

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION No. 22 OF 2012

IN THE MATTER OF ARTICLES 22, 70 AND 258 OF THE CONSTITUTION OF KENYA 2010
IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 19, 20, 22, 27, 35, 42, 43, 44, 70 and 258 OF THE
CONSTITUTION OF KENYA 2010
AND IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 2(5) &(6) ,10, 69 AND 73
OF THE CONSTITUTION OF KENYA 2010

BETWEEN

MOHAMED ALI BAADI AND
THE OTHER PETITIONERS AS NAMED IN THE SCHEDULE
ANNEXED.....PETITIONERS

AND

THE HON. ATTORNEY GENERAL1ST
RESPONDENT
THE MINISTER FOR ENVIRONMENT AND
NATURAL RESOURCES.....2ND
RESPONDENT
THE MINISTER FOR LANDS.....3RD
RESPONDENT
THE MINISTER FOR INFORMATION AND COMMUNICATION.....4TH
RESPONDENT
THE MINISTER FOR TRANSPORT.....5TH
RESPONDENT
THE MINISTER FOR ROADS6TH
RESPONDENT
THE MINISTER FOR PUBLIC WORKS.....7TH
RESPONDENT
THE MINISTER FOR ENERGY.....8TH
RESPONDENT
KENYA PORTS AUTHORITY.....9TH
RESPONDENT
NATIONAL ENVIRONMENT AND MANAGEMENT AUTHORITY.....10TH
RESPONDENT

AND

1. THE GLOBAL INITIATIVE FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS
2. THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW
.....*AMICI CURIAE*

AMICUS CURIAE INTERVENTION

(Articles 22(1),(2) & (3), 23(1) & (3) & 165(1) & (3) of the Constitution of Kenya, 2010, Rules 20 and 21 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006

I. Introduction and Interests of Amici

1. The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR) and The Center for International Environmental Law (CIEL) respectfully seek leave to intervene as *amici curiae* in the above-referenced case.

2. The *Amici* are non-profit, non-governmental organizations with a shared interest in the adjudication of economic, social and cultural rights and environmental law with experience in litigating such rights before domestic and international fora. The amici have provided assistance to many domestic courts and international human rights bodies in interpreting and applying social and economic rights, particularly the right to adequate housing, and environmental law.

3. The *Amici* seek to assist the Court in the present case with the application of relevant international law, including as a means of interpreting the Constitutional provisions relied upon by the Petitioners. *Amici*'s arguments demonstrate that the Lamu Port – Southern Sudan – Ethiopia Transport project as planned would violate the Constitution of the Republic of Kenya as well as international law binding upon the Republic of Kenya.

II. International law binding upon the Republic of Kenya must be observed in its own right as well as used to interpret national Constitutional and legislative provisions.

4. The Vienna Convention on the Law of Treaties requires that “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”¹ and that “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”²

¹ Vienna Convention on the Law of Treaties, Article 26, 1155 U.N.T.S. 331, entered into force 27 January 1980.

² *Id.* at para. 27.

5. The United Nations General Assembly has stated that “States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations.”³

6. Relevant international treaties applicable to the present case include the International Covenant on Economic, Social and Cultural Rights which the Republic of Kenya ratified on 3 January 1976, the African Charter on Human and Peoples’ Rights which the Republic of Kenya ratified on 23 January 1992, and the UNESCO Convention for the Protection of the World Cultural and Natural Heritage which the Republic of Kenya ratified on 5 June 1991. Other UN pronouncements, including General Assembly and Human Rights Council resolutions, are also relevant and are discussed below.

7. The Committee on Economic, Social and Cultural Rights, mandated to interpret and monitor compliance with the International Covenant on Economic, Social and Cultural Rights, has adopted General Comment No. 9 which states that “although the precise method by which Covenant rights are given effect in national law is a matter for each State Party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party.”⁴ The Committee also emphasized that “courts should take account of Covenant rights where this is necessary to ensure that the State’s conduct is consistent with its obligations under the Covenant.”

8. The obligations under the Covenant include the obligation to respect rights by refraining from interfering with the present enjoyment of the substance of rights, the obligation to protect the right by ensuring that others actors including non-state actors and other states don’t violate rights, and the obligation to fulfill the right by providing information on the content of the rights and providing the substance of the right for those in need.

³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by United National General Assembly, resolution 60/147, UN Doc. A/RES/60/147 (21 March 2005).

⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 9, The domestic application of the Covenant (Nineteenth session, 1998), para. 5, U.N. Doc. E/C.12/1998/24 (1998), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 54 (2003).

9. Finally, the Constitution of the Republic of Kenya states that “The general rules of international law shall form part of the law of Kenya”⁵ and that “Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”⁶ Indeed, in *Susan Waithera Kariuki & 4 others v. Town Clerk, Nairobi City Council & 2 others* and in *Ibrahim Sangor Osman et al. v. The Hon. Minister of State for Provincial Administration & Internal Security et al.* the High Court of Kenya at Nairobi and the High Court of Kenya at Embu, respectively, relied on these Constitutional provisions to resort to international law in dealing with cases involving fundamental social rights.⁷

10. Consequently, international law binding upon the Republic of Kenya must be enforced by this Court in the present case and national constitutional provisions and legislation must be interpreted consistently with Kenya’s international legal obligations including those related to human rights, environmental law and indigenous peoples’ rights referenced in the present case.

III. As currently planned and designed, the Lamu Port – Southern Sudan – Ethiopia Transport project, also known as LAPSSET (the Proposed Project) would violate the right to development.

11. The right to development is enshrined as an “inalienable human right” in the United Nations Declaration on the Right to Development. Importantly, the right to development requires that “the human person [be] the central subject of development and should be the active participant and beneficiary of the right to development.”⁸ Indeed, the Right to Development requires that national development policies aim at the constant improvement of the well-being of the entire population and requires the “active, free and meaningful participation” of affected persons in the planning, design, implementation and monitoring of development.⁹

12. The Right to Development is augmented by the human rights-based approach to development. The human-rights based approach to development ensures that: (1) development schemes are expressly linked

⁵ Constitution of the Republic of Kenya, 2010, Article 2(5).

⁶ Id. at Article 2(6).

⁷ High Court of Kenya at Nairobi, *Susan Waithera Kariuki & 4 others v. Town Clerk, Nairobi City Council & 2 others*, Petition Case 66 of 2010 [2011] eKLR; High Court of Kenya at Embu, *Ibrahim Sangor Osman et al. v. The Hon. Minister of State for Provincial Administration & Internal Security et al.*, Constitutional Petition No. 2 of 2011 [2011] eKLR.

⁸ United Nations Declaration on the Right to Development, Art. 2(1).

⁹ See, United Nations Declaration on the Right to Development, Art. 2(3).

to human rights standards, including economic, social and cultural rights standards such as the rights to adequate housing, water, sanitation, food, health and education; (2) that there is accountability when those standards are not met; (3) that those affected by development are empowered by virtue of being rights-holders and being informed of their rights; (4) that affected rights-holders have a right to actively, freely and meaningfully participate in decisions related to the planning, design, implementation and monitoring of development; and (5) that development prioritize the needs of marginalized groups and communities.¹⁰

13. To date, the right of active, free and meaningful participation of rights-holders affected by the Proposed Project, including those threatened by displacement and those who would remain living near the project site, has been violated. Contributing to this violation is the lack of information made available to affected rights-holders, as that information is required for meaningful participation.

14. Indeed, according to the United Nations Office of the High Commissioner for Human Rights, “Rights-based approaches give due attention to issues of accessibility, including access to development processes, institutions, information and redress or complaints mechanisms.”¹¹

15. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, the African Commission on Human and Peoples’ Rights elaborated upon the content of the right to development in a Kenyan context. There, the Commission held that the Republic of Kenya “is obligated to ensure that the [affected community is] not left out of the development process or benefits”¹² and made clear that “closely allied with the right to development is the issue of participation” and that “the State has a duty to actively consult with said community” and that “this duty requires the State to both accept and disseminate information, and entails constant communication between the parties” and that “these consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.”¹³

¹⁰ See, e.g., Office of the United Nations High Commissioner for Human Rights and United Nations Development Programme.

¹¹ United Nations Office of the High Commissioner for Human Rights.

¹² African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003 (Decision on the Merits, 2010) at. para. 298.

¹³ *Id.* at para. 289..

16. The African Commission expressly referred to the United Nations Declaration on the Right to Development in reaffirming that that right includes “active, free and meaningful participation” and that development should result in empowering affected communities.¹⁴ The Commission went on to find a violation of Article 22 of the African Charter (right to economic, social and cultural development) since the “consultations failed to fulfill the African Commission’s standards of consultations in a form appropriate to the circumstances”, as the affected community was “informed of the project as a *fait accompli* and not given an opportunity to shape the policies or their role in [the development project].”¹⁵

17. The Commission went on to state that “it was incumbent upon [the Republic of Kenya] to conduct the consultation process in such a manner that allowed the representatives [of the affected community] to be fully informed of the [project], and participate in developing parts crucial to the life of the community.”¹⁶

18. As the facts alleged by Petitioners demonstrate, in the present case the Respondents have violated the right of the Petitioners to actively, freely and meaningfully participate in the Proposed Project and they have violated the right of access to information necessary for meaningful and informed participation.

IV. As currently planned and designed, the Proposed Project would cause environmental degradation resulting in violations of fundamental human rights in contravention of the Constitution of the Republic of Kenya as well as international law binding upon the Republic of Kenya including the rights to adequate housing, water, food, and highest attainable standard of health.

19. The Human Rights Council (Council) adopted a resolution on human rights and the environment at its 16th session in March 2011.¹⁷ In its resolution, the Council identifies several key components of the interaction between human rights and the environment, including the following: sustainable development and the protection of the environment can contribute to human well-being and to the enjoyment of human rights; and environmental damage can have negative implications, both

¹⁴ *Id.* at para. 281.

¹⁵ *Id.* at para. 281.

¹⁶ *Id.* at para. 282.

¹⁷ Human Rights Council resolution 16/11, UN Doc. A/HRC/RES/16/11 (March 2011).

direct and indirect, for the effective enjoyment of human rights. In its resolution, the Council also requested the Office of the High Commissioner for Human Rights (OHCHR) to conduct a detailed analytical study on the relationship between human rights and the environment.

20. The OHCHR study on human rights and environment was concluded in December 2011. Among its conclusions, it notes that, “environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights. In this connection, the human rights treaty bodies have addressed the environmental dimensions of the rights protected under their respective treaties, for example, in general comments, decisions concerning individual petitions and concluding observations. Similarly, regional human rights monitoring bodies and courts have clarified the environmental dimensions of protected rights, including the rights to life, health, property, private and family life and access to information.”¹⁸

21. The right to a healthy environment has particular implications in the African continent, by virtue of its explicit recognition in the African Charter on Human and Peoples’ Rights: “All peoples shall have the right to a general satisfactory environment favorable to their development.” This right was interpreted and applied by the African Commission in the case *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*¹⁹ (Ogoni case), which involved major investments in the oil and gas sector in Nigeria that resulted in significant impacts on the rights of the Ogoni people. In the Ogoni case, the African Commission held that:

The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.²⁰

22. The African Commission also observed that:

¹⁸ Office of the High Commissioner for Human Rights, Analytical Study on the Relationship between Human Rights and the Environment, UN Doc. A/HRC/19/34 (16 December 2011).

¹⁹ African Commission on Human and Peoples’ Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, judgement of 27 May 2002.

²⁰ *Id.* at para. 52.

Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.”²¹

23. The African Commission has reaffirmed its jurisprudential line in the *Endorois* case, where it adopted a three-part test to examining the justifiability of any restrictions on the right to property, including effective participation, benefit-sharing, and prior environmental and social impact assessments. In the *Endorois* case, the African Commission concluded that the absence of a prior environmental and social impact assessment was tantamount to the violation of the right to property guaranteed in the African Charter.²²

24. Specific social rights also have environmental components. One such right is the right to adequate housing which is enshrined in Article 43 of the Constitution of the Republic of Kenya and in Article 11 of the International Covenant on Economic, Social and Cultural Rights. The right to adequate housing has also been held to be implicit in Articles 14, 16 and 18(1) of the African Charter on Human and Peoples’ Rights.²³

25. General Comment No. 4 on the right to adequate housing requires that housing be, *inter alia*, habitable and in an adequate location. The habitability element includes protection from environmental hazards that may have a detrimental impact on health while the adequate location element requires that housing not be “in immediate proximity to pollution sources that threaten the right to health of the inhabitants....”²⁴

26. On 3 August 2010, the United Nations General Assembly adopted Resolution 64/292 on the human right to water and sanitation, in which it

²¹ *Id.* at para. 53.

²² *See, id.* at para. 228.

²³ *See*, African Commission on Human and Peoples’ Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, judgement of 27 May 2002.

²⁴ Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003) at para. 8.

recognized “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”²⁵ This action was followed by the United Nations Human Rights Council which adopted resolution 15/9 on 6 October 2010, which expressly tied the right to water and sanitation to specific human rights treaty frameworks including in particular the International Covenant on Economic, Social and Cultural Rights.

27. The Committee on Economic, Social and Cultural Rights, mandated to monitor compliance with the International Covenant on Economic, Social and Cultural Rights, adopted General Comment No. 15 which states in relevant part that:

The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.²⁶

28. General Comment No. 15 also states that the human right to water requires that States Parties “Prevent threats to health from unsafe and toxic water conditions” including by ensuring “that natural water resources are protected from contamination by harmful substances.”²⁷ To that end, the ICESCR also imposes the obligation that “Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.”²⁸

29. The right to food is guaranteed by Article 43 of the Constitution of the Republic of Kenya, Article 11 of the ICESCR, and implicitly in Articles 4, 16 and 22 of the African Charter.²⁹

²⁵ United Nations General Assembly resolution 64/292, The Human Right to Water and Sanitation, adopted 3 August 2010.

²⁶ Committee on Economic, Social and Cultural Rights, General Comment 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2002), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 105 (2003), para. 10.

²⁷ *Id.* at para. 8.

²⁸ *Id.* at para. 48.

²⁹ See, African Commission on Human and Peoples’ Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, judgement of 27 May 2002.

30. In its General Comment No. 12 on the right to food, the Committee on Economic, Social and Cultural Rights has stated that food must be sustainable and that sustainability is “intrinsicly linked to the notion of adequate food or food security, implying food being accessible for both present and future generations.”³⁰ General Comment No. 12 also states that the right to food requires availability of food, which in part “refers to the possibilities either for feeding oneself directly from productive land or other natural resources.”³¹

31. Finally, the human rights to housing, water, sanitation and food all closely relate to and affect the right to the highest attainable standard of health, which is guaranteed by Article 43 of the Constitution of the Republic of Kenya, Article 12 of the ICESCR, and Article 16 of the African Charter.

32. In its General Comment No. 14 on the right to health, the Committee on Economic, Social and Cultural Rights makes clear that the right to health is:

An inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels.³²

33. General Comment No. 14 also states that the right to health requires that States Parties prevent and reduce “detrimental environmental conditions that directly or indirectly impact upon human health” and that there exists “a strong presumption that retrogressive measures taken in relation to the right to health are not permissible [and] if any deliberately retrogressive measures are taken, the State Party has

³⁰ Committee on Economic, Social and Cultural Rights, General Comment 12, Right to adequate food (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 62 (2003) at para. 7.

³¹ *Id.* at para. 12.

³² Committee on Economic, Social and Cultural Rights, General Comment 14, The right to the highest attainable standard of health (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003) at para. 11.

the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant.”³³

34. The above international human rights content should be taken into consideration and applied by the Court as the facts alleged by the Petitioners demonstrate a substantial risk of the Proposed Project violating the human rights to housing, water, sanitation, food and the highest attainable standard of health as enshrined in the Constitution of the Republic of Kenya as well as international human rights treaties which the Republic of Kenya is legally obligated to respect, protect and fulfill.

35. Furthermore, the Court should highlight that without thorough and objective environmental and social impact studies, including eviction impact assessments, conducted in a participatory and transparent manner and made available to affected individuals, groups and communities including Petitioners, the associated right to information and right to active, free and meaningful participation has been and will be violated.

V. As currently planned and designed, the Proposed Project would result in unlawful forced eviction in contravention of the Constitution of the Republic of Kenya as well as international law binding upon the Republic of Kenya.

36. International law binding upon the Republic of Kenya defines and prohibits forced eviction, and such law must also be relied upon to define and interpret the Constitution of the Republic of Kenya, including regarding the definition and interpretation of the right to adequate housing enshrined in Article 43 of the Constitution of the Republic of Kenya.

37. The international community has repeatedly affirmed that “forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing.”³⁴

38. The Republic of Kenya ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 3 January 1976 and consequently became legally bound to respect, protect and fulfill the

³³ *Id.* at para. 32.

³⁴ Commission on Human Rights, Resolution 1993/77, UN Doc. (10 March 1993); Commission on Human Rights, Resolution 2004/28, UN Doc. (16 April 2004).

rights therein, including the right to adequate housing and the related prohibition of forced eviction, as guaranteed by Article 11 of the ICESCR.

39. The UN Committee on Economic, Social and Cultural Rights (CESCR) provides a detailed analysis of the prohibition on forced eviction under international law. Forced eviction is defined by the Committee as:

The permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.³⁵

40. Furthermore, the CESCR has clarified that “notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups.”³⁶ This requirement applies to those living in informal settlements.³⁷

41. Additionally, for evictions to be justified under the ICESCR, they must (1) only be carried out in the *most exceptional circumstances*;³⁸ (2) after *all feasible alternatives* to eviction that address the exceptional circumstance are explored *in consultation with the affected community*;³⁹ and (3) after due process protections are afforded the individual, group or community.⁴⁰ As the facts alleged by Petitioners indicate, none of these legal tests have been met by the Respondents, including in particular the requirement of consultation with the affected community.

³⁵ Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), para. 4, U.N. Doc. E/1998/22, annex IV at 113 (1998), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003).

³⁶ Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003) at para. 8(a).

³⁷ See *id.* at para. 8(a).

³⁸ *Id.* at para. 18.

³⁹ Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003) at para. 14.

⁴⁰ *Id.* at para. 16 (emphasis added).

42. In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, the African Commission reaffirmed these legal obligations, and in particular that decisions related to eviction and displacement required the effective participation of the affected community. They also held that the African Charter required that the affected community benefit from the development project and that prior environmental and social impact assessments be carried out.⁴¹

43. The ICESCR imposes an additional obligation upon states to ensure that no form of discrimination is involved in any eviction. Nor should an eviction render persons homeless or vulnerable to other human rights violations. “Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.”⁴²

44. In its Concluding Observations on the Republic of Kenya in 2008, the CESCR referred to the above-referenced standards, recommending that the Republic of Kenya:

Consider including a provision in its new draft Constitution to ensure that evictions are only used as a last resort, adopt legislation or guidelines strictly defining the circumstances and safeguards under which evictions must take place, in accordance with the Committee’s general comment No. 7 (1997) on forced evictions, and ensure that each victim of forced evictions is provided with adequate alternative housing or compensation and that he or she has access to an effective remedy.⁴³

45. The International Covenant on Civil and Political Rights (ICCPR), ratified by the Republic of Kenya on 23 March 1976, also prohibits forced eviction under Article 17 (prohibition on arbitrary or unlawful interference with the home). Indeed, the Human Rights Committee, which monitors compliance of the ICCPR, addressed forced evictions in

⁴¹ African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003 (Decision on the Merits, 2010) at para. 60.

⁴² Committee on Economic, Social and Cultural Rights, General Comment 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 45 (2003) at paras. 13, 16.

⁴³ Committee on Economic, Social and Cultural Rights, *Concluding Observations: Kenya*, UN Doc. E/C.12/KEN/CO/1 (1 December 2008) at para. 31.

Kenya in 2005, finding that forced eviction “arbitrarily interferes with the Covenant rights of the victims of such evictions, especially their rights under article 17 of the Covenant” and that the Government “should develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made.”⁴⁴

46. With respect to the African Charter on Human and Peoples’ Rights (African Charter), ratified by the Republic of Kenya on 23 January 1992, the African Commission on Human and Peoples’ Rights (African Commission) relied on the substantive content of the right to adequate housing and the prohibition of forced eviction under the ICESCR to interpret provisions of the African Charter. In doing so, the African Commission held that there is an implied right to adequate housing and related prohibition on forced eviction in Articles 14 (right to property), 16 (right to enjoy the best attainable standard of physical and mental health) and 18(1) (right of the family to be protected by the State) of the African Charter.⁴⁵ The African Commission subsequently held, again relying on the ICESCR jurisprudence, that evictions can only occur in the most exceptional circumstances and after all feasible alternatives are explored with the affected community.⁴⁶

47. Finally, displacement and forced eviction often result in violations of other human rights, including the right to education (Article 43 of the Constitution of the Republic of Kenya; Article 13 of the ICESCR; and Article 17 of the African Charter), the right to an adequate standard of living (Article 11 of the ICESCR), the right to food (Article 43 of the Constitution of the Republic of Kenya, Article 11 of the ICESCR, and implicitly in Articles 4, 16 and 22 of the African Charter), and the right to the highest attainable standard of health (Article 43 of the Constitution of the Republic of Kenya, Article 12 of the ICESCR, and Article 16 of the African Charter), by displacing persons from areas where they have access to the substantive content of such rights as well as by environmental damage resulting from development projects.

48. In order to comply with the above-mentioned legal requirements, the Republic of Kenya should abide by the above referenced international

⁴⁴ Human Rights Committee, Concluding Observations

⁴⁵ African Commission on Human and Peoples’ Rights, Decision 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria (27 May 2002) at para. 60.

⁴⁶ African Commission on Human and Peoples’ Rights, Communication 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, at para. 200.

law as well as the United Nations Principles and Guidelines on Development Induced Evictions and Displacement. These Principles and Guidelines articulate processes before, during and after eviction that must occur so as to not contravene international law. They include the requirement that “States should explore fully all possible alternatives to evictions” and that “All potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider”⁴⁷ and that “The entire resettlement process should be carried out with full participation by and with affected persons, groups and communities.”⁴⁸

49. Finally, the required social impact assessments should including eviction impact assessments that take into account the full costs of eviction including in particular the costs borne by those evicted.⁴⁹

VI. As currently planned and designed, the Proposed Project would result in harm to indigenous or tribal peoples in contravention of the Constitution of the Republic of Kenya as well as international law binding upon the Republic of Kenya.

50. International human rights law has developed certain guarantees to ensure protection to the rights of indigenous and tribal peoples affected by investment and development projects affecting their lands, resources and territories. In the African context, these human rights guarantees have been reaffirmed by the African Commission on Human and Peoples’ Rights in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (*Endorois case*).

51. In the *Endorois case*, the African Commission emphasized that the Charter recognizes the rights of peoples.⁵⁰ The African Commission also noted that normatively, the African Charter is an innovative and unique

⁴⁷ United Nations Principles and Guidelines on Development Induced Evictions and Displacement, UN Doc. A/HRC/4/18 (5 February 2007) at para. 38.

⁴⁸ *Id.* at para. 56(i).

⁴⁹ For more information on eviction impact assessments, see UN Habitat and Office of the High Commissioner for Human Rights, *Losing Your Home: Assessing the Impact of Eviction*, Nairobi: UN Habitat 2011.

⁵⁰ African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003 (Decision on the Merits, 2010) at. para. 155.

human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of “peoples.”⁵¹

52. The African Commission decided the *Endorois* case in harmony with earlier developments in the Inter-American human rights system. Particularly since the landmark *Awas Tingni v. Nicaragua* case decided by the Inter-American Court of Human Rights, indigenous peoples are recognized as having a right to property over their lands and territories which they have traditionally possessed and utilized. The Inter-American Court also decided the *Saramaka People v. Suriname*, which effectively utilizes systemic interpretation techniques to secure coherence among various human rights treaties. The *Saramaka* case also provides a framework of safeguards that directly relate to investment and development projects, which has been endorsed and applied by the African Commission in the *Endorois* case.

53. Systemic interpretation techniques are particularly relevant in regards to the Proposed Project because they call for observance of rights included in international human rights instruments. International Labor Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries of (ILO Convention No. 169), for example, includes standards of protection for indigenous peoples. ILO Convention No. 169 provides that, “special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labor, cultures and environment of the peoples concerned.”⁵² More specifically, ILO Convention No. 169 establishes that States Parties, “shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities”⁵³ and that “Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.”⁵⁴

54. Since Kenya is not a Party to ILO Convention No. 169, these standards of protection are not directly applicable to the Proposed Project. Nevertheless, they are relevant to the interpretation and application of the protection of the right to property recognized in the African Charter by virtue of systemic interpretation techniques that have informed the

⁵¹ *Id.* at para. 134.

⁵² ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, Art. 4.1 (adopted 27 June 1989)..

⁵³ *Id.* at Art. 7.

⁵⁴ *Id.*

jurisprudence of the African Commission and consequently should be considered as persuasive authority.

55. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in 2007, reinforces the rights of the Lamu people to the protection of their lands and environment. UNDRIP recognizes that indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”⁵⁵ In addition, UNDRIP provides that, “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.”⁵⁶

56. The duty of Kenya to adopt special measures of protection to the rights of the Lamu people, including in particular their rights over their lands and environment, is also rooted in the right of self determination recognized in Common Article 1 the ICCPR and ICESCR. According to the right of self determination, the Lamu people have a right to the recognition and protection of their ancestral lands and cultures, including the right to be adequately consulted as well as to offer or withhold consent regarding the approval of any investment or development project affecting their lands, culture and environment.

57. The African Commission in the *Endorois* case noted that a “Government must consult with respect to indigenous peoples especially when dealing with sensitive issues as land.”⁵⁷ The African Commission expressed, “the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”⁵⁸ Given the significant impact of the Proposed Project on the Lamu territory, by failing to consult and to obtain the consent of the Lamu people and by failing to acquire their free, prior and informed consent, the State has breached the standards of protection established in the African Charter.

⁵⁵ UN Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (adopted 13 September 2007) at Art. 29.

⁵⁶ *Id.* at Art. 32.2.

⁵⁷ African Commission on Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003 (Decision on the Merits, 2010) at. para. 281.

⁵⁸ *Id.*

VII. As currently planned and designed, the Proposed Project would result in harm to cultural and natural heritage in contravention of the Constitution of the Republic of Kenya as well as international law binding upon the Republic of Kenya.

58. The Proposed Project would severely disrupt the natural and cultural balance of Lamu Old Town, which is protected under the UNESCO Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention). In light of its outstanding cultural and natural value, Lamu Old Town is included in the World Heritage List and thus protected by the World Heritage Convention. Kenya is thus obliged “not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage” of the Lamu Island.⁵⁹

59. The World Heritage Convention establishes that State Parties have a duty to ensure the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage found within its territory.⁶⁰ This obligation incumbent upon Kenya as a State Party to the World Heritage Convention is particularly relevant to sites listed in the World Heritage List, such as the Lamu Old Town. In addition, Kenya is obliged to ensure that effective and active measures are taken for the protection, conservation and presentation of the cultural and natural heritage situated on its territory, including measures “to integrate the protection of that heritage into comprehensive planning programmes.”⁶¹

60. According to UNESCO, “Lamu Old Town is the oldest and best-preserved Swahili settlement in East Africa, retaining its traditional functions. Built in coral stone and mangrove timber, the town is characterized by the simplicity of structural forms enriched by such features as inner courtyards, verandas, and elaborately carved wooden doors. Lamu has hosted major Muslim religious festivals since the 19th century, and has become a significant centre for the study of Islamic and Swahili cultures.”⁶²

61. In order to be listed and receive protection under the World Heritage Convention, a site must satisfy stringent selection criteria that

⁵⁹ UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Art. 6.3 (adopted on 16 November 1972).

⁶⁰ *Id.* at Art. 4.

⁶¹ *Id.* at Art. 5.1.

⁶² UNESCO website, <http://whc.unesco.org/en/list/1055> (accessed 6 February 2012).

highlight its outstanding universal value. These criteria include cultural dimensions, such as sites that exhibit an important interchange of human values, bear a unique or exceptional testimony to a cultural tradition, or demonstrate an outstanding example of a landscape or traditional human settlement. The criteria also include natural dimensions, such as natural areas of universal beauty from the point of view of science, conservation or natural beauty.

61. It is for each State Party to identify and delineate the various cultural and natural properties of sites within their territory, which means that the Lamu Old Town has been listed as a result of analysis and evaluation undertaken by the Government of Kenya. Accordingly, the approval of the Proposed Project would manifestly contradict Kenya's determinations regarding the outstanding cultural and natural value of Lamu Old Town, as well as Kenya's international commitments regarding the conservation and preservation of Lamu Old Town.

62. Finally, the World Heritage Convention's preamble considers that the "deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world."⁶³ In this light, Kenya bears a solemn responsibility to the international community not to allow the cultural and natural heritage of Lamu Old Town to be undermined by the Proposed Project.

VIII. Conclusion

63. Based on the foregoing, Amici request that the Court support the relief sought by the Petitioners.

**DATED AT DULUTH, MN AND WASHINGTON, DC, U.S.A.
THIS ____ DAY OF February 2012**

**Bret Thiele, Esq.
Global Initiative for Economic, Social and Cultural Rights (GI-ESCR)**

and

**Marcos Orellana, Esq.
Center for International Environmental Law (CIEL)**

(ADVOCATES FOR THE AMICI)

⁶³ UNESCO Convention for the Protection of the World Cultural and Natural Heritage, Preamble (adopted on 16 November 1972).

AMICI:

THE GLOBAL INITIATIVE FOR
ECONOMIC, SOCIAL AND CULTURAL RIGHTS (GI-ESCR)
8 N. 2ND AVENUE EAST
SUITE 208
DULUTH, MN 55802
U.S.A.

THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW
(CIEL)
1350 CONNECTICUT AVENUE, NW
SUITE 1100
WASHINGTON, DC 20036
U.S.A.

TO BE SERVED UPON:-

The Honourable Attorney General

Attorney General's Chambers

State Law Offices

NAIROBI

The Minister, Ministry of Lands

Ardhi House, Ngong Road

P.O. Box 30450-00100

NAIROBI

The Minister, Ministry of Information and Communication

Teleposta Towers

Kenyatta Avenue

P.O. Box 30025

NAIROBI

The Minister, Ministry of Transport

Transcom House

Ngong Road

P.O. Box 52692-00200

NAIROBI

The Minister, Ministry of Roads and Ministry of Public Works

Public Works Building, Ngong Road

P.O. Box 30260 – 00100

NAIROBI

The Minister, Ministry for Energy

Nyayo House, 23rd Floor

Kenyatta Avenue

NAIROBI

Kenya Ports Authority

P.O. Box 95009-80104

MOMBASA

National Environment and Management Authority

Popo Road

Off Mombasa Road

P.O. Box 67839 – 00200

NAIROBI