the Victims).

2. The Complaint was filed against the State of the Democratic Republic of Congo (hereinafter referred to as the Respondent State or the DRC), a State that ratified the African Charter on Human and Peoples' Rights (the African Charter) on 23 July 1987.

3. From the Complainants' presentation, it is understood that:
The Batwa of the Kahuzi-Biega National Park are a hunter-gatherer community who have lived in the forests of the Kahuzi Mountains for centuries. Their livelihoods, homes, traditional and cultural way of life, and well-being depend on these forests and lands. They are recognized by other ethnic groups in the region as the original inhabitants of the forests.

4. They allege that in July 1937, the Belgian colonial administrator had by Decree No. 81/AGRI established "the Mount Kahuzi Zoological and Forestry Reserve" a small natural reserve belonging to the Congolese State. But the Batwas remained on these lands and occupied them continually and practised their traditional lifestyles. In 1957, the Kahuzi reserve was extended to include the Biega forest, thus covering a total land surface area of 600 km2.

5. In November 1970, Law No. 70-316 transformed the zone into a National Park code-named "*the Kahuzi-Biega National Park*". This change of name came along with a measure interdicting any human presence in the Park based on a proposal by the Congolese Institute for the Conservation of Nature (ICCN). This proposal was supposedly intended to protect gorillas in the eastern low altitude region. The Batwa families who were using the lands according to their traditional customary ways of life, were expelled from the forest without any appropriate means of consultation, nor were they adequately compensated before or after the evictions meted out to them.

6. In July 1975, the Congolese government passed another law, No. 75-238, which extended the area of the National Park from 60,000 to 600,000 hectares, further encroaching on the ancestral lands of the Batwa communities, resulting in an increase in evictions, bringing the number of evicted families since 1970 to about 6,000, without any compensation or prior consultation. Though other communities were also evicted, they refused to leave and to date they still live on their lands in the forests and use some parts for agricultural activities.

7. According to them, the situation of the Batwas who are a vulnerable and marginalised community as a result of some societal prejudices against them, has worsened considerably due to the evictions and their aftereffects which have disrupted their harmonious existence with nature. Currently, they live in abject poverty in makeshift camps on the fringes of the forests of other Bantu villages. They have been deprived of their lands and can no longer practice their traditional way of life nor even have access to the most basic social services. Furthermore, they are suffering from a high rate of malnutrition, mortality and various diseases. Additionally, the fact that they live among other majority groups without the same culture or lifestyle makes them victims of a deep-seated discrimination in terms of behaviours and attitudes.

8. In order to recover their lands, the Batwa communities have initiated a legal action against the Congolese government and the ICCN at the District Court in Uvira, South Kivu (TGI), with the support of ERND, by alleging the violation of Law No. 77-001 of 22 February, 1977, governing expropriation for a public purpose, thus culminating in their arbitrary eviction from their lands without compensation which is a violation of Articles 34(1), (2) and (4) of the Constitution of the DRC on expropriation.

9. The Complainants allege that they also relied on many provisions of international law, in particular, the African Charter on Human and Peoples' Rights (the African Charter) to claim the specific rights of the victims, including the right to life; the right to practice one's culture and religion, the right to freely dispose of their natural wealth and resources, the right not to suffer any discrimination, as well as the right to health and education.

10. The District Court gave a judgement on 28 February 2011, in which it declared that the case bordered on the issue of the constitutionality of the laws establishing and extending the boundaries of the Park (Laws No. 70-316 of 30 November 1970 and No. 75-238 of 22 July 1975). It therefore ruled that it lacked jurisdiction to hear the case on its merits and dismissed the Complaint.

11. The Batwas appealed the judgment at the Court of Appeal of Bukavu by arguing, *inter alia*, that the original application never requested the judge of the District Court to rule on any issue of constitutionality, and that by so doing, the court ruled *ultra petita*. Notwithstanding the relevance of the arguments put forward and submitted on behalf of the Batwa victims, the Court of Appeal confirmed the judgment of the District Court in all its provisions and dismissed the appeal.

12. In December 2013, the Batwas lodged an appeal in cassation with the Supreme Court of Kinshasa, by alleging, among others, that the judges of the two lower courts had distorted the meaning of Article 34 of the Constitution by viewing it as the object of the application and not as the source of the relevant law and asserting that the dispute bordered on an issue of unconstitutionality. To date, the case is still pending at the Supreme Court and no progress has been made in recent years.

The Complaint:

13. The Complainants allege that the following Articles of the African Charter have been violated: 1, 2, 4, 8, 14, 16, 17, 21,22 and 24.

Prayers:

14. The Complainants are requesting the Commission to:

    a. Grant provisional measures to the Batwa community of the Kahuzi-Biega Park as a means of protecting the community from any possible acts of harassment and intimidation that may arise from the seizure of the Commission;
    b. Declare the Communication admissible;
    c. Establish that the facts constitute a violation by the Respondent State of the following articles of the African Charter: 1, 2, 4, 8, 14, 16, 17, 21,22 and 24.

The Procedure

15. The Complaint was received by the Secretariat of the African Commission on 2 November, 2015 and the Secretariat acknowledged receipt on 21 January, 2016.

16. At the 19th Extraordinary Session held from 16 to 26 February, 2016 in Banjul, The Gambia, the African Commission considered the Communication and decided to

be seized of it. The Commission however decided not to grant provisional measures to the Respondent State since there was no conclusive evidence to warrant such measures.

17. By letter dated 3 March, 2016, the Secretariat informed the Complainants and the Respondent State about the seizure of the Communication and simultaneously sent a copy of the petition of the Complainants to the Respondent State and urged the Complainants to submit their arguments on admissibility within two (2) months from the date of notification.

18. On 29 April 2016, the Secretariat received the arguments of the Complainants which were then forwarded to the Respondent State and the latter was urged to present its arguments within two (2) months from the date of notification.

19. At its subsequent sessions, the Commission postponed the consideration of the Communication several times, pending receipt of the Respondent State's arguments, which were never submitted despite numerous reminders, namely through :**(ACHPR/COMM/588/15/RDC/319/16 ; ACHPR/COMM/588/15/RDC/783/16 ;ACHPR/COMM/588/15/RDC/913/16 ;ACHPR/COMM/588/15/RDC/1183/16 ;ACHPR/COMM/588/15/RDC/1888/16 ; ACHPR/COMM/588/15/RDC/75/17 ;ACHPR/COMM/588/15/RDC/219/18 ; et ACHPR/COMM/588/15/RDC/1766/18).**

20. Since the Respondent State had gone beyond the prescribed timeframe and failed to make any request for extension of the deadline, the Commission instructed the Secretariat to prepare a decision on admissibility by default after the Parties had been duly informed.

21. During its 64th Ordinary Session held from 24 April to 14 May 2019 in Sharm-El-Sheikh, Arab Republic of Egypt, the Commission examined the Communication and declared it admissible.

22. By letter and note verbale dated 23 May 2019, the Secretariat informed the parties of the decision on admissibility and requested the Complainants to submit their arguments on the merits within sixty (60) days in accordance with Rule 108(1) of the Commission's Rules of Procedure 2010 in force at that date.

23. On 30 May 2019, the Complainants requested an extension of the deadline for submission of their arguments on the merits which was granted by letter dated 11 June 2019.

24. On 12 September 2019, the Complainants submitted their arguments on the merits which were transmitted to the State by note verbale dated 11 October 2019.

25. By Letters and Note Verbales dated 3 January and 12 March 2020, the Secretariat informed the parties that the Commission had decided to defer its decision on the merits to a later Session pending the State's submissions which were due on 7 April 2020.

26. The State has yet to submit its arguments and has not requested any additional time for submission.

27. After the 68th Ordinary Session held virtually from 14 April to 4 May 2021, the parties to the Communication were informed by letter and Note Verbale, that the Commission has decided to draft a decision on the basis of the elements in its possession, given that the Respondent State has not yet submitted its arguments on the merits.

THE LAW

Admissibility

The Complainants' submissions on Admissibility:

28. The Complainants maintain that the Communication must be declared admissible on grounds that it fulfils all the requirements stipulated under Article 56 of the African Charter.

29. At the outset, they emphasise that it is important to note that for the Commission to be seized of the Communication, the Complainants must present a case that meets the *prima facie* conditions set out in Article 56(5).[1]

30. The Complainants maintain that the domestic remedies are not available, effective or sufficient since there are no sufficient domestic remedies in the

[1]**Communication 71/92-** *Rencontre Africaine pour la Défense des Droits de l'Homme v/ Zambia* (1996) ACHPR para 10 ; **Communication 368/09** - *Abdel Hadi, Ali Radi1 and others v/ Republic of Sudan* (2013) ACHPR para 44 ; **Communication 413/ 12** -David Mendes *(represented by the University of Pretoria Human Rights Centre)* v/ Angola (2013) ACHPR para 52 ; **Communication 155/96** - *Social Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v/ Nigeria* (2001) ACHPR para.38.

DRC to address the situation of the Batwas by way of reparation of the violations and specific harms alleged in the Communication.

31. They further allege that the national procedures initiated by the Batwas with tribunals and Courts in the DRC, including seizure of the Supreme Court, have been unduly prolonged for more than eight years, which represents undue delay in the light of the Commission's jurisprudential practice, including those of the Inter-American Court of Human Rights (CIDH) and the European Commission on Human Rights (CEDH). They allege that upon seizure of the Commission in November 2015, no date had been set for the hearing whereas the Supreme Court had been seized on 20 December, 2013.

32. The Complainants also allege that there is no law protecting group and individual rights of Batwas regarding their ancestral lands and their resources. They further maintain that there is no procedure for demarcation of lands nor for granting titles to indigenous communities on lands they occupy and depend on for their livelihood and survival. Furthermore, in the event of expropriation, there does not exist any effective legal mechanism for the restitution of traditional lands of indigenous communities. As a result, the only potential means of redress open to the Batwas are civil remedies generally available to persons who oppose unjustified eviction pursuant to the Ordinance-Law governing expropriation of lands for a public purpose. These civil redress mechanisms are not adequate nor sufficient to deal specific violations contained in the Complaint since they do not provide the possibility for Batwas to ascertain their rights to their ancestral lands.

33. The Complainants argue that Article 56(5) does not require them to exhaust all discretionary and/or non-judicial remedies[2]. In support of their argument, they point out that the Commission clearly established in its Communication ***375/09-Priscilla Njeri Echaria (represented by the Federation of Women Lawyers of Kenya and the International Centre for the Protection of Human Rights) v. Kenya*** that « *the domestic remedy referenced in Article 56(5) involves a remedy of the judicial measure sought from the courts "which shall not be subject to the discretionary power of a public authority" [....] Only mandatory domestic remedies must be exhausted* »[3] Consequently, the Batwa are not required to exhaust all

---

[2] **Communication 231/99** -*Avocats Sans Frontières (pour le compte des Bwampamye) c/ Burundi* (2000) CADHP paras 22-23 ; **Communication 268/03** -*Illesanmi c/ Nigeria* (2005) CADHP para 42, See also **Communication 211/98** -*Alfred B. Cudjoe c/ Ghana* (1999) CADHP para. 14 & **Communication 313/05** -*Kenneth Good C/ Republic of Botswana* (2010) CADHP para 88

[3] **Communication 375/09** -*Priscilla Njeri Echaria (represented by the Federation of Women Lawyers of Kenya and the International Centre for the Protection of Human Rights) v/ Kenya* (2011) para 53

non-judicial or discretionary domestic remedies that may or may not be available in the DRC.

34. Furthermore, and notwithstanding the aforementioned arguments, the circumstances of this present case are such that the requirements of Article 56(5) of the Charter must be deemed to have been complied with. In fact, according to the Complainants, the requirement of having exhausted domestic remedies is based on the principle according to which the Respondent State must be aware of any alleged violation in order to have the opportunity to provide remedies within the confines of its own national legal system before they are submitted to the Commission. According to the Complainants, the Respondent State had knowledge of the content of their Communication for decades and had not reacted. Consequently, the rationale for Article 56(5) has been fully complied with.

35. With respect to the requirement of Article 56(6), the Complainants submit that this requirement is met since the Communication was filed with the Commission "within a reasonable period of time" after the date on which the domestic procedures initiated by the Complainants (if they were to be considered as "domestic remedies") were to be deemed to have been exhausted in terms of what constitutes a "reasonable period of time within which to exhaust domestic remedies" under Article 56(6).

36. They also point out that in its Communication **308/05 - Michael Majuru v. Zimbabwe**[4], the Commission considered that "*six months seems to be the usual standard*". It explained, however, that "*each case must be dealt with on its own merits*" and thus, "*where there are valid and compelling reasons for the Complainant not to submit his or her complaint in time, the Commission may consider the complaint in order to ensure fairness and justice*"[5]

37. The Complainants consider that domestic remedies within the meaning of Article 56(5) that need to be exhausted do not exist. However, the Batwas sought to exhaust all available domestic mechanisms before submitting the Communication. Moreover, they state that the Communication was submitted within six months of being informed that the Public Prosecutor's Office had not produced its conclusions in the appeal proceedings before the Supreme Court, contrary to the law in force.

---

[4] **Communication 308/05** -*Michael Majuru v/. Zimbabwe* (2008) ACHPR para. 109

[5] *Ibidem*

38. The Complainants request that the Commission consider the deadline for submission to be reasonable.

39. Thus, in the absence of a response from the Respondent State concerning their findings and arguments, the non-exhaustion of domestic remedies cannot stand in the way of the Batwa victims. In any case, it is incumbent on the latter to prove to the contrary by establishing in particular that the non-exhausted redress mechanisms meet the requirements of availability, effectiveness and sufficiency of the Commission.[6]

The Commission's analysis on Admissibility

40. The Commission notes that in spite of the numerous requests sent to the Respondent State to obtain its arguments on the admissibility of the Communication in question, in accordance with Rule 102(2) of its Rules of Procedure, the latter State has failed to make any submissions.[7]

41. In accordance with its well-established jurisprudence on the matter, the Commission decides on the basis of the facts communicated by the Complainants.[8]

42. Article 56 of the African Charter prescribes seven (7) conditions that must be cumulatively met for a communication to be declared admissible by the Commission.

43. The Commission notes that the Complainants submitted arguments on all the criteria required under Article 56 of the African Charter. It observes that in this present case, only the conditions provided for under Article 56 (5) of the African Charter on exhausting domestic remedies could be challenged by the Respondent State.

44. The Commission notes that the other requirements stipulated in Article 56 of the African Charter were complied with in the Communication. More precisely, the author of the Communication has been identified; the Communication shows *prima facie* violations of the African Charter by a State Party; it is inconsistent with both the Constitutive Act of the AU and the African Charter. The Commission also does not find any insulting or disparaging language in the Communication and it

---

[6] **Communication 268/03** -*Ilsanni v. Nigeria* (2005) ACHPR para 46 ; **Communication 275/03** -*Article 19 v. Eritrea* ACHPR para, 51.

[7] See paragraph 19

[8] See **Communications *25/89, 47/90, 56/91, 100/93, Communication 60/91, Communication 159/1996, Communication 276/03* and *Communication 292/04.***

is not based on news disseminated through the mass media and it does not deal with cases or claims which have been brought to the attention of an international dispute body or settled by such a body.

45. The Commission is satisfied that the five (5) conditions set out in sections 56 (1), (2), (3), (4) and (7) are met. This leaves paragraphs 5 and 6 of Article 56 of the Charter.

46. According to Article 56(5), Communications "*must be sent after the exhaustion of domestic remedies, if any, unless it is obvious to the Commission that the procedure for such remedies is being unduly prolonged*". In its jurisprudence, the Commission maintained that three major criteria must be met in determining whether domestic remedies have been exhausted and if that is the case, they must be available, effective and sufficient[9], while also noting that "*A remedy is considered available if the petitioner can access it without any obstacles whatsoever; it is deemed effective if it offers a prospect of success and it is deemed sufficient if the complaint is upheld*".[10] Where one of these characteristics is not present, the requirement of exhaustion of domestic remedies is deemed not to have been met as stipulated in Article 56(5).

47. In this present Communication, the Complainants maintain that domestic remedies have not been available, neither have they been effective and sufficient to provide remedy as a result of the unduly prolonged nature of the procedure initiated with the aforementioned jurisdictions.

Unavailability of Remedy

48. The Complainants claim that the District Court (TGI) of Uvira and the Court of Appeal of Uvira have successively declared themselves incompetent on the grounds that the issue raised by the Complainants falls within the realm of constitutionality. They indicated that they had been obliged to refer the matter to the Supreme Court, but that no hearing had been scheduled up to the date on which the case was referred to the Commission.

49. The Commission has clearly established that a remedy is available if the petitioner can have access to it without any hindrances. In this specific case, the successive abandonment of claim by the District Court and the Appeal Court on grounds of an unstated allegation by the Complainants can cause an obstacle since it compelled the latter to seize the Supreme Court, thus prolonging the waiting time

---

[9] **Communication 147/95-149/96** - *Sir Dawda Jawara v/ The Gambia* (2000) ACHPR para 31

[10] *Idem*, para 32.

of the victims to seek redress for their grievances. Moreover, since the sole purpose of the Supreme Court's referral is to determine whether or not the Congolese courts have jurisdiction over the Complainants' claim, the dismissal of the Appeal would *de facto* result in the unavailability of remedies.

50. The Commission is of the opinion that in this specific case there is a de facto unavailability of remedy and therefore has decided to receive the Complainants based on this submission.

Ineffectiveness of the Remedy

51. The Commission considers that the Complainants have clearly demonstrated the will to exhaust the existing remedies despite the various obstacles encountered, coupled with the uncertainty as to their effectiveness, and with no real prospect of success for the victims.

Inadequacy of the remedy

52. In its Communication **147/95-149/96-*Dawda Jawara v. The Gambia,*** the Commission established that a remedy is considered sufficient if it is capable of redressing the grievance[11].

53. The arguments previously developed by the Complainants, particularly those concerning the absence of a legal framework conducive to the resolution of their grievances and the declared incompetence of the courts seized of the case, reinforce the Commission's conviction, based on its jurisprudence, that a remedy that does not present all the guarantees required to obtain the desired solution or at least to guarantee conclusive prospects of satisfaction, cannot be considered sufficient[12]. In the case in point, it appears that the domestic remedies do not have any likelihood of resolving the problem, and cannot be considered sufficient.

Unduly Prolonged Remedy

54. In its Communication ***293/04- Zimbabwe Lawyers for Human Rights* and *Institute for Human Rights and Development in Africa /Zimbabwe*** [13], the Commission asserted the need to take into consideration the circumstances of the case and the

---

[11] See note 3 para. 32

[12] Id.

[13] African Commission on Human and Peoples' Rights, decision on **Communication 293/04** *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa /Zimbabwe,* available at: http://www.achpr.org/fr/communications/decision/293.04/

reasons put forward to justify the prolongation of the remedy in order to determine whether the prolongation is normal or abnormal.

55. From the analysis of the arguments of the Complainants, it appears that the procedure for domestic remedies is unduly prolonged, particularly in the light of eight years of proceedings already gone by at the lower courts in addition to two years of seizure at the Supreme Court for which a hearing date is yet to be scheduled. Furthermore, considering that the sole purpose of the application to the Supreme Court is to rule on a question of constitutionality before referring the case to the lower courts for examination on the merits, it is clear that there is a lack of expediency in the handling of this case, which in this case constitutes an abnormal extension of the remedies.

Reasonable time

56. Finally, with regard to the requirement in article 56(6) of the African Charter that the Communication must be "*submitted within a reasonable time after the exhaustion of domestic remedies or after the date on which the Commission considers that the time limit for the submission of the Communication has expired*". Having already established the fact that appeals are abnormally prolonged, the Commission should confirm whether the time limits for submissions meet its criteria.

57. The African Charter only provides that communications must be submitted "within a reasonable time" which is not defined. The Commission acknowledged in **Communication 308/05-Michael Majuru v. Zimbabwe**[14], that "*six months seems to be the usual standard*" for bringing a case before the Commission after the exhaustion of domestic remedies[15]. But it also emphasised that each case must be dealt with on its own merits, stating that if there are valid and compelling reasons for the Complainant not to be able to submit his or her complaint within the time limit, the Commission may consider the complaint in order to ensure fairness and justice [16]

58. In the case at hand, the Complainants indicated that they had filed a complaint with the Commission six months after being informed that the Public Prosecutor's Office had not given its opinion in the appeal procedure before the Supreme Court, contrary to the law in force.

---

[14] **Communication 308/05** -*Michael Majuru v. Zimbabwe* (2008) ACHPR para 109
[15] **Communication 308/05** -*Michael Majuru v. Zimbabwe* (2008) ACHPR para 109
[16] *Ibidem*

59. On the basis of the above facts and in accordance with its jurisprudence, it appears to the Commission that the time limit within which the matter was referred to it, can be considered reasonable and it accepts the Complainants' argument on this ground.

Decision of the Commission on Admissibility

60. In the light of the foregoing, the African Commission on Human and Peoples' Rights declares the present Communication admissible pursuant to Article 56 of the African Charter.

On the merits

The Complainants' Pleas on the Merits

Alleged violation of Article 1

61. The Complainants allege a violation of Article 1 of the Charter, which states that Member States parties to the Charter recognize the rights, duties and freedoms set forth therein and undertake to ensure their observance by adopting legislative or other measures for their implementation.

62. In support of their allegations of a violation of this provision of the Charter, the Complainants base their argument on the Communication *Dawda Jawara v. The Gambia* (2000) in which the Commission held that the obligation under Article 1 is a "mandatory" obligation in the sense that States Parties to the Charter have undertaken to adopt legislative or other measures to give effect to it. The Complainants state that the obligation imposed by Article 1 is not an obligation of diligence, but rather an obligation of result.

63. Referring to the Commission's jurisprudence in the Communication *Kevin Mgwanga Gunme et al. v. Cameroon* (2009), the Complainants state that it is because of the mandatory nature of Article 1 above that the Commission itself has in some instances found it to be violated without the Complainant's having referred to it. They ask, therefore, that if the Commission finds any violation of the articles of the Charter, then the Respondent State must have violated Article 1.

Alleged violation of Article 2

64. The Complainants claim that the right to non-discrimination under Article 2 of the Charter has been violated. According to them, the discrimination suffered by the

Batwa of Kahuzi-Biega is reflected in the lack of compensation following their eviction, the fact that other non-Batwa communities are allowed to remain in the KBNP, the community's lack of land tenure and access to basic social services outside the forest, and the absence of Batwa representation in the political and administrative institutions of the DRC.

65. The Complainants state that the Respondent State has allowed other non-Batwa communities to remain in the KBNP despite national legislation prohibiting human presence and activities in the park. According to the Complainants, such discriminatory application of the law constitutes a violation of Article 2 because, they insist, 'there is no objective justification as to why other non-Batwa communities have been allowed to remain in the park'. They claim that, furthermore, non-Batwa activities were more damaging to the environment than Batwa activities, which they claim were favourable and protective of the environment.

66. The Complainants submit that the discrimination against the Batwa is also manifested in 'access to basic social services'. According to the Complainants, the Batwa do not have access to basic social services because "they are unable to access schools and health centres, water, sanitation and infrastructure due to their state of poverty after eviction and the poor quality of the land on which they are allowed to settle.

67. The Complainants allege that another area of discrimination against the Batwa relates to political representation and participation. They claim that the Batwa are not represented in 'the political, institutional and administrative institutions of the DRC', which excludes them from the process of governance and decision-making on issues that affect them.

68. The Complainants argue that the State has no 'objective' and 'reasonable' justification for this discrimination against the Batwa, and that it has therefore violated Article 2 of the Charter.

Alleged violation of Article 4

69. With regard to Article 4, which guarantees the right to life, the Complainants allege that this right was violated by the forced eviction and displacement of the Batwa from their ancestral lands. Indeed, they aver that the state has not provided for accompanying measures to ensure the protection of the Batwa after their forced eviction and displacement 'by guaranteeing access to food, clean water, sanitation

health care and social services. The Complainants insist that the existence of the Batwa in conditions of 'destitution has resulted in increased rates of maternal mortality, infant mortality, malnutrition and morbidity in the community'.

70. The Complainants also point out that the Batwa continue to be subjected to violence by State agents, in the form of extrajudicial killings of individuals trying to enter the forest in search of food and traditional medicines. For all these reasons, the Complainants conclude that the DRC has violated and continues to violate Article 4.

Alleged violation of Article 8

71. The Complainants allege a violation of the right to freedom of religion under section 8 of the Charter. In support of this allegation, they report that the Kahuzi-Biega forest is the centre of the Batwa's religious and spiritual life. According to the Complainants, the religious beliefs and practices of the Batwa are intimately linked to their traditional way of life in the Kahuzi-Biega forest.

72. In the same vein, the Complainants argue that the eviction of the Batwa from the Kahuzi-Biega forest has deprived them of access to their ancestral lands, which not only prohibits them from worshipping their gods and ancestors, but also prohibits them from organising their religious ceremonies in the forests and from properly burying their dead in their ancestral homes

73. In light of these facts, the Complainants conclude that the DRC has violated Article 8 of the Charter.

Alleged violation of Article 14

74. The Complainants allege a violation of the right to property under Article 14. They point out that the eviction of the Batwa community constitutes a serious encroachment on the Batwa's right to property that 'is not in accordance with applicable law and is totally disproportionate to a public need or general community interest'.

75. In support of this allegation, the Complainants state that the Kahuzi-Biega forest is the ancestral home of the Batwa community and that the community draws benefits from the forest's resources and the sacred sites erected there. They add that the Batwa have a 'symbiotic relationship with the land' and that they rely on this land and its forest to sustain all aspects of their economic, social, cultural and

religious life. They report that these Batwa have exercised a 'form of indigenous customary tenure, holding the land through a form of collective ownership'.

76. The Complainants argue that some of the uses that the Batwa made of this forest, including modest houses built from branches, leaves and mud, as well as custom-made tools and traditional clothing made from animal skins and tree pods, is 'an indication of traditional African ownership'. According to them, it was rarely written as a codification of rights or titles, but was eventually understood by society through "mutual recognition and respect for property.

77. The Complainants point out that the seriousness of the DRC's infringement of these property rights is encapsulated in the fact that it has attempted to sever the Batwa's relationship with the central element of their cultural identity, which is the forest. According to the Complainants, the Batwa have been evicted and expropriated from their communal lands, relegating them to an existence defined by poverty, discrimination and social marginalization.

78. The Complainants go on to state that this infringement of property rights by the DRC was not justified by either the public interest or the general interest of the community. Furthermore, they insist that the Batwa were better protectors of the environment during the time they lived in the Kahuzi-Biega forest.

79. The Complainants also indicate that this infringement was not compliant with existing laws either. They argue that at the time of the eviction, the forest was still "under indigenous reservations," which they say makes the eviction illegal under domestic law. The Complainants add that the regime of expropriation governed by a 1977 law was not followed, since the Batwa were neither informed of the eviction nor compensated.

Alleged violation of Article 16

80. With regard to Article 16 of the Charter, the Complainants allege that the DRC violated the Batwa's right to health 'by evicting and excluding them from the Kahuzi-Biega forest, cutting off their sources of food and medicinal plants, and failing to implement positive measures to ensure their non-discriminatory access to health care, education, hygiene, food, drinking water, sanitation and adequate housing'.

81. In support of their allegations, the Complainants argue that by expelling the Batwa from the Kahuzi-Biega forest, the DRC has impeded the availability of health care that is dependent on traditional medicines and their particular health practices. They add that the DRC has also failed to make health care accessible in all its dimensions (as defined by the UN Committee on Economic, Social and Cultural Rights (CESCR), which include physical accessibility, economic accessibility, information accessibility and non-discrimination.

82. The Complainants reiterate that by evicting the Batwa, the DRC has failed to respect, fulfil and protect their underlying health rights, including the right to food, water and sanitation.

Alleged violation of Article 17 (1)

83. With regard to Article 17(1), which protects the right to education, the Complainants allege that the eviction of the Batwa from the Kahuzi-Biega forest violated the right to education in all its aspects as set out in the Principles and Guidelines on Economic, Social and Cultural Rights in Africa (« Pretoria Declaration »)

Alleged violation of Article 17 (2) et (3)

84. Article 17(2) and (3) protects the right to culture. The Complainants allege that the eviction of the Batwa violated their right to culture because the DRC denied them access to their traditional lands in the Kahuzi-Biega forest and its spiritual sites.

85. In fact, the Complainants argue that the DRC has violated the right to culture under Article 17(2) and (3) in two respects. Firstly, they state that by evicting them and 'prohibiting them from entering ancestral lands, the DRC has impeded the Batwa's access to cultural sites and their right to engage in traditional, territory-based cultural practices and rituals'. Secondly, the Complainants explain that the DRC has violated the Batwa's right to culture 'by irreversibly damaging their traditional way of life, in particular by preventing them from accessing traditional forest-based knowledge, which is integral to the Batwa's distinct cultural identity and way of life'.

86. With regard to the first aspect, the Complainants allege that before their eviction the Kahuzi-Biega forest was a centre of Batwa cultural life. They point out that this forest was a cultural site of great importance to the Batwa, where they would gather for rituals or cultural practices such as "blessing rituals for marriages and

births, dealing with family conflicts, remedying drought, sterility or illness, and promoting good luck in hunting. They indicate that because of this exclusion from the Kahuzi-Biega forest, the Batwa have lost their cultural identity.

87. Regarding the second aspect of this violation, the Complainants allege that the Batwa have a symbiotic relationship with the forest and that this relationship gives them special knowledge about the forest that they pass on from generation to generation. The Complainants reiterate that, as a result, 'the Batwa's relationship with their traditional lands and resources is essential to their way of life and ultimately to their preservation and survival as a distinct people'.

88. The Complainants allege that the DRC's interference with the Batwa's right to culture is neither justified nor proportionate.

Alleged violation of Article 21

89. Complainants allege a violation of Article 21, which guarantees the right of peoples to freely dispose of wealth and natural resources, in three respects: through their eviction, the Batwa have been denied access to their natural resources; the DRC has benefited from and/or allowed others to exploit them without consulting and compensating them; and finally, the DRC has failed to prevent environmental degradation of the natural resources of the forest that were beneficial to the Batwa.

90. With regard to the first aspect, the Complainants allege that since their eviction, the Batwa have no longer had access to the natural resources of the forest and that whenever they have tried to enter the forest to collect these resources, they have been fined, imprisoned and even subjected to excessive violence by State agents.

91. With regard to the second aspect, the Complainants allege that the forest has significant economic activity, including various forms of agricultural exploitation. They claim that by undertaking to dispossess the Batwa of their ancestral lands, the DRC has not prevented other groups from illegally extracting and exploiting the same resources through these various agricultural activities. According to the Complainants, by exploiting and profiting from the natural resources of the Kahuzi-Biega forest, or allowing others to do the same without consulting or compensating the Batwa, the DRC has violated Article 21.

92. On the third aspect, the Complainants argue that the exploitation of the Kahuzi-Biega forest by the DRC and other non-Batwa groups has led to severe

deforestation and environmental degradation of the Batwa's traditional lands and natural resources. They insist that, on the contrary, the Batwa had managed to conserve and safeguard these natural resources of the Kahuzi-Kiega forest. Consequently, they conclude that by causing or failing to prevent environmental degradation of the natural resources contained in the Kahuzi-Biega forest, the DRC has violated Article 21.

93. In light of the above, the Complainants argue that the Batwa, as indigenous peoples, have an absolute right to freely dispose of their wealth and natural resources under Article 21(1) and that the DRC has therefore violated it. Finally, they insist that under Article 21(2), the Batwa are entitled to the recovery of their land and to an adequate compensation for their losses, including a share of the profits from the use and exploitation of their natural resources.

Alleged violation of Article 22

94. The Complainants allege a violation of the right to economic, social and cultural development under Article 22. The Complainants argue that the DRC has violated the right to development through numerous cumulative actions and omissions.

95. According to them, the exclusion of the Batwa from the Kahuzi-Biega forest subjected them to conditions that 'deprived them of any meaningful control over their institutions, culture, traditions and territories'. They argue that this has had an impact on their development as a people.

96. The Complainants further submit that the DRC has failed to ensure the Batwa's access to basic public services since their eviction ' including 'water, sanitation, health and education - services necessary for the realization of other basic human rights - firmly associated with development and the determination of economic and social programs that affect them'.

97. The Complainants conclude that, as a result, the eviction of the Batwa from the Kahuzi-Biega Forest has prevented them from realizing their individual and collective human potential and ambitions, which they claim is a violation by the DRC of their rights under Article 22 of the Charter.

98. In particular, the Complainants consider that the DRC has violated the Batwa's right to development under Article 22 in two fundamental ways. First, they consider that the State did not consult them or obtain their prior consent before classifying the Kahuzi-Biega forest as a national park, before evicting them from

their ancestral lands and before determining their capacity in terms of conservation that might be appropriate to conserve the Kahuzi-Biega forest. Instead, they argue, the Batwa are being denied access, use, and participation in decisions about their ancestral lands. This threatens 'their traditional ways of life and their collective development in accordance with their right to self-determination.

99. Secondly, the Complainants allege that the DRC has failed to fulfil the Batwa's right to development as an indigenous people. They contend that it was the DRC's obligation to ensure that the Batwa 'retain control over their institutions, culture, traditions and territories in order to contribute to their collective development and well-being as a traditional people'. To the contrary, their eviction from the Kahuzi-Biega forest has forced them to live in miserable conditions, even though the forest used to provide them with everything they needed to meet their basic needs. They maintain that the degradation of the Batwa's living conditions is a consequence of the DRC's actions, amplified by the fact that it has not taken the necessary measures to mitigate the effects.

Alleged violation of Article 24

100. Article 24 protects the right of all peoples to an adequate and comprehensive environment for their development. The Complainants argue that by evicting the Batwa from the Kahuzi-Biega Forest, the Government has failed to provide them with a favourable environment. According to them, the Kahuzi-Biega forest is the only favourable environment for the Batwa. They point out that the right protected by Article 24 includes not only the protection of the natural environment from pollution and environmental degradation, but also 'the obligation to take measures to provide the community with an environment that enables it to develop economically, socially and culturally'.

101. The Complainants allege that under Article 24, the DRC has breached three main obligations, namely the obligation to respect, the obligation to protect and the obligation to provide.

102. Regarding the obligation to respect, the Complainants argue that the State has an obligation to put in place internationally acceptable expropriation rules that provide safeguards against arbitrary dispossession. They insist that these measures should detail the process and standards to be applied "including consultations with affected members of society, timely notification, payment of adequate compensation and assistance for rehabilitation. The Complainants further state that the Batwa had a special bond with the land of their ancestors such

that "nothing can adequately replace the loss of the forest and no land can offer them similar cultural and material benefits. They reiterate that evicting the Batwa from the Kahuzi-Biega forest by violence, without notice or compensation constitutes a violation of the obligation to respect the Batwa's right under Article 24.

103. As for the duty to protect, the Complainants assert that the State has an obligation to protect the environment under Article 24. They argue that the Kahuzi-Biega forest is the only environment conducive to the favourable development of the Batwa people, and that the State "has an obligation to protect this environment". In the Complainants' view, "the DRC has failed to safeguard and protect the environment. They argue that by evicting them, the State has removed an effective layer of environmental protection. They conclude that this constitutes a violation of the State' s obligation to protect the Batwa' s right to a favourable environment.

104. Finally, the Complainants claim that the State has breached the obligation to provide, which consists of the State's obligation to 'invest in the provision of necessary social services and physical infrastructure and provide support for the improvement of the livelihoods of local people ... as well as investing in the benefits for future generations'. The Complainants allege that the DRC has not taken any steps to restore the environment and repair the damage, while insisting that in addition the "key problems faced by the Batwa stem from the lack of access to basic social services, such as schools and health care".

Respondent State's Submissions on the Merits

105. As indicated above, the Respondent State did not submit its observations on the merits of the Complainants' allegations, despite several letters sent by the Secretariat and the time it was given in accordance with the relevant provisions of the Commission's Rules of Procedure.

***Amicus curiae* submissions**

106. Various Organisations, led by the Secretariat of the ESCR - International Network for Economic, Social and Cultural Rights - submitted an *Amicus Curiae* brief, namely: Asia Indigenous Peoples Pact (AIPP), *Asociacion Interamerican de Derechos Ambientales (AIDA), Comision Colombiana de Juristas (CCJ)*, Due Process of Law Foundation (DPLF) and Global Initiative for Economic, Social and

Cultural Rights (GI-ESCR). These Organisations claim to have experience in human rights analysis and litigation with respect to indigenous peoples' rights and economic, social, cultural and environmental rights.

107. While not referring to violations of Charter provisions, the *amicus curiae* provides an interpretation of the rights of indigenous peoples to the lands, territories and resources they traditionally own, occupy or use. To support their arguments, they rely on the standards of the UN human rights system, the Inter-American human rights system, the UN International Labour Organisation and the standards of comparative constitutional law.

108. Thus, the *Amicus Curiae* brief concludes that States should harmonise their environmental protection measures with the rights of indigenous peoples over their lands, territories and resources. It also emphasises that States should recognise and respect the role of indigenous peoples and their traditional knowledge in conserving biodiversity; recognise and implement cultural rights; and respect, protect and fulfil the right of indigenous peoples to free, prior and informed consent when adopting environmental measures.

Analysis of the Commission on the Merits

109. In light of the Respondent State's failure to submit its arguments, the Commission, in accordance with its jurisprudence[17], will proceed with its consideration of this Communication on the basis of the information at its disposal. The following analysis also takes into account the *Amicus Curiae* brief submitted.

110. The facts as reported indicate that the Congolese State expelled the Batwa people from their forest without resettling them.

On the concept of indigenous people

111. Asserting that the Batwa are an indigenous people, the Complainants argue that they are entitled to the protection contained in the African Charter on Human and Peoples' Rights relating to collective rights, and in accordance with related

[17] See **Communication 155/96** - Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v/ Nigeria (2001) ACHPR para 49; See also **Communication 292/04** - Institute for Human Rights and Development in Africa v/ Angola (2008) ACHPR para 34 and **Communication 159/96** - Inter-American Union for Human Rights, International Federation of Human Rights Leagues, African Meeting for Human Rights, National Organisation for Human Rights in Senegal and Malian Association for Human Rights v/ Republic of Angola (1997) ACHPR para 10.

international standards. In support of their claims, they point to the various statements contained in the decisions rendered by the Commission, as well as by other international judicial bodies.

112. The African Commission notes that the African Charter, in Articles 20 to 24, provides that peoples can assert their rights as peoples, i.e. as communities. In this regard, on the question of whether the BATWA constitute an "indigenous people", the Commission notes that the term contains two concepts that have been defined. These are the concept of "people" and the concept of "indigenous".

113. With regard to the concept of "people", and on the basis of definitions provided by various experts, who understood this concept as either a "*group of human beings living in society on a given territory and who, often sharing a community of origin, present a relatively homogeneous form of civilisation and are linked by a certain number of shared customs and institutions*"[18], or a "*group of persons who, not living on the same territory but having the same ethnic origin or religion, have the feeling of belonging to the same community*", the African Commission was able to observe that there is consensus on some objective features that a group of individuals should manifest to be considered as "*a people*".

114. It is therefore a question, in particular, of a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, economic life, in addition to other bonds, identities and affinities which they collectively enjoy or are denied – in particular the rights enumerated under Articles 19 and 24 of the African Charter[19].

115. With regard to the term "*indigenous*", the Commission notes that Article 1 of ILO Convention 169 on "*Indigenous and Tribal Peoples*" defines them as, inter alia, "*peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions*"[20].

---

[18] *"As long as men are not bound together by a common belief, they do not yet form a people, for the reason, which may have brought them together yesterday, tomorrow may divide them" (Ch. BLANC, Gramm. arts dessin, 1876, p. 54) CNRTL.*

[19] **Communication 276/03** - Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v/ Kenya (2009) ACHPR para. 151

[20] Article 1 of ILO Convention 19 on Indigenous and Tribal Peoples.

116. However, the Commission notes that in the African context, the term "*indigenous*" is not intended to create a special class of citizens, but rather to take into account past and present-day injustices and inequalities suffered by these first inhabitants. This is clear in the work of the African Commission's Working Group on Indigenous Populations/Communities, which also noted that the notion of "peoples" is closely related to collective rights[21].

117. This Mechanism presented four criteria for identifying indigenous peoples:
- occupation and use of a specific territory;
- voluntary perpetuation of distinctive cultural traits;
- self-identification as a distinctive community, as well as recognition by other groups;
- an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.

118. It also identified some common characteristics of indigenous groups in Africa, including, but not limited to, the various hunter or former hunter groups and some pastoralist groups, noting the key characteristic for most of them that the survival of their special way of life depends on their access to, and rights to, their traditional space and the natural resources it contains

119. It can therefore be concluded that, in general, all definitions of the concept of indigenous people recognise the linkages between peoples, their lands and their culture and the fact that such a group expresses its wish to be identified as a people or is aware that it is a people. The United Nations Working Group on Indigenous Peoples, recognises that "*Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems*".[22]

120. Thus, in addition to a sacred relationship with their land, self-identification is another important criterion for determining indigenous peoples. In this regard, the Inter-American Court considered that the *Saramaka* people constitute a tribal community whose social, cultural and economic traditions are different from

---

[21] **Communication 276/03** *op. cit*, para. 149

[22] Report of the UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the *Study of the problem of discrimination against Indigenous People*, para 379.

other sections of the national community, mainly because of their special relationship with their ancestral land, and because they regulate themselves, at least partially, by their own norms, customs, and traditions.[23]

121. The UN Panel on Indigenous Peoples also stated that "*on an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference*".[24]

122. In the present Communication, it appears from the documents and testimonies available to the Commission that the Batwa community identifies itself as a distinct social and cultural entity and "considers itself as a distinct people sharing a unique common history, ethnicity, culture and religion as a traditional people living in the forest". Moreover, other non-Batwa groups recognise, accept and identify them by their culture and physical traits.

123. The Batwa have built a special relationship with their ancestral lands in the Kahuzi-Biega forest based on a spiritual and material life. For example, H. K., one of the Batwa expelled from Kahuzi-Biega, testifies: *"Our life is conditioned by the presence of a forest. It is important for us to have access to the park because that is where our hospital, food and place of worship are. [...] we used to hunt, look for yarns to make traditional loincloths and plates, collect firewood, yams and fruit. »*[25]

124. In view of the above, the Commission, relying also on its jurisprudence in the *Endorois* case, as well as that of the African Court on Human and Peoples' Rights in the *Ogiek* case, considers that the Batwa people, as presented in the documents produced by the Complainants, have the characteristics of an indigenous, and therefore primitive, people. As such, its existence, in all its aspects, is linked to the environment of this area, which has been declared a national park. Thus, its eviction from this area without resettlement, if proven, constitutes a general infringement of its right to existence, as set out in the violations alleged by the Complainants, which they are entitled to bring before the Commission.

---

[23] Inter-American Court of Human Rights, *case of the Saramaka People v. Suriname*, Judgement of November 28, 2007, para 79

[24] Report of the UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the *Study of the problem of discrimination against Indigenous People*, para 381 & 382.

[25] Voir Déclaration sous serment de H. K.

On the alleged violation of Article 2

125. Article 2 stipulates that "*Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status*". This provision of the Charter advocates non-discrimination. The Complainants' allegations of violation of this right draws upon their understanding of non-discrimination.

126. The right to non-discrimination is a fundamental right in the contemporary organisation and design of modern societies.

127. In the Communication *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*, the Commission defined discrimination as: "any act which aims at distinction, exclusion, restriction or preference which is based on any ground such as race, colour [...] or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms".[26]

128. Similarly, in the Communication *World Organisation Against Torture and the Ligue de la Zone Africaine pour la Défense des Droits des Enfants et Elèves (on behalf of Céline) v. Democratic Republic of Congo*, the Commission stated that discrimination is unlawful or unjustified differentiation, i.e. based on one of the distinctions listed in Article 2[27]. Differentiation necessarily involves an explicit or implicit, known or assumed comparator.

129. In the Communication *Kenneth Good v. Republic of Botswana*, the Commission set out three requirements to be considered in assessing whether there has been discrimination. Thus, discrimination occurs when equal cases are treated in a different manner, when the difference in treatment does not have an objective and reasonable justification, and if there is no proportionality between the aim sought and the means employed.[28] The Commission also stressed that the three requirements are cumulative and therefore proof of the existence of one of them automatically implies a violation of the right to non-discrimination.

---

[26] Communication 294/04 – ZLHR & IHRDA v. Zimbabwe (2006) ACHPR, para 91

[27] **Communication 325/06**- *World Organisation Against Torture and the Ligue de la Zone Africaine pour la Défense des Droits des Enfants et Elèves (on behalf of Céline) v. Democratic Republic of Congo* (2015) ACHPR para 74

[28] **Communication 313/05**- Kenneth Good v. Republic of Botswana (2010) ACHPR para 219

130. In this case, it appears to the Commission that the Batwa have been treated differently from others without any valid objective or reasonable justification. Testimonies available to the Commission converge on the fact that non-Batwa people have always had access to the Kahuzi-Biega National Park despite national legislation prohibiting human presence and activities within the park. For example, in the sworn testimony of S. M. of the Twa community, he states: *"Other communities such as the Tembo, Shi, Havu and Rwandophone Hutu with farms, fields and even villages have not been affected so far and continue to make use of the park by making money from minerals, cattle, plants, embers and wood that are sold and they pay taxes to local authorities on these products"*.[29]

131. K.N., another member of the pygmy community, claimed that *"some people from other communities are illegally exploiting the PNKB without facing any problems from the park rangers" and that "they apparently have an agreement with the park authorities"*.[30] On the basis of all these facts, the Commission concurs with the Complainants that the Batwa were treated differently from other communities in the locality of Kahuzi-Biega because of their identity as Batwa, since non-Batwa people were treated more favourably.

132. A related question is whether the DRC had any justification for treating the Batwa differently from other communities. Although the Respondent State did not submit its arguments, the Commission is of the view that there is no justification for such a difference in treatment. Indeed, one of the fundamental characteristics of national legislation is its general nature. If it only applies to a specific group, it becomes discriminatory and therefore would violate Article 2 of the Charter.

133. For all these reasons, the Commission concludes that the Respondent State violated the right to non-discrimination prescribed by Article 2 of the Charter.

On the alleged violation of Article 4

134. Article 4 of Charter provides: *"Human beings are inviolable. Every human being shall be entitled to respect for his life and the physical and moral integrity of his person. No one may be arbitrarily deprived of this right."* This Article promotes respect for the right to life.

---

[29] See Affidavit of S. M., Annex 100. See also Affidavit of F. K., Annex 112; Affidavit of F. K , Annex 114; Affidavit of M. K., Annex 116. Affidavit of M. N., Annex 124.

[30] See Affidavit of K. N., Annex 109

135. The Commission reiterated in the Communication *Forum of Conscience v Sierra Leone* that the right to life is the fulcrum of all other rights; it is the fountain through which other rights flow and that any violation of this right without due process amounts to arbitrary deprivation of life.[31] The UN Human Rights Committee emphasises that the right to life "concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity".[32]

136. The definition of indigenous people shows that this category of the population is distinguished by its umbilical relationship with its living environment. This being the case, the Commission notes that the link between the mass eviction of an indigenous people from their living environment, without adequate remedy, and their right to life is particularly narrow, given that this is a non-derogable right under international law.[33]

137. As a result, if indigenous peoples are displaced without resettlement under the same living conditions, their lives are threatened. For instance, in *Yakye Axa v. Paraguay*, the Inter-American Court ruled that the consequence of the eviction of indigenous peoples from their ancestral lands could constitute a violation of Article 4 (right to life), if the community's living conditions are incompatible with the principles of human dignity.[34] It thus incorporated the right to life into the elements of "*public interest*" in its jurisprudence.

138. In the Endorois case, the Commission concluded that one of the obligations that the State must respect as guarantor in order to protect and ensure the right to life is to create minimum living conditions compatible with the dignity of the human person and not to create conditions that prevent or impede such dignity. It insisted that in this regard, the State has a duty to take positive and concrete measures to realise the right to life, especially in the case of vulnerable and exposed persons, whose protection becomes of high priority.[35]

---

[31] Communication 223/98- *Forum of Conscience v. Sierra Leone* (2000) ACHPR para 20.

[32] UN Human Rights Committee General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, para 3

[33] See General Comment No. 3 on the African Charter on Human and Peoples' Rights on the right to life (Article 4), para 1

[34] Inter-american Court of Human Rights, case of *Yakye Axa Indigenous Community v. Paraguay*, Judgement of June 17, 2005; para 160- 178

[35] **Communication 276/03** – *op. cit.*, para 217

139. It is not disputed that the Batwa were evicted from their ancestral home, since the national park exists. There is no evidence that they have been resettled elsewhere. In particular, the testimonies and documents available to the Commission provide ample evidence that by expelling the Batwa from their living environment, the DRC has created conditions that negatively affects their potential for a decent life. The Report of the African Commission on Human and Peoples' Rights Working Group on Indigenous Populations/Communities, as produced by the Complainants, states that indigenous peoples in the Democratic Republic of Congo have been driven off the land they have occupied for centuries and are currently living in conditions under which they are deprived of economic, social and cultural rights.[36]

140. It follows that Article 4 has been violated by the Respondent State.

On the alleged violation of Article 8

141. Article 8 stipulates: "*Freedom of conscience, profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms*". This provision protects the right to freedom of religion. It is an obligation for States to respect and ensure freedom of conscience, profession and free practice of religion.

142. In the case *African Commission on Human and Peoples' Rights v. Republic of Kenya*, the African Court on Human and Peoples' Rights (the African Court) observed that in the context of traditional societies, where formal religious institutions often do not exist, the practice and profession of religion are usually inextricably linked with land and the environment.[37] In this respect, it placed particular emphasis on indigenous societies. In the view of the African Court, in these societies, the freedom to worship and engage in religious ceremonies depends on access to land and the natural environment.[38] It concluded that, any impediment or interference with accessing land constitutes a violation of the right to engage in religious rituals with considerable repercussions on the enjoyment of their freedom of worship.

143. The Commission has, in its jurisprudence, examined this existing relationship between land and religion. It noted that religion is often linked to land, cultural

---

[36] Report of the African Commission's Working Group on Indigenous Populations/ Communities, *Research and Information visit to the Democratic Republic of Congo*, adopted at the 49th Ordinary Session held from 28 April-12 May 2011, p. 73

[37] Application No. 006/2012- *African Commission on Human and Peoples' Rights v. Kenya*, para 164

[38] *Ibidem*

beliefs and practices, and that the freedom of worship and engage in such acts is central to freedom of religion.[39] Furthermore, the African Commission considered in the Communication *Free Legal Assistance Group v. Zaire*, that the right to freedom of conscience allows individuals or groups to worship or assemble in relation to a religion or belief, and to establish and maintain places in relation thereto, as well as to perform ceremonies in accordance with the precepts of the religion or belief.

144. States should ensure that this right is respected. In accordance with Article 8, the Commission considers that the restriction that could be placed on the exercise of this right to freedom of conscience, profession and free practice of religion is maintaining law and order. However, as the African Court indicated in the *Ogiek* case, this restriction must be "necessary and reasonable".[40]

145. Based on the submissions of the Complainants and witnesses, the Commission notes that the land of the Kahuzi - Biega forest is for the Batwa a sanctuary for their religious and spiritual life and that their religious beliefs and practices are inextricably linked to their traditional way of life in the forest.[41]

146. It further notes from the same testimonies, as well as from the Report of the Commission's Working Group on Indigenous Populations/Communities as presented by the Complainants, that the local authorities refuse to allow the Batwa to return to the Kahuzi-Biega forest, alleging that they pose a threat to the ecosystems.[42] On the contrary, this Report by the Commission's Working Group indicates that this is only a pretext because, traditionally, the Batwa have never hunted gorillas and do not destroy the forest by cutting down trees.[43]

147. Consequently, and in the present case, the Commission considers that the eviction of the Batwa people from their ancestral lands, with a ban on their return, constitutes an infringement on their freedom of worship, and a violation of Article 8 of the African Charter.

On the alleged violation of Article 14

---

[39] **Communication 276/03** – *op.cit.*, para 16

[40] Application No. 006/2012 African Commission on Human and Peoples' Rights v. Kenya, para 167.

[41] See para 395 of the Complainants' submissions on the merits

[42] See the Report of the African Commission on Human and Peoples' Rights Working Group on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session, p. 27

[43] *Ibidem*

148. Article 14 stipulates that "*the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws*". »

149. In the case between the *Malawi African Association and Others v. Mauritania*, the land was considered "property".[44] The African Commission, in the *Ogoni* case, also found that the "*right to property*" includes not only the right to have access to one's property and to prevent invasion and encroachment of that property, but also the right to possession, use and control of that property in total peace of mind, as desired by its owners. Indeed, the right to property, as understood by civil law, includes *usus*, *abusus* and *fructus*.

150. The African Commission also notes that, according to the European Court of Human Rights, "*property rights*" can also include economic resources and rights to the community land of applicants. In this regard, in the case of *Dogan and Others v. Turkey*, although the applicants were unable to produce a title deed to the land taken from them by the Turkish authorities, the European Court of Human Rights nevertheless observed that: "*the notion "possessions" in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision.*"

151. The African Commission notes that Articles 26 and 27 of the UN Declaration on Indigenous Peoples use the terms "*traditionally occupied or used*". This means that it is recognised that indigenous people are entitled to ownership of their ancestral land under international law, even in the absence of a title deed. This position was taken in the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* judgment. In this case of 31 August 2001, the Inter-American Court decided that logging concessions granted to private investors by the Nicaraguan authorities, in an area claimed by a tribal community, constituted a violation of the property rights of the applicants, who were members of that community, guaranteed by the Convention (Art. 21).[45]

152. Despite the absence of any explicit reference to a community's right to property, the Court, in a progressive interpretation, included the customary right of

---

[44] **Communication 54/91-61/91-98/93-164/97_196/97-210/98** *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme et RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v. Mauritania* (2000) ACHPR para 128.

[45] Inter-American Court of Human Rights, Case of *Mayagna (Sumo) Awas Tingni Communiy v. Nicaragua*, Judgement of August 31, 2001; para 155

indigenous communities to use their ancestral lands for agriculture and hunting in order to block an environmentally harmful project.

153. For its part, the Inter-American Commission interpreted the right to life to protect communities threatened by environmental degradation. In the case of the *Yanomani Indigenous People of Brazil*, the Commission on 5 March 1985 considered the connection between the destruction of the environment and natural resources and the right to life, in response to a Communication submitted by Yanomani indigenous people of Brazil.

154. In this regard, the Commission's *Working Group on Indigenous Populations/Communities* recognised that some African minorities are facing dispossession of their lands and that special measures are needed to ensure their survival, in accordance with their traditions and customs.[46]

155. In view of the foregoing, the African Commission draws the following conclusions:

a. the traditional possession of their land by indigenous people has effects equivalent to those of a title granted by the State;
b. traditional possession implies that indigenous people have the right to demand official recognition and registration of title deed;
c. indigenous community members who have involuntarily left their ancestral land, or who have lost possession of it, retain the right to possession and ownership, even if they do not have legal title, unless the land has been legally transferred to bona fide third parties; and
d. Members of an indigenous community who have involuntarily lost possession of their land, where such land has been lawfully transferred to bona fide third parties, are entitled to restitution of the land in question or to obtain other land of equal size and quality.

156. However, total or partial expropriation is not in itself a violation of Article 14 of the Charter as long as it is done in accordance with the law. Indeed, Article 14 of the African Charter provides for a double condition should such expropriation be unavoidable: it must be done "*in the interest of public need or in the general interest of the community*" and "*in accordance with the provisions of appropriate laws*".

[46] See the Report of the African Commission on Human and Peoples' Rights Working Group on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session, p. 26 and 27

157. The "*public utility test*" is more broadly understood in the case of encroachment on indigenous land than in the case of individual ownership. Indeed, this condition is more stringent when applied to ancestral land rights of indigenous peoples. In 2005, this point was highlighted by the Special Rapporteur of the UN Sub-Commission on the Promotion and Protection of Human Rights in the following terms:

> *"Limitations, if any, on the right of indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the State. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the rights to life, food, self-determination, shelter and the right to exist as a people."*[47]

158. In its own jurisprudence, the Commission notes that "*... the reason for the limitations must be strictly proportional and absolutely necessary in relation to the benefits involved*".

159. It also recalls the case of *Handyside v UK*, in which the *European Commission of Human Rights* stated that any conditions or restrictions imposed on a right must be "*proportionate to the legitimate aim pursued*".[48] The African Commission therefore considers that any limitation of rights must be proportionate to the legitimate need and must be the least restrictive measure possible.

160. In this case, it is clear that the Batwa, an indigenous people, were dispossessed, without compensation or resettlement, of their ancestral land, whereas it was not proven that their presence or continued presence on the site was harmful, given their way of life, which consisted of food gathering and hunting.

161. It follows that Article 14 was violated.

On the alleged violation of Article 16

162. Article 16 of the African Charter states that "*1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick*". This provision of the Charter advocates the right to health.

---

[47] See **Communication 276/03** – *op.cit.*, para 212

[48] Case of Handyside v. United Kingdom, ECHR, para 47.

163. The right to the best attainable state of health includes the right to health facilities, goods and services which must be guaranteed to all without discrimination of any kind.[49] The right to the best attainable state of health refers to the availability, accessibility, acceptability and quality of health care, services and conditions and it is an obligation for the State to respect, fulfil and protect this right. As explained by the Commission in the Pretoria Declaration on Economic, Social and Cultural Rights in Africa, health care, services and conditions entail, among other things, access to health services for all, access to the minimum essential food to prevent malnutrition, access to housing, safe drinking water, reproductive health and protection against major infectious diseases.[50]

164. The Commission also notes that there is a close link between the right to health and the living environment of indigenous peoples. Indeed, indigenous peoples find in their living environment the resources necessary for their growth and development in terms of physical and mental health.[51] In its Declaration on the Rights of Indigenous Peoples adopted on 13 September 2007, the United Nations General Assembly revisited this point. It stressed that indigenous peoples have the right to their traditional medicines and the right to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals.[52] Thus, removing them from this environment, without providing them with a similar, if not identical, environment, undeniably constitutes a violation of their right to health.

165. In this case, the Commission concurs with the Complainants that the Kahuzi-Biega forest is the only source of medicinal plants necessary for the traditional health practices of the Batwa and that these plants were part of the resources available to them to treat various illnesses from which they suffer. This is based on the various testimonies available to the Commission. For example, M.M., one of the Batwa expelled from the Kahuzi-Biega park, said: "*I watch with dread as our grandchildren often die of diseases that could have been cured in the PNKB using*

---

[49] **Communication 241/01**- *op. cit.*, para 80

[50] See Pretoria Declaration on Economic, Social and Cultural Rights in Africa, 17 September 2004, para 7

[51] In this regard, for the BAKA populations of East and South Cameroon, "*the forest is (our) life*" (Dieudonné Tombombo), and "*for the Baka, it is a supermarket, a hospital and a bank*" (René Ndameyang). Interview by Josiane Kouagheu, for *Le Monde Afrique*, for the article "*Au Cameroun, la cartographie participative, un "puissant outil" de reconnaissance des Pygmées*" [In Cameroon, participatory mapping is a "powerful tool" for recognising Pygmies], published on 24 August 2021

[52] Article 24 of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly on 13 September 2007.

our medicinal plants as well as pregnant women, most of whom are operated on in hospitals and unable to find the money to pay their hospital bills".[53]

166. The Commission also notes that the removal of the Batwa from the Kahuzi-Biega Park has led them to live under difficult conditions with no access to health care. For example, K. M. states: *"My family and I are finding it difficult to live whereas our land and resources in the PNKB provided us with everything... [...] I do not have health insurance and have to pay for access to health care; we the landless poor will die without receiving appropriate care and deprived of access to medicinal plants usually found in the park.... [...] Our sick people die at home because the hospital will not treat us without money and the principle of paying a deposit before going to the hospital for treatment. At this very moment, we have a seriously ill child here and his parents have been asked to pay for treatment."*[54] As a result, the lack of access to public services provided by the State aggravates the physical health of the Batwa.

167. The allegations indicate that the Batwa were evicted and not resettled in a similar setting, and that they were not provided with any facilities. It follows that their right to the highest attainable standard of physical and mental health, as understood by them, has been violated.

On the alleged violation of Article 17

168. Article 17 stipulates:

"1. Everyone has the right to education.

2. Every individual may freely take part in the cultural life of his community.

3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State".

On the alleged violation of Article 17 (1)

169. Under Article 17 (1) *"Everyone has the right to education"*. The Complainants allege that following the eviction of the Batwa from the Kahuzi-Biega forest, the Respondent State violated the right to education in all its aspects.

170. In its General Comment No. 13 on the right to education, the UN Human Rights Committee stated that this right is fundamental in itself and is an indispensable

[53] See Affidavit of M.M., Annex 103

[54] See Affidavit of K. M., Annex 99

means of realizing other inherent human rights.[55] It includes the right to all levels of education and training, on the basis of intellectual capacity. Modern education is one of the ways in which people can lift themselves out of poverty and identify and defend their rights.

171. The right to education affects the growth, development and welfare of human beings, particularly children and youth.[56] The Commission recognises that, as a fundamental right, education is the primary vehicle by which economically and socially marginalised children and adults can lift themselves out of poverty and obtain the means to participate fully in their community.[57] Thus, it plays a vital role in the protection of human rights in that its aim is to develop intellectual capacity and thereby enable individuals to claim their rights at all levels.

172. Moreover, education should be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.[58]

173. Based on the foregoing, the Commission notes that education is one of the ways in which people can lift themselves out of poverty and identify and defend their rights. In particular, it enables marginalized populations to participate fully in community life. Furthermore, the right to education also includes the right to traditional and ancestral knowledge for indigenous peoples.

174. In this case, the eviction of the Batwa from their ancestral forest deprived them of this form of teaching, as the elders were no longer able to pass on their knowledge, particularly medicinal knowledge, to the younger generations *in situ*, as stated in the various testimonies made by members of this community who were victims of this eviction. These testimonies all point to the fact that there is knowledge related to the identity of the Batwa from which they

---

[55] General Comment No. 13 of the Committee on Economic, Social and Cultural Rights on the implementation of Article 13 of the International Covenant on Economic, Social and Cultural Rights; adopted at the 21st Session, 1999

[56] ACHPR, Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights, para 69

[57] ACHPR, Principles and Guidelines on the implementation of economic, social and cultural rights in the African Charter on Human and Peoples' Rights, para 69

[58] General Comment No. 13 of the Committee on Economic, Social and Cultural Rights on the implementation of Article 13 of the International Covenant on Economic, Social and Cultural Rights; adopted at the 21st Session, 1999

benefited while in the Kahuzi-Biega forest but to which they no longer have access. For example, O.M. one of the Batwa expelled states: *"The Forest was our space for education and initiation of young people into adulthood"*.[59] N. B. I., another victim of the expulsion reiterates that *"this lack of access to their land and natural resources makes them more vulnerable because they now face difficulties in accessing basic social services such as education"*.[60] In this regard, the Commission concludes that failure to provide access to such knowledge constitutes a violation of the right to education protected under the provisions of Article 17(1).

On the alleged violation of Article 17(2) and 17(3)

175. Under Article 17(2) and (3) *"2. Every individual may freely take part in the cultural life of his community. 3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State"*. Based on the considerations and arguments presented by the Complainants, understanding of the concept of 'culture' within the meaning of Article 17(2) and 17(3) of the Charter and its conception in the context of indigenous peoples is of particular importance in the present Communication.

176. Culture was defined as follows by the UNESCO World Conference on Cultural Policies in the Mexico City Declaration: *"in its widest sense, culture may now be said to be the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs"*.[61] Later, in the Fribourg Declaration, a group of international experts, the 'Fribourg Group', decided that: *"The term "culture" covers those values, beliefs, convictions, languages, knowledge and the arts, traditions, institutions and ways of life through which a person or a group expresses their humanity and the meanings that they give to their existence and to their development"*.[62]

177. According to the Charter for African Cultural Renaissance, adopted by the 6th Ordinary Session of the Assembly held on 24 January 2006 in Khartoum, *"culture should be regarded as the set of distinctive linguistic, spiritual, material,*

---

[59] Affidavit of O. M., Annex 101

[60] Affidavit of N.B.I, Annex 1

[61] Mexico City Declaration on Cultural Policies. World Conference on Cultural Policies, Mexico City, 26 July - 6 August 1982

[62] Article 2 of the Fribourg Declaration on Cultural Rights, adopted in Fribourg on 7 May 2007
Founding text, dated 1993 (cf: http://www.droitshumains.org/ONU_GE/Comite_ Drtcult/decla-fribourg.htm
The Fribourg Declaration on Cultural Rights is the result of 20 years of work by an international group of experts, known as the "Fribourg Group".

intellectual and emotional features of the society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs".[63]

178. In its Mexico City Declaration on Cultural Identity, UNESCO stated that: "*Every culture represents a unique and irreplaceable body of values since each people's traditions and forms of expression are its most effective means of demonstrating its presence in the world.*"[64]

179. The African States, in the framework of the 1976 Cultural Charter for Africa adopted by the Heads of State and Government of the Organisation of African Unity at its Thirteenth Session held in Port Louis, Mauritius, from 2 to 5 July 1976, were already aware "*that any people has the inalienable right to organise its cultural life in full harmony with its political, economic, social, philosophical and spiritual ideas*" and "*that any human society is necessarily governed by rules and principles based on traditions, languages, ways of life and thought in other words on a set of cultural values which reflect its distinctive character and personality*".[65]

180. In the *Endorois* case, the Commission held that culture refers to that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups and that cultural identity encompasses a group's religion, language, and other defining characteristics.[66]

181. Referring to all these different definitions and considerations, the Commission notes that due to its complexity, the notion of culture should be understood in a broader sense. Indeed, as summarized by the African Court in the case of the *African Commission on Human and Peoples' Rights v. Republic of Kenya*, culture should be construed in its widest sense "*encompassing the total way of life of a particular group, including the group's languages, symbols such as dressing codes and the manner the group constructs shelters; engages in certain economic activities,*

---

[63] Charter for African Cultural Renaissance, adopted by the 6th Ordinary Session of the Assembly held on 24 January 2006 in Khartoum, Sudan

[64] Mexico City Declaration on Cultural Policies. World Conference on Cultural Policies, Mexico City, 26 July - 6 August 1982

[65] See the Preamble of the 1976 Cultural Charter for Africa adopted by the Heads of State and Government of the Organisation of African Unity at its Thirteenth Session held in Port Louis, Mauritius, from 2 to 5 July 1976

[66] **Communication 276/03** – *op. cit*, para 241.

produces items for survival; rituals such as the group's particular way of dealing with problems and practicing spiritual ceremonies; identification and veneration of its own heroes or models and shared values of its members which reflect its distinctive character and personality".[67]

182. On this basis, the Commission is of the view that protecting human rights also requires respect for, and protection of, their religious and cultural heritage essential to their group identity, including buildings and sites such as libraries, churches, mosques, temples, synagogues and similar places.[68]

183. In the context of indigenous peoples, the preservation of their culture is of particular importance. Indeed, as the African Court notes, these populations have often been affected by activities of other groups and deliberate policies of exclusion, exploitation, forced assimilation, discrimination and other forms of persecution.[69] On this point, the African Commission agrees with the Complainants that in its interpretation of the African Charter, it has recognised the duty of the State to tolerate diversity and to introduce measures that protect identity groups different from those of the majority/dominant group.[70]

184. In this respect, it considers that Article 17(2) requires governments to take measures *"aimed at the conservation, development and diffusion of culture," such as promoting "cultural identity as a factor of mutual appreciation among individuals, groups, nations and regions; promoting awareness and enjoyment of cultural heritage of national ethnic groups and minorities and of indigenous sectors of the population".*[71]

185. In this case, the Commission concurs with the Complainants that the eviction of the Batwa from their ancestral land deprives them of their cultural and religious references as understood above in its various senses, and consequently, no longer allows them to take part freely in the cultural life of the community of the Democratic Republic of Congo. The various testimonies gathered prove that these Batwa are no longer able to engage in their religious and cultural practices that were associated with the Kahuzi-Biega forest.

186. This is the case for M.M, one of the Batwa expelled from Kahuzi-Biega National Park, who testifies as follows: *"The causes for the disappearance of our culture are mainly related to lack of access to our traditional land and to the various*

---

[67] Application No. 006/2012, African Commission on Human and Peoples' Rights v. Republic of Kenya, Para 179

[68] **Communication 276/03** – *op. cit,* para 241.

[69] Application No. 006/2012- African Commission on Human and Peoples' Rights v. Kenya, para 180.

[70] **Communication 276/03** – *op. cit.*, para 246.

[71] **Communication 276/03** – *op. cit.*, para 246.

displacements that our community has suffered. How can we teach our children about our culture when we are outside of our own home and how can one be initiated into a culture when one does not know the ins and outs of that culture? [...] All our rituals are associated with the forest where there are rivers, sacred sites and species such as the Muhumbahumba which reflect the culture and the right to reside in the community of a dignitary".[72] M. M., another member of the Batwa community expelled from the Kahuzi-Biega National Park wonders: *"Where can we practice our rituals when we are outside our ancestral lands? Our children will no longer be able to know our cultures and practice our rituals so as to understand our cultures and values".*[73]

187. Thus, on the basis of all these observations, the Commission considers that the DRC did not take into consideration the right to culture as envisaged in the context of indigenous peoples. It thus violated Article 17 (2) and (3) of the Charter.

On the alleged violation of Article 21 (1 and 2)

188. The Complainants allege violation of Article 21(1) and (2) which provides that: *"1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. 2. In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation."* This provision upholds the right of peoples to freely dispose of their wealth and natural resources. The drafters of the African Charter obviously wanted to remind African governments of the continent's painful legacy and restore cooperative economic development to its traditional place at the heart of African Society.[74]

189. Indeed, the African Court in its jurisprudence considers that the Charter primarily targets the peoples comprising the populations of the countries struggling to attain independence and national sovereignty.[75] And the Commission notes, in *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria,* that the origin of Article 21 may be traced to colonialism, during which colonial powers exploited the

---

[72] Affidavit of M. M., Annex 102

[73] Affidavit of M.M., Annex 103

[74] **Communication 155/96-** *Social and Economic Rights Action Centre (SERAC)and Centre for Economic and Social Rights (CESR) v. Nigeria* (2001) ACHPR para 56

[75] Application No. 006/2012- *African Commission on Human and Peoples' Rights v. Kenya,* para 197

natural resources of African countries to the detriment of African peoples.[76] The aftermath left Africa's people and natural resources still vulnerable.

190. Notwithstanding this interpretation originating from a specific context, the Commission has consistently held that this provision still applies to groups belonging to a State[77] . Thus, it has indicated that the term "People" in this Article 21 can mean either any people of a given State or a "people" within that State[78] . It is therefore understandable that both categories of 'peoples' are entitled to the rights guaranteed under the provisions of Article 21.

191. This view is also shared by the African Court. Indeed, regarding the question as to whether the enjoyment of the rights recognised to the peoples constituting the population of a given State can be extended to sub-state ethnic groups and communities which are part of that population, this Court has responded in the affirmative[79]. It does, however, set a condition that such groups must not challenge the sovereignty or territorial integrity of the State without the State's consent in the exercise of their rights.

192. Thus, governments have a duty to protect their citizens, not only by adopting appropriate legislation and effectively enforcing it, but also by protecting them from harmful activities that may be perpetrated by private actors (*see Union des jeunes avocats v. Chad 12*)[80]. As emphasised by the African Court, this duty requires a positive obligation on the part of the State to act whenever the rights of the people under its protection are threatened; and this must be done in accordance with human rights instruments.

193. More specifically, the situation described and objected to in this case calls into question the criteria, conditions and objectives for the establishment of national parks. Indeed, the issue that arises is whether the establishment of a national park must necessarily be to the detriment of the primary occupying population. In other words, if the purpose of creating a park is to protect biodiversity for the good of all, should the way of life, culture and environment of the indigenous populations occupying it not be taken into account?

---

[76] **Communication 155/96**- *Social and Economic Rights Action Centre (SERAC)and Centre for Economic and Social Rights (CESR) v. Nigeria* (2001) ACHPR para 56

[77] *Idem, paras 56-57*

[78] **Communication 328/06** - *Front de libération de l'Etat du Cabinda v. Republic of Angola* (2013) para 130

[79] Application No. 006/2012, African Commission on Human and Peoples' Rights v. Republic of Kenya, para 198-199

[80] **Communication 155/96** - *op. cit. para 57*

194. The UNESCO Convention on the Protection of the World Cultural and Natural Heritage, in its Part 2, entitled "National and International Protection of the Cultural and Natural Heritage", states in its Article 5: "*In order to ensure that the cultural and natural heritage situated on their territory is protected and preserved as effectively as possible and that it is enhanced as actively as possible under conditions appropriate to each country, the States Parties to this Convention shall endeavour as far as possible: (a) to adopt a general policy designed to assign a function to the cultural and natural heritage in the life of the community, and to incorporate the protection of that heritage into general planning programmes*"[81] .

195. In view of the foregoing, the establishment of a natural site as a national park should not be done to the detriment of the original occupants, especially when it is an indigenous people, unless the State can prove that the actions of these populations are harmful to the said protection.

196. In this case, the Respondent State has not produced any evidence to show that the choice of the Kahuzi-Biega Park was not to the detriment of the Batwa people. On the contrary, it is clear from the testimonies and documents at the Commission's disposal that, in the aftermath of the establishment of this Park, the Batwa were denied access to their ancestral lands, which contain a number of natural resources. The Commission also notes that the DRC has exploited these natural resources or allowed other parties to do so without consulting them or paying them compensation for the benefits derived from these resources, and that it has caused or failed to prevent the environmental degradation of the natural resources of their forest.

197. In this regard, the Commission recalls that it has already recognised a number of rights to ancestral land for the Batwa people, including the right of use (*usus*) and the right to enjoy the fruits (*fructus*). In their nature, both rights imply the right to access and occupy this forest in order to benefit from it. It is clear that in this case, both rights have been violated.

198. From all the above, the Commission concludes that Article 21 (1 and 2) of the Charter has been violated.

[81] See Article 5 of the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage.

On the alleged violation of Article 22

199. Article 22 states: "1. *All peoples shall have the right to their economic, social and cultural development, with due regard to their freedom and identity, and in the equal enjoyment of the common heritage of mankind 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.* In light of the complainants' allegations, the Commission proposes to analyse the scope of the right to development as it applies to indigenous peoples.

200. The UN Declaration on the Right to Development adopted by the General Assembly on 4 December 1986 defines the right to development as an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised[82] . Looking at it from this angle, the right to development is a right that is vested in individuals and peoples. Indeed, as the Declaration emphasises, this right also implies the realisation of the right of peoples to self-determination, which entails the exercise of their inalienable right to full sovereignty over all their natural wealth and resources[83] .

201. The right to development of indigenous peoples has, moreover, been recognised in the United Nations Declaration on the Rights of Indigenous Peoples. Under Article 23 of the Declaration, indigenous peoples have "the right to define and establish priorities and strategies for the exercise of their right to development"[84]. In order to ensure the realisation of this right, States have an obligation to involve indigenous peoples in the plan and definition of health, housing and other economic and social programmes affecting them, and, as far as possible, in their administration through their own institutions[85].

202. Thus, as Article 8 of the same Declaration emphasises, the components of this right to development are, among others, "the right to food, the right to health, the right to education, housing, employment, [...] equitable distribution of income, the elimination of all social injustices through economic and social reforms". Ultimately, the right to development is simply about the

---

[82] Article 1 of the United Nations Declaration on the Right to Development in its Resolution 41/128 of 4 December 1986

[83] Article 2 of the United Nations Declaration on the Right to Development in its Resolution 41/128 of 4 December 1986

[84] Article 23 of the United Nations Declaration on the Rights of Indigenous Peoples, Resolution 61/295 adopted by the General Assembly on 13 September 2007

[85] Article 23 of the United Nations Declaration on the Rights of Indigenous Peoples, Resolution 61/295 adopted by the General Assembly on 13 September 2007

participation of all people in the design and implementation of development programmes.

203. States are the primary actors to ensure implementation in the sense that they represent the people and have the means and legitimacy to enact laws or take the necessary measures to achieve this goal. Thus, for example, in *African Commission on Human and Peoples' Rights v. Republic of Kenya,* the African Court held that the failure to involve the Ogiek in the development and definition of health, housing and other social programmes that affect them constituted a violation of Article 22 of the Charter[86] . Similarly, in *Endorois,* the Commission made it clear that for any development or project that would have a major impact on the territory of the *Endorois,* the State has a responsibility not only to consult the community, but also to obtain their free, prior and informed consent, in accordance with their customs and traditions[87].

204. In this case, analysis of the various documents and testimonies available to the Commission shows that the Batwa were not consulted because they were expelled from the Kahuzi-Biega Forest. This has had a serious impact on their socio-economic and cultural development. The Commission notes that the DRC, which has not responded to the arguments of the Complainants, has not provided evidence that it was satisfied that the Batwa, as an indigenous people, were involved in this development programme that affects them directly or indirectly.

205. In these circumstances, the Commission concludes that the DRC has violated Article 22 of the Charter.

On the alleged violation of Article 24.

206. Article 24 of the Charter states: *"All peoples shall have the right to a general satisfactory environment, conducive to their development"*. According to Fatimata Dia, former Director of the Institut de la Francophonie pour le Développement Durable, *''the environment can be defined as all the natural and cultural conditions likely to affect living organisms and human activities*"[88] . In this sense, one of the main obligations that States are called upon to fulfil is to ensure that natural

---

[86] Application No 006/ 2012 *African Commission on Human and Peoples' Rights v. Republic of Kenya*, para 210

[87] **Communication 276/03** - *op. cit.* para 291

[88] Fatimata DIA was Director of the Institut de la Francophonie pour le développement durable, and this definition comes out of her introductory words in issue 98 of the Revue *Liaison Energie- Francophonie* of the Institut de la Francophonie pour le Développement, which came out in the 3rd quarter of 2014.

and cultural conditions which are likely to have a negative impact on human life do not change or are at least improved.

207. The importance of the right to a satisfactory and comprehensive environment for development is recognised in many international instruments. For example, according to Rebecca GRYNSPAN, then Associate Administrator of the UNDP (at the Development with Culture and Identity Forum): "*States must recognise cultural differences in their laws and institutions and in the creation of policies to ensure that the interests of certain groups are not ignored or supplanted. And they must do so in ways that do not conflict with other human development goals and strategies, such as human rights, building a competent State, and ensuring equal opportunities for citizens*".

208. Furthermore, Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples states: "*Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and agreement on fair and equitable compensation and, where possible, the option of return*". The same applies to ILO Convention 169. Its Article 2 (1) (2) (b) states: "*1. Governments, with the participation of the peoples concerned, shall develop coordinated and systematic action to protect the rights of these peoples and to ensure respect for their integrity. "This action shall include measures to (b) promote the full realization of the social, economic and cultural rights of these peoples, with due respect for their social and cultural identity, customs and traditions and institutions*"[89]

209. In its Article 7, the same ILO Convention 169 emphasises on this right of peoples to an environment favourable to development in the following terms

" *1. The peoples concerned shall have the right to determine their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise as much control as possible over their own economic, social and cultural development. Furthermore, these peoples shall participate in the formulation, implementation and evaluation of national and regional development plans and programmes that may directly affect them.*

2. The improvement of the living and working conditions of the peoples concerned and of their standard of health and education, with their participation and co-operation, shall be given priority in the overall economic development plans of the regions they

[89] Article 2 (1) (2) (b) of ILO Convention 169

inhabit. Specific development projects in these regions shall also be designed to promote such improvement.

3. Governments shall ensure that, where appropriate, studies are carried out in co-operation with the peoples concerned to assess the social, spiritual, cultural and environmental impact that planned development activities may have on them. The results of such studies shall be considered as a fundamental criterion for the implementation of such activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment in the territories they inhabit.

210. All these texts and declarations recognise the importance of a healthy environment, as part of economic and social rights, on the understanding that the environment affects the quality of life and the safety of the individual.

211. In the Communication *Social and Economic Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v. Nigeria,* the Commission stated that the right to a healthy environment imposes obligations on States to take reasonable and other measures to prevent pollution and ecological degradation, to promote environmental conservation and to ensure environmentally sustainable development and use of natural resources[90] . In its 2012 Resolution 224 on Natural Resources Governance in the run-up to the Rio+20 Conference on Sustainable Development, the Commission had already considered that the State has the primary responsibility to preserve and protect natural resources, together with and in the interest of the people[91].

212. Thus, for example, in activities related to exploration, extraction, toxic waste management, exploitation and governance of natural resources, States are called upon to ensure that independent social and human impact assessments are carried out, in order to guarantee, inter alia, indigenous and customary rights, and environmental impact assessments[92].

213. The Commission therefore considers that in the implementation of its activities, the State must take into account the specificity of the indigenous population in order not to create an unfavourable environment for their fulfilment as human beings. As with all other human rights, States have an obligation to respect, protect and fulfil. In the present case, the Congolese State,

---

[90] **Communication 155/96** - *op cit.*, para 52.

[91] Resolution 224 on a Human Rights-Based Approach to Natural Resources Governance ACHPR/Res.224(LI)2012

[92] Resolution 224 on a Human Rights-Based Approach to Natural Resources Governance ACHPR/Res.224(LI)2012

which has not responded to the submissions of the Complainants, has not provided any evidence that it has complied with the requirements of the provisions of Article 24 after the eviction of the Batwa people. In other words, the Commission agrees that the eviction of the Batwa from the Kahuzi-Biega Forest did not take into account the natural and cultural conditions that are likely to have a negative impact on their lives. It is clear that the alleged violation is established.

On the alleged violation of Article 1 of the Charter

214. It is clear from the Commission's well-established jurisprudence that a violation of any provision of the Charter automatically implies a violation of Article 1[93] . Thus, for example, in the Communication *Kevin Mgwanga Gunme and Others v. Cameroon,* the Commission reiterated that a violation of any provision of the African Charter automatically constitutes a violation of Article 1 insofar as it reflects the failure of the State Party to adopt adequate measures to give effect to the provisions of the African Charter'[94] . It therefore concluded that having found violations of several provisions in the course of its analysis, the Respondent State had violated Article 1'[95].

215. Noting that there was a violation of a number of Articles of the Charter in this case, the Commission concludes that the DRC has therefore violated Article 1.

The Commission's comments on the claims for compensation

216. The Complainants allege that they are entitled to reparation and have therefore made a number of requests for reparation. The Commission notes that the African Charter does not contain a specific provision on reparation for violations of the rights enshrined therein. However, in accordance with its jurisprudence, it notes that the violation of the rights protected by the Charter gives rise to a right for reparation. For example, in the Communication *Jean-Marie Atangana Mebara v. Republic of Cameroon,* the Commission indicated that reparation can take various forms depending on the rights violated and the circumstances of the case, ranging from administrative, legislative and judicial actions to monetary compensation[96] .

---

[93] **Communication 147/95-149/96** - *Sir Dawda K. Jawara v. The Gambia* (2000) ACHPR para 46

[94] **Communication 266/03-** *Kevin Mwanga Gunme et al v. Cameroon* (2009) ACHPR para 213

[95] *Ibid*

[96] Communication 416/12- *Jean-Marie Atangana Mebara v/ Republic of Cameroon* (2015) ACHPR para 134

217. In the present case, also on the basis of the various considerations set out above, the Commission finds the following claims for compensation to be justified:

1. The declaration that the Democratic Republic of Congo is in violation of Articles 1, 2, 4, 8, 14, 17(1)-(3), 21, 22 and 24 of the African Charter.
   Indeed, as can be seen from the above developments, the Commission found that the DRC had violated the above-mentioned Articles of the Charter.

2. The statement that the Kahuzi-Biega Forest has been the ancestral home of the Batwa people since time immemorial, and that its occupation by the Batwa is essential to the preservation of their identity.
   The Commission has noted that the Batwa people are an indigenous people and as a result their way of life is intimately linked to their ancestral lands. Indeed, the Commission's Working Group on Indigenous Populations/Communities noted that one of the characteristics of indigenous peoples is the occupation and use of a specific territory[97] . In particular, the Working Group reiterated that the survival of particular ways of life of indigenous peoples depends on the recognition of their rights and access to their traditional lands and natural resources[98] . In this case, the Kahuzi-Biega forest is the ancestral home for the Batwa people.

3. The statement that the occupation of the Kahuzi-Biega forest was in no way an obstacle to biodiversity occurring in the KBNP and that, furthermore, their occupation created a customary property right which the Respondent State has a duty to recognise and protect under international law. As the Commission has already noted, the report of the Working Group of Experts of the African Commission on Human and Peoples' Rights states that traditionally the Batwa have never hunted gorillas and do not destroy the forest by cutting down trees[99] .

4. A statement that fortress conservation models based on the eviction of indigenous peoples are no longer relevant, and that in cases where such

---

[97] Report of the Working Group of Experts of the African Commission on Human and Peoples' Rights on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session, 2005, p. 100

[98] Report of the Working Group of Experts of the African Commission on Human and Peoples' Rights on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session, 2005, p. 100

[99] *Idem*, p. 27

measures are necessary, they must take into account their impact on indigenous peoples.

The Commission has already indicated this in its Resolution on the approach to the governance of natural resources. In this resolution, it stressed that in activities related to exploration, extraction, toxic waste management, exploitation and governance of natural resources, States must ensure that social and human impact assessments are carried out, to guarantee, inter alia, indigenous and customary rights, and environmental impact assessments[100]

5. A statement that the Batwa are the best guardians of the environment and that conservation measures to exclude them from their land can be dangerous and counterproductive to conservation efforts.

6. A finding that the creation of the KBNP, and the decision to allow non-Batwa communities to settle and remain on their ancestral lands, has contributed to the destruction of the Kahuzi-Biega forest and has not benefited the Batwa people, in violation of Article 21 (2) of the Charter

a. Restitution

218. The Complainants appeal for restitution. Restitution is a procedure that is provided for in the Charter. Article 21 (2) provides that in case of spoliation, dispossessed persons have the right to legally recover their property as well as to receive adequate compensation. The Commission regards restitution as a valid and appropriate way to restore victims to the state they were in before the violation of the rights concerned. For example, in the Communication *Mbiankeu Geneviève v. Cameroon*, it notes that restitution remains the reparation par excellence since it responds to the principle of *restitution in integrum* which requires restoring the victim to the situation prior to the violation[101] . In the *Endorois* case, the Commission called on Kenya to "recognise the property rights of the *Endorois* and to return the *Endorois*" ancestral land'[102] .

219. In this case, the Complainants are asking for the restitution of their ancestral land through a series of measures they wish to be taken by the Democratic

[100] Resolution 224 on a Human Rights-Based Approach to Natural Resources Governance ACHPR/Res.224(LI)2012

[101] **Communication 389/10** - *Mbiankeu Geneviève v/ Cameroon* (2015) ACHPR para 131

[102] **Communication 276/03** - *op. cit.* para 298

Republic of Congo. Of all these requests, based on Article 1 of the Charter, which stipulates that the Member States, party to the Charter recognise the rights, duties and freedoms set out in the Charter and undertake to adopt legislative or other measures to give effect to them, the Commission finds the following to be justified:

i. Adoption in its domestic legislation, as soon as possible, after free and fully informed consultation with the Batwa, of legislative, administrative and any other measures necessary to establish an effective mechanism for the delimitation, demarcation and titling of the territory traditionally occupied by the Batwa and the various natural resources attached to it in accordance with their tradition.
The DRC may also ratify the International Labour Organisation Convention No. C107 concerning Indigenous and Tribal Peoples, 1957.

ii. Take physical, legislative and administrative measures to (1) demarcate, delineate and provide a title, or clarify and protect, the relevant Batwa land, and (2) until such measures are implemented, to refrain from any act or omission that may lead the State or its agents - or third parties acting with its consent or tolerance - to have an effect on the existence, value, use or enjoyment of Batwa ancestral lands or lands currently occupied by the Batwa on the periphery of the KBNP

iii. The annulment of all laws, ordinances or other measures prohibiting the presence of the Batwa on ancestral lands and the enjoyment of the fruits of these lands.

iv. The withdrawal of non-Batwa from Batwa territories and ancestral lands within six months of notification of the decision. Indeed, these non-Batwa groups are damaging and degrading the forest through their activities.

220. However, the Commission finds the following request inappropriate and therefore rejects it. In particular, the Complainants request a review of "*the conditions for the establishment and management of nature reserves at the national level to ensure that they do not impede the full use and enjoyment of indigenous peoples' lands. Further ensure that all measures relating to the future of these territories, particularly but not exclusively in the area of conservation, place indigenous communities at the forefront, with the State seeking to build models of co-management of the territories with the indigenous peoples concerned.* The Commission rejects this request because the Complainants represent only the

Batwa in this case and therefore cannot act on behalf of any other person or community.

b. Compensation

221. In its jurisprudence, the Commission recognises that when restitution is impossible or inappropriate, the related obligation is resolved through compensation. The principle being that "compensation must be fair, adequate, effective, sufficient, appropriate, victim-oriented and proportionate to the damage suffered"[103] .

222. In the present case, the Complainants have submitted a series of claims for compensation. The Commission will attempt to give its opinion on any of these claims. In particular, the Complainants request:

i. The establishment, in consultation with the Batwa, of an independent panel with expertise in the area of compensation and redress for human rights violations, to assess the appropriate level of compensation that should be awarded to the Batwa.

The Commission notes that this panel is necessary and implores the Independent National Human Rights Commission to play the role of appointing these experts at its convenience.

ii. The payment of damages to reflect the loss of life, property, hindrance to development, depletion and destruction of natural resources on ancestral lands.

The Commission notes that the Complainants have not established, with the help of supporting documents, the value of their moral and material losses. Thus, in the absence of a mathematical benchmark for this claim, the Commission cannot determine the amount corresponding to the damage caused by the DRC. Consequently, and in accordance with its relevant practice, it refers the Complainants to the national courts for the assessment of damages, in accordance with its well-established jurisprudence.[104] In any event, such compensation should be fair, adequate, effective, sufficient, appropriate, victim-oriented and proportionate to the harm suffered. [105]

---

[103] **Communication 389/10** - *Mbiankeu Geneviève v/ Cameroon* (2015) ACHPR para 131

[104] See Communication 313/05- ***op. cit.*** para 244; Communication 253/02- ***Antoine Bissangou v. Congo*** (ACHPR) 2006 para 83; Communication 59/91- ***Embga Mekongo Louis v. Cameroon*** (ACHPR) 1995, para 2.

[105] Communication 389/10- ***op. cit.*** para 131.

iii. Payment of non-pecuniary damages, to include the loss of their freedom to practice their religion and culture, and the threat to their livelihood, as well as to compensate community members for abuses committed by the PNKB guards.

For this claim too, the Complainants were unable to show the estimated value of the damage that the Batwa suffered. In this sense, it is difficult for the Commission to estimate the amount of this damage.

iv. The creation of a community development fund administered by the community to address the growing deficiencies in health, housing and education in the community.

In this regard, the Commission notes the jurisprudence of the Inter-American Court which has already established such a fund. Thus, in the case of *Kali'na and Lokono Peoples v. Suriname,* this Court found it necessary to create a community development fund whose main purpose is to develop projects in the areas of health, education, food security, resource management and other provisions that the *Kalina and Lokono* Peoples consider relevant for their development.[106] It ordered the State to take administrative, legislative and financial measures and to make available the necessary human resources to create and implement this fund[107] . The court also suggested that the *Kalina and Lokono* peoples choose a representative to dialogue with the State on the implementation of this fund in accordance with the will of these peoples. In the case of *Sawhoyamaxa Indigenous Community v. Paraguay,* the same court ordered the Uruguayan State to create a *Sawhoyamana* Indigenous People's Development Fund worth US$ 1,000,000.00 (one million United States Dollars) to be used in a programme of education, housing, agricultural and health projects, as well as the production of drinking water and the construction of sanitary infrastructure for the benefit of the members of this community[108] . Thus, based on this jurisprudence, the Commission requests the DRC to create a development fund to support the Batwa of Kahuzi-Biega in projects that would enable them to provide themselves with a decent life in terms of health, education, housing, water and sanitation and other areas that the Batwa themselves deem necessary.

---

[106] Inter-American Court of Human Rights, *case of the Kalina and Lokono Peoples v. Surname*, Judgment of 25, 2015, para 296

[107] Interamerican Court of Human Rights, *case of the Kalina and Lokono Peoples v. Suriname*, Judgment of 25, 2015, para 296

[108] Interamerican Court of Human Rights, case of *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of March 29, 2006, para 224

v. The payment of royalties from existing economic activities in the Kahuzi-Biega Forest.

As the Commission has already indicated in its analysis on the merits, the Batwa of Kahuzi-Biega have a right of ownership over their ancestral lands and territories. Since this right implies the right to enjoy, use and dispose of the land, this indicates that the royalties from economic activities related to this land should accrue to them. Therefore, the Commission finds this claim justified and calls on the DRC to pay these royalties.

vi. Ensure that the Batwa benefit from employment opportunities within the KBNP, particularly in the area of conservation and land repair.

The Commission agreed to this request. Indeed, the Batwa have been found to be good protectors of the environment. Thus, offering them an opportunity to work in the Park will contribute to the conservation and protection of the environment in this forest.

vii. Ensure regular dialogue with the community on how best to implement measures to provide the Batwa with access to free basic public services, with particular emphasis on issues relating to water and sanitation, adequate health care and education.

The Commission finds this request relevant. Indeed, as the Inter-American Court indicated in the case of the *Yakye Axe Indegenous Community v. Paraguay*, the State has a duty to take positive and concrete measures to realise the right to life, especially in the case of vulnerable and exposed persons, whose care becomes a matter of high priority[109] . In this sense, one of the most effective ways to ensure the realisation of the right to life for indigenous peoples is to engage in regular dialogue with the peoples concerned. It is from this dialogue that the State will know the weak points that require special attention.

viii. Work collectively with the Batwa community to protect their traditional values and beliefs and work constructively with community members to disseminate it nationally as a source of pride in Congolese culture.

The Commission finds this request relevant as well. Traditional values and beliefs are important pillars of a people's cultural identity. States have an obligation to protect and promote them in order to avoid their disappearance. In the present case, the Commission invites the DRC to integrate the culture of indigenous peoples into the educational curriculum. The Commission had already made such a recommendation in other countries. This is the case, for

[109] Inter-American Court of Human Rights, case of the *Yakye Axe Indegenous Community v. Paraguay*, Judgment of June 17, 2005, para 163

example, in the Republic of Congo, a neighbour of the DRC. In its report on its mission to the Republic of Congo from 15-24 March 2010, the Commission's Working Group on Indigenous Populations/Communities urged the State to "integrate elements of indigenous culture and identity into education and literacy programmes; and develop technical and vocational education that takes into account indigenous know-how and economy"[110] .

b. Guarantees of non-repetition

223. As measures to guarantee non-repetition, the Complainants requested a series of actions including:

1. Adoption, without any further delay, of national legislation to implement the rights and duties enshrined in the UNDRIP, officially recognising indigenous peoples in the DRC and defining specific measures for their protection.

   The Commission notes that this request is not relevant. Indeed, a declaration is not a binding instrument. Thus, States are not obliged to incorporate it into their domestic law. It would therefore be contrary to the rules of international law to require the DRC to put in place a law implementing the rights and duties enshrined in the Universal Declaration on the Rights of Indigenous Peoples. Instead, the Commission invites the DRC to put in place a law on the promotion and protection of indigenous peoples as is the case for its neighbour, Congo.[111] This law could be a source of inspiration for the DRC.

2. Adoption of legislative, administrative and other measures to recognise and guarantee the right of the Batwa to be effectively consulted, in accordance with their traditions and customs, and/or to give or withhold their free, prior and informed consent to development, conservation or investment projects on Batwa ancestral lands in the Kahuzi-Biega forest, in order to implement adequate protection measures to minimise the adverse effects that such projects may have on the social, economic and cultural survival of the community;

   This claim requires legislative, administrative and other measures to recognise and guarantee the rights of the Batwa. The Commission considers

---

[110] African Commission on Human and Peoples' Rights, *Report of the Working Group of the African Commission on Indigenous Populations/Communities*, Mission to the Republic of Congo from 15-24 March 2010, adopted at the 49th Ordinary Session of the Commission from 28 April to 12 May 2011, p. 97

[111] The Republic of Congo has a law on the promotion and protection of indigenous peoples. See Law No.5-2011 of 25 February 2011 on the promotion and protection of the rights of indigenous peoples

that this request would be contrary to the general rules of law. Indeed, it considers that a law cannot be created for the Batwa alone. One of the fundamental characteristics of laws is their generality. When it is made for a group of people, it becomes discriminatory and therefore contrary to the rules of law.

3. Issuance of a full public apology by the Respondent State to the Batwa people, including an acknowledgement of its responsibility for: (a) the abuse by park rangers resulting in loss of life; (b) the deaths resulting from the eviction; and (c) the inhumane and degrading living conditions to which the community was subjected as a result of their eviction, as well as any death or other harm caused to its members as a result of these conditions.

   The Inter-American Court has considered this remedy necessary and important. Thus, in the case, *Kichwa Indigenous People of Sarayaku v. Ecuador*, the Inter-American Court requested the State to acknowledge publicly of the breach of international responsibility over the violations that the Court had found in the judgment.[112] Referring to this jurisprudence, the Commission finds that this request of the Complainants is relevant. Consequently, it requests the Democratic Republic of Congo to publicly acknowledge its international responsibility for the human rights violations of which the Batwa of Kahuzi-Biega were victims within a period not exceeding six months from the notification of the judgment. This acknowledgement should be made in a public ceremony in the presence of senior state officials and the people, in the language that the Batwa understand, and should be widely publicised in the media.

4. Recognise the Batwa as full citizens of the DRC, and their social, cultural and other contributions to the heritage of humanity, including but not limited to their knowledge of medicinal plants, to be included in school curricula throughout the DRC;

   The Commission finds this request justified and appropriate. Indeed, it would be in line with the United Nations Declaration on Indigenous Peoples. Actually, in the preamble to this Declaration, States have recognised that indigenous peoples are equal to all other peoples while acknowledging the right of all peoples to be different, to consider themselves different and to be respected as such.[113] The Declaration also

---

[112] Inter-American Court of Human Rights, case of *Kichwa Indigenous People of Sarayaku V. Ecuador*, Judgement of June 27, 2012, para 305

[113] Preamble of the United Nations Declaration on the Rights of Indigenous Peoples, Resolution adopted by the General Assembly on 13 September 2007

recognises that all "peoples contribute to the diversity and richness of civilisations and cultures which constitute the heritage of humanity"[114] . Therefore, in the opinion of the Commission, the recognition of the Batwa as a People of the DRC and their social and cultural contributions to the Heritage of Humanity is commendable.

5. Provision of training in human rights and indigenous peoples' rights to ICCN administrators and park rangers in PNKB involving the Batwa community.

   Referring to the jurisprudence of the Inter-American Court in this matter, the Commission recommends this training. Indeed, on a similar request in *Kalina and Lokono Peoples v. Suriname*, the Inter-American Court ruled that the State of Suriname must, within a reasonable time, establish mandatory permanent programmes and courses that include modules on national and international standards of indigenous and tribal peoples' rights, in particular on respecting, protecting and guaranteeing the right to collective property.[115] The court decided that these programmes should be addressed to law enforcement officials. In this case, such training would be an important remedy to the violations of Batwa rights that are perpetrated by PNKB guards and ICNN administrators perhaps out of ignorance. The Commission calls on the DRC to organise such training for the two categories mentioned above.

224. Furthermore, the Complainants request that an independent compensation body be appointed within three months of the decision; that the amount of compensation, royalties and the Community development fund be agreed within one year of the date of the decision, and that payment be made within 18 months of the date of the judgment. The Commission agrees to the establishment of this body and proposes that payment be made within 6 months of the notification of the judgment.

225. On the other hand, the Commission does not find the Complainants' request that the Respondent State identify the State representatives, ministries or other competent bodies responsible for implementing these recommendations to be justifiable. Indeed, the Commission considers that the requests already granted in this decision are sufficient to allow for effective reparation for the damage suffered by the Batwa. In particular, the establishment of an

[114] Preamble of the United Nations Declaration on the Rights of Indigenous Peoples, Resolution adopted by the General Assembly on 13 September 2007.

[115] Interamerican Court of Human Rights, *case of the Kalina and Lokono Peoples v. Surname*, Judgment of 25, 2015, para 309.

independent panel with expertise in the field of compensation and reparation for human rights violations already proposed is sufficient.

226. The Complainants requested the Commission to make such further or other recommendations as it deems appropriate in the circumstances of the case.

In this regard, based on the jurisprudence developed by the Inter-American Court, the Commission requests the DRC to publish this judgment. Indeed, in the case of *Xákmok Kásek Indigenous Community v. Paraguay,* the Court found that even if the Complainants had not requested this remedy, it would be an important measure of satisfaction for the time that this community has waited in requesting the protection of its rights.[116] It requested the Republic of Paraguay to publish certain parts of its judgment in the official gazette, the publication of a summary of the judgment prepared by the court in a daily newspaper of national scope, the publication of the judgment in its entirety on an official government website for a period of at least one year[117] . Finally, it requested that the summary of the judgment be read on a radio station covering the region of the *Xákmok Kásek* community. The Inter-American Court has decided this remedy in a number of other judgments[118] . Thus, in the present case, the Commission requests the Democratic Republic of Congo to publish a summary of the judgment within a period not exceeding 6 months after notification of the judgment:

- The official summary of the judgment prepared by the Commission in an official journal.
- The summary of the judgment prepared by the Commission in a reputable newspaper with national coverage.
- This decision in its entirety on an official website which will be available for one year.

The Commission also finds that it would be appropriate for the State to publish the summary of this decision in French; that of BATWA and other surrounding communities on a radio station that covers the Kahuzi-Biega Park area.

---

[116] Inter-American Court of Human Rights, Case of *The Xákmok Kásek Indigenous Community V. Paraguay,* Judgement of August 24, 2012, para 298.

[117] *Ibid*

[118] Interamerican court of Human Rights, case of *Huilca Tecse v. Peru*, Judgment of March 3, 2005, para 111. See also Inter-American Court of Human Rights, case of *the Kalina and Lokono Peoples v. Surname*, Judgment of 25, 2015, paras 312 & 313. See also Interamerican Court of Human Rights, case of The *Kichwa Indigenous People of Sarayaku V. Ecuador*, judgment of June 27,2012, para 307.

The Commission's Decision on the Merits
In view of the foregoing, the Commission

227. Declares that the Democratic Republic of Congo has violated the provisions of Articles 1, 2, 3, 4, 8, 14, 16, 17 (1)-(3), 21, 22 and 24 of the African Charter.

228. Declares that the Kahuzi-Biega Forest has been the ancestral home of the Batwa people since time immemorial. Consequently, the occupation of this forest by the Batwa people is essential for their survival and the maintenance of their cultural identity.

229. Declares that the occupation of the Kahuzi-Biega Forest did not constitute any danger to biodiversity and that, consequently, the forest is a customary property that the Democratic Republic of Congo is obliged to recognise and protect under international law by putting in place a law on customary property.

230. Declares that fortress conservation models based on the exclusion of indigenous peoples from their ancestral lands without their free and prior consent are no longer relevant and recalls that, in cases where such conservations are necessary, their impact on indigenous peoples must be carefully analysed and remedied. In particular, the conservation model used in the Kahuzi-Biega National Park has failed, by excluding the Batwa as custodians of the forest.

231. States that as good stewards of the environment, measures to exclude the Batwa from their land may be harmful to the environment given the positive historical record of conservation of the Kahuzi-Biega forest by the Batwa

232. Notes that the creation of the Kahuzi-Biega National Park and the authorisation of other non-Batwa communities to continue to exploit their ancestral lands constitutes a violation of the Charter.

233. The Commission therefore requests the Democratic Republic of Congo to:

i. Adopt as soon as possible, in consultation with the Batwa, such legislative, administrative and other measures as may be necessary to establish a mechanism for demarcation and titling of Batwa ancestral territory and related rights in accordance with their values, customs and beliefs.

ii. Ratify the International Labour Organisation Convention No. C107 concerning Indigenous and Tribal Peoples, 1957.

iii. Take physical, legislative and administrative measures to clarify and determine Batwa ancestral lands

iv. Reintegrate the Batwa into their ancestral territory

v. Refrain from any action that may prevent the Batwa from using or enjoying their ancestral lands in the Kahuzi-Biega National Park until these measures are adopted and implemented,

vi. Rescind all laws, ordinances or other measures that prohibit the presence of the Batwa on their ancestral lands and their traditional use and enjoyment.

vii. Take the necessary material, legislative and administrative measures to implement the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)

viii. Remove, within a period not exceeding 6 months from the notification of this decision, non-Batwa from Batwa ancestral lands and territories.

ix. Establish, in collaboration with the National Independent Human Rights Commission, an independent committee of experts in compensation and reparations for human rights violations to examine the value of compensation required to redress the harm suffered by the Batwa.

x. Establish a community development fund administered by the community to address growing deficiencies in health, housing and education;

xi. Paying royalties from economic activities in the Kahuzi-Biega Forest;

xii. Ensure that Batwa are given priority for employment opportunities in Kahuzi Biega National Park, particularly in guarding, conservation and land repair;

xiii. Engage in regular dialogue with the Batwa to provide them with the basic public services they need;

xiv. Work with the Batwa, through the ministry responsible for culture, to protect their traditional values and beliefs as a source of pride in Congolese culture;

xv. Adopt national legislation on the rights of indigenous peoples and define measures for their protection

xvi. Make a full public apology to the Batwa people, acknowledging the abuse by park rangers resulting in loss of life, the deaths resulting from eviction, and the inhumane and degrading living conditions to which the Batwa community has been subjected

xvii. Recognise the Batwa as citizens of the DRC, including their social, cultural and other contributions to the heritage of humanity;

xviii. Provide training on national and international human rights and indigenous peoples' standards to ICCN administrators and PNKB rangers;

xix. Publicise this decision in accordance with the instructions drawn up by the Commission in paragraph 226 of this decision.

Adopted by the African Commission on Human and Peoples' Rights at its 71st Ordinary Session held virtually from 21 April 2022 to 13 May 2022