The "Water Tower" in East Africa. Source © Sande Murunga/ CIFOR, 2017

The Rights of the Ogiek as an Indigenous Group:

The Matter of African Commission on Human and Peoples' Rights v. Republic of Kenya

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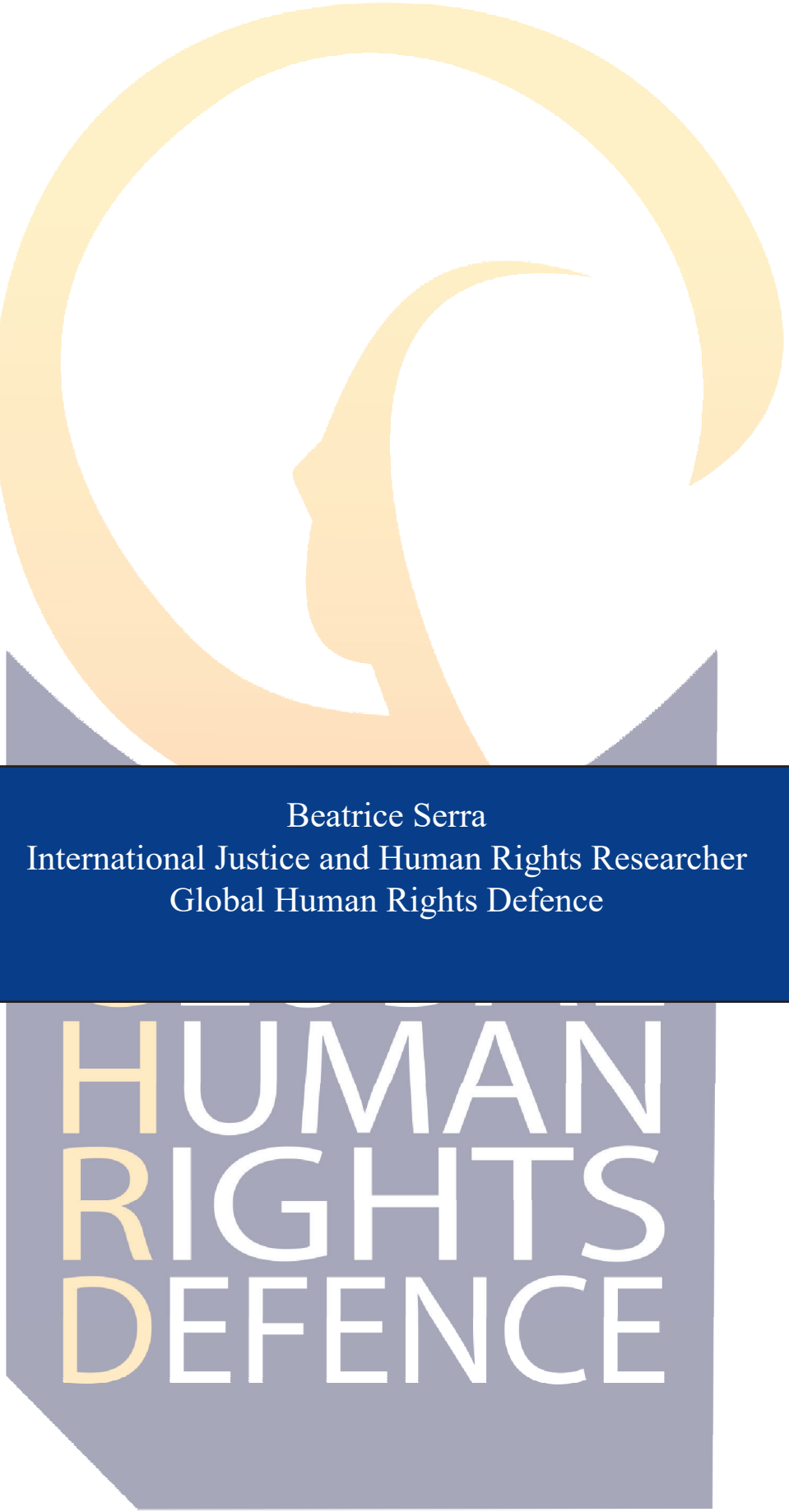

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ABBREVIATION LIST:

AICHR - Inter-American Commission on Human Rights

ICC - International Criminal Court

ILO - International Labour Organisation

NGO - Non-Governmental Organisation

OAU - Organisation of African Unity

UN - United Nations

UNDRIP - United Nations Declaration on the Rights of Indigenous Peoples

Introduction

As individuals, indigenous peoples are entitled to the rights enshrined in the Universal Declaration of Human Rights. In addition, other international and regional instruments, such as the UN Declaration on the Rights of Indigenous Peoples and the African Charter, came into existence to guarantee indigenous groups a wide range of collective rights able to preserve and protect their unique traditions and cultures. Decades of colonization and oppression required the development of a legal framework to not only uphold the rights of individuals who have been violently and unlawfully evicted from their lands, but also to fight structural discrimination and give dignity to indigenous communities. (Amnesty International Australia, n.d.) The world hosts 476 million indigenous people, each of which have different aspirations, languages, and traditions. Yet, indigenous communities have one common claim: the rights over their ancestral land. (Amnesty International, n.d.) Indigenous people are, in fact, distinguishable from other groups or minorities for their unique and deep connection to traditional lands, on which their very existence and self-driven development depend on. The identity of indigenous peoples is found in their relationship with traditional lands and the management and usage of natural resources as a basis of their livelihoods. (IFAD, 2018)

Over the years, the exploitation over land and resources by governments led to the unrecognition, and thus the forced evictions, of thousands of indigenous peoples. The eviction of the Ogiek ethnic group from the Mau Forest by the government of Kenya is one such case that illustrate the common challenges faced by the indigenous communities. After more than 20 years of forced displacement with the pretext of biodiversity preservations, on July 12, 2012, the African Commission filed a case before the African Court for the alleged human rights violations committed by the Kenyan government. The case was filed following the delivering of a 30 days eviction notice demanding the Ogiek to leave the Mau Forest. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2017; Okata, 2021)

The analysis developed by the African Court in the judgement on merits extensively refers to the right of self-identification as the cornerstone principle on which indigenous rights originate and take form. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2017) The refusal of formulating a definition of 'indigenous group' was, indeed, a conscious decision taken by international law, and followed by regional and domestic legal frameworks, to put emphasis on the right of individuals and groups to determine their own identity. (Göcke, 2017) The right to self-determination, as the right to freely determine their political status and freely pursue their economic, social and cultural development, is then invoked for the protection of other fundamental rights, including the rights to lands, territories and natural resources, as well as cultural identity, ways of life and political organisation and representation of indigenous communities. (Comisión Interamericana De Derechos Humanos, IWGIA, 2021)

While the judgement on merits was delivered in 2017, the African Court reserved itself the right to acknowledge on reparations in a separate judgement issued on June 23rd, 2022. Recognising the vulnerability to discrimination, forced assimilation, exploitation, exclusion and persecution to which the Ogiek group has been exposed over the years, the African Court ruled in favor of a pecuniary compensation while deeming indispensable a non-pecuniary compensation to restitute the Ogieks not only their dignity as a group, but also to fight against structural discrimination as the main cause of the marginalization, stigmatization and extreme poverty faced by indigenous peoples. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2022)

The African Human Right Protection System

As the youngest judicial regional human rights system, the African System, inspired by the model of the Inter-American System and, mostly, the European System, has its main purpose entrenched in protecting "…individuals and communities against conditions that threaten their well-being" through established enforcement human rights mechanisms. (A Dersso, 2008; International Justice Resource Center, n.d.A) Three main instruments are designed as responsible for promoting, monitoring and assessing States' compliance with human rights standards: the founding document, the African Charter on Human and Peoples' Rights (the African Charter), enforced through the African Commission on Human and Peoples' Rights (African Commission), and the African Court on Human Peoples' Rights (African Court). (Manrique Gil, Bandone, Calvieri, 2013)

1.1 The Drafting of the African Charter on Human and Peoples' Rights

The African Charter is the founding instrument of the African System, adopted on June 27th, 1981, and entered into force on October 21, 1986. Nevertheless, the idea of establishing an African human rights protection system dates back to the first Congress of African Jurists, held in Lagos, Nigeria in 1961, during which the declaration known as the "Law of Lagos'' was adopted. Since then, the purpose was the drafting of a founding treaty establishing a human rights court and commission. (PULP, 2016) However, neither in that occasion nor for the 1963 Charter establishing the Organisation of African Unity (OAU), the African system took concrete steps for the creation of a comprehensive human rights framework. At that time, the OAU main focus was almost entirely on decolonization, political and economic independence, and the eradication of apartheid and racial discrimination, while individual human rights abuses perpetrated by African authoritarian leaders were not a major priority. (African Commission, n.d.B)

For almost two decades, different groups, including media, the Church, inter-governmental and non-government organisations (NGOs) exposed grave human rights violations perpetrated within African countries as a way to pressure the OAU to uphold "its primary goal of restoring dignity to the humiliated African peoples" during colonialism and slavery. Not even the 1979 UN sponsored Monrovia Seminar on the Establishment of Regional Commissions on Human Rights with Special Reference to Africa was successful in this regard. (African Commission, n.d.B) Only later in 1979, a conference welcoming 20 African experts held in Dakar, Senegal, provided the preliminary draft of a human rights charter for Africa. Despite several African states hostile to the creation of a regional instrument threatened the project, the crucial role played by the President of The Gambia in convening two Ministerial Conferences in Banjul, The Gambia, successfully led to the completion of the draft Charter and its submission to the OAU Assembly. It was on June 28, 1981, in Nairobi, Kenya, that the African Charter - also referred to as the "Banjul Charter" - was adopted by the OAU Assembly. (PULP, 2016) By 1999, all OAU members had ratified the Charter, while the newest African state,

South Sudan - which gained its independence from the north in 2011 - ratified it on October 23, 2013. (African Commission, n.d.A; Manrique Gil, Bandone, Calvieri, 2013) As of today, the Charter is divided into three parts: part one (Articles 1 to 29) recognizes universal civil and political rights, as well as economic, social and cultural rights of individuals and groups; part two (Articles 30 to 63) establishes the African Commission and defines its structure; finally, part three (Articles 64 to 68) contains general procedural provisions. (A Dersso, 2008)

1.2 The African Commission for Human and People's Rights

Established pursuant to Article 30 of the African Charter, the African Commission on Human and Peoples' Rights became operational on October 21st, 1986, as the organ responsible for monitoring and protecting humans' and peoples' rights as set out in the African Charter. Composed by 11 Commissioners – elected in their individual capacity and each being a national of a different Member State - the African Commission holds two ordinary sessions every year – extraordinary session may also be held on request of the Chairperson of the Commission or a majority of Commissioners – during which it (1) reviews reports that member states are required to submit every other year on the human rights situation and issue conclusion on the implementation of the African Charter; (2) considers reports submitted by members of the Commission, Special or Subsidiary Mechanisms – Special Rapporteurs, Committees, and Working Groups – and those concerning country visits or "Special Missions". Lastly, the African Commission can also submit cases to the African Court. (African Charter, Articles 31 and 32; Open Society Justice Initiative, 2013; International Justice Resource Center, n.d.B)

In fulfilling its mandate, the Commission has also the duty to receive complaints submitted by Member States, individuals, and NGOs, alleging that a State party to the African Charter has violated one or more of the rights contained therein and release recommendations deciding on the merits if the complaint is declared admissible. Although such recommendations are not legally binding on the States concerned, the Commission's findings have been oftentimes implemented making the complaint mechanisms an indispensable tool in addressing matters that could not be solved at the national level. Indeed, the requirement of "exhaustion of domestic remedy" must be fulfilled to determine whether a case is admissible before the African Commission. (PULP, 2016; African Commission Communication Procedure, n.d.)

Lastly, the Commission's responsibility of issuing general comments, guidelines and principles interpreting African human rights standards in accordance with the United Nations and African instruments, have inspired and influenced member states. Over years, national legislations have been harmonised with the Charter and the Commission's interpretation, finding in it a guide about the content of their commitments. (PULP, 2016; African Charter, Articles 60 and 61; International Justice Resource Center, n.d. B;)

1.3 The African Court on Humans' and Peoples' Rights

Located in Arusha, Tanzania, the African Court on Human and Peoples' Rights was established by the Protocol to the African Charter and adopted by OAU Member States in Ouagadougou, Burkina Faso in June 1998; the Protocol entered into force in January 2004, after its ratification by 15 Member States. (Open Society Just Initiative, 2013A)

Established "to complete and reinforce the functions of the African Commission…", the African Court has jurisdiction in "all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned". (Article 3, the Protocol to the African Charter) Furthermore, the Court has the power to issue advisory opinions on "any legal matter relating to the Charter or other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission." (Article 4, the Protocol to the African Charter) Contrary to the African Commission, the Court's decisions are binding on state parties to the Protocol. Indeed, the establishment of the Court was believed to be the most effective mechanism to rectify the Commission's incapacity to ensure compliance. (A Dersso, 2008)

As of 2022, only 33 out of 55 countries ratified the Protocol, while only eight deposited the Declaration under Article 34 establishing that "at the time of ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under Article 5(3) of this Protocol." Article 5(3) states as follows: "The Court may entitle relevant Non-Governmental Organisations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol." That is, the Court can address an individual complaint exclusively when the concerned State has deposited a declaration under Article 34 of the Protocol. (African Court Website, n.d.; the Protocol to the African Charter, 1998) Such a Declaration is actually labeled as an obstacle of the African Human Rights System since it prevents access to the Court for numerous victims of human rights violations. (A Dersso, 2008; Protocol to the African Charter, 1998) Moreover, when acts of violence amount to international crimes, the power of the African Court, as well as the Commission, is limited. Indeed, while the two bodies can demand the concerned state to hold perpetrators accountable and conduct investigations, only international judicial bodies, in particular the International Criminal Court (the ICC) can try criminal matters. (A Dersso, 2008)

The Matter of African Commission on Human and Peoples' Rights V. Republic of Kenya

72-year-old Ogiek community elder, Cosmas Chemwotei Murunga, inspects one of the trees felled by foreigners in 1976. Source © Isaiah Esipisu/IPS, 2020

Covering a total of 455,000 hectares, the Mau Forest is the largest in Kenya, hosting vulnerable tree species used in traditional medicine and the source of clean water for nearly 6 million people in the country. The forest is inhabited by the Ogiek indigenous ethnic group, counting more than 20.000 thousand members, 15.000 of which reside in the Mau Forest Complex. Over the past 20 years the Ogiek group has been forcibly displaced from its lands by the Kenyan government with the pretext of conserving the biodiversity of the forest. However, the displacement of the ethnic group dates back to the 19th century under the power of British colonial rule. (Okata, 2021)

On July 12th, 2012, the African Commission filed a case before the African Court alleging that in October 2009, the Kenya Forestry Service delivered a 30 days eviction notice to an indigenous minority ethnic group in the Republic of Kenya, the Ogiek, demanding them to leave the Mau Forest. The filing of the Application by the Commission followed an application from the Centre for Minority Rights Development and Minority Rights Group International acting on behalf of the Ogiek group on November 14th, 2009. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2022)

2.1 The Ogiek ethnic group of the Mau Forest: Indigenous Population in the African and International System

After decades of marginalisation and unrecognition by the Kenyan government, the first matter discussed in The African Commission on Human and Peoples' Rights V. Republic of Kenya (2017)

has been the identification and recognition of the Ogiek as an indigenous group.

Due to a lack of definition in the African Charter, the Court referred to the work of the African Commission as well as international human rights instruments to draw the criteria to identify indigenous populations. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2017) The international community never elaborated a universal definition of indigenous people, believing it could not represent the diversity of indigenous peoples. Instead, Article 3 and 4 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007 establish the criterion of self-identification. (World Bank Operational Policy 4.10, 2005; Göcke, 2017) In accordance, the African Court refers to the (African Commission) Working Group on Indigenous Populations/Communities which distinguishes three main criteria:

"i. Self-identification; ii. A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and iii. A state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model." (As cited in The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2017)

The second reference cited by the African Court is the most widely accepted definition of indigenous communities, peoples and nations, given by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his famous Study on the Problem of Discrimination against Indigenous Populations in 1986:

"Indigenous people can be appropriately considered as "Indigenous communities, peoples and nations which having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of 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." (As cited in UN Department of Economic and Social Affairs, 2004 and Göcke, 2017)

As highlighted by the Working Group and Jose R. Martinez Cobo himself, the key criterion of self-identification has been crucial to prevent States from excluding certain indigenous groups through closed definitions. In reinforcing this, Article 1(2) of the International Labour Organisation Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) mentions that "[s]elf identification as indigenous or tribal shall be regarded as fundamental criterion for determining the groups to which the provisions of this Convention apply".

The unique connection of indigenous groups to ancestral lands appears as the second most important criterion highlighted by human rights instruments. (Göcke, 2017) The loss of ancestral lands is, indeed, labelled as the cause of marginalization, discrimination and underdevelopment of indigenous communities, and as stated by Erica Irene Daes, UN Special Rapporteur in 2002, "The gradual deterioration of indigenous societies can be traced to the non-recognition of the profound relation that indigenous peoples have to their lands, territories and resources." (United Nations, n.d.)

By identifying these two main criteria, the African Court recognised the Ogieks as an indigenous

group because of their "voluntary perpetuation of cultural distinctiveness, which includes aspects of language, social organisation, religious, cultural and spiritual values, modes of production, laws and institutions through self-identification and recognition by other groups and by State authorities." Moreover, having them "priority in time, with respect to the occupation and use of the Mau Forest" and being a "hunter-gatherer community" which "for centuries depended on the Mau Forest for their residence and as a source of their livelihood," the forest is the "ancestral land" on which their survival depends on. The eviction from their ancestral lands and unrecognition of "their status as a tribe or indigenous population" by the government of Kenya over the years led to their marginalisation and subjugation, which in turn put at risk their very existence. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2017)

2.2 The Right to Life of Indigenous Groups

As the cornerstone on which every right and freedom originates, the right to life is extensively protected by numerous regional and international instruments, including Article 3 of the Universal Declaration on Human Rights, Article 6 of the International Covenant on Civil and Political Rights, Article 2 of the European Convention of Human Rights and Fundamental Freedoms, and Article 4 of the American Convention on Human Rights.

Article 4 of the African Charter establishes that:

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

Differently from other human rights instruments, the African Charter states an inviolable link between the right to life and the right to integrity of the human being. Embracing a broad interpretation of the rights to life in accordance with General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4), the Charter broadly protects the right to a dignified life and recognizes upon States a duty to protect individuals and groups. That is, the African Court took into account both the physical and existential understanding of the right to life, elaborating a distinction between the right to life following its classical meaning and the right to a decent existence of a group. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2017) In this framework, the right to life appeared to be in complete opposition to any "conditions that impede or obstruct access to a decent existence", including "forcibly dispossessing indigenous peoples from their ancestral land," "if the living conditions of the community are incompatible with the principles of human dignity". (Yakye Axa Indigenous Community v. Paraguay, 2005) Nevertheless, the African Court pointed out that Article 4 refers to "the physical rather than the existential understanding of the right to life." Therefore, the Court recognised that, although acts of eviction and deprivation of economic, social and cultural rights may constitute a violation of the right to life when leading to physical harm, this is not always the case. In the instant case, despite acknowledging that numerous members of the Ogieks died following forced evictions, the Court found no violation of the right to life because "the causal connection between the evictions of the Ogieks by the Respondent and the [Ogiek population] deaths alleged to have occurred as a result" has not been proven by the Applicant. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2017)

2.3 The Right to Self-Determination as a Framework of Indigenous Rights

Despite over the past 40 years, there have been numerous disputes around the subject of indigenous

people, it is now internationally recognized their inherent rights to self-determination. At the international level, the UN Declaration on the Rights of Indigenous Peoples in its Article 3 establishes as following:

"Indigenous people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The right to self-determination is deeply connected to, and thus invoked for, the protection of other fundamental rights, including the rights to lands, territories and natural resources, as well as cultural identity, ways of life and political organisation and representation, among others. (Comisión Interamericana De Derechos Humanos, IWGIA, 2021)

2.3.1 The Right to Property

In 2009, the Inter-American Commission on Human Rights (IACHR) recognised the direct link between the right to self-determination and the right to lands, territories and natural resources. Indeed, as ruled by the Inter-American Court of Human Rights in the case Saramaka vs. Suriname of 2007, the right to property also refers to the right of indigenous and tribal peoples to determine freely and enjoy their own social, cultural and economic development; this is fundamental to preserve their existence and well-being as a group, as well as their cultural and religious identity. (Comisión Interamericana De Derechos Humanos, IWGIA, 2021) The Office of the High Commissioner for Human Rights and UN Human Settlements Programme also confirm this view, highlighting that "the dispossession of indigenous peoples' from their lands has robbed them of the ability and opportunity to use their own resources to control and determine their economic, social and cultural development." (UN-HABITAT, OHCHR, 2005)

Ester Sitomik talking about conservation. Sitomik is an 'Ogiek Minority Woman'. Source © Patrick Shepherd/CIFOR, 2017

The right to property is recognize by numerous international human rights instruments, including Article 14 of the African Chapter pursuant which:

"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."

By recognizing that the right to property must be guarantee to both individuals and groups, in The African Commission on Human and Peoples' Rights V. Republic of Kenya (2017), the Court pointed out three elements of the right: "(a) the right to use the thing that is the subject of the right (usus), (b) the right to enjoy the fruit thereof (fructus), and (c) the right to dispose of the thing, that is, the right to transfer it (abusus)." However, it is prudent to highlight that the right to property guaranteed to communities and/or groups over their ancestral lands slightly differ from "the right of ownership in its classical meaning": in accordance with internationally recognized principles, the right to property of indigenous people revolves around "the rights of possession, occupation, use/utilisation of land," which the Ogieks are entitled to because of their status as an indigenous group as stated by the Court in the opening assessment. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2017) Instead, at the centre of the debate is the existence of one of those circumstances "in the interest of public need or in the general interest of the community" enabling the restriction of the right to property of the Ogieks. In the instant case, the Court did not find "any evidence to the effect that the Ogieks' continued presence in the area is the main cause for the depletion of natural environment in the area." By contrast, evidence shows that one of the main causes of the environmental degradation of the Mau Forest is due to "other groups and government excisions for settlements and ill-advised logging concessions." Therefore, the Court ruled that "by expelling the Ogieks from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land as defined above and as guaranteed by Article 14 of the Charter read in light of the United Nations Declaration on the Rights of Indigenous Peoples of 2007." As emerged from the ruling, informed consultation and prior consent are key elements of the right to self-determination, and thus of the right to property and other related rights. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2017; CIDH, IWGIA, 2021)

In the instant case, the violation of the right to property through dispossession and eviction also led to a violation of the right to free disposal of wealth and natural resources (Article 21 of the African Charter) and the right to development (Article 22 of the African Charter) (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2017). As acknowledged by the African Commission in the Endorois case, the right to development poses not only the duty upon States to conduct consultation with and obtain prior consent from an indigenous group, but also to ensure that all benefits obtained from ancestral land are shared, and full and adequate compensation is provided as a result of restriction or deprivation of property and natural resource rights. (Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 2003) The case set an important precedent for indigenous rights, clearly stating that States shall engage indigenous people in development policies. (Claridge, 2010)

2.3.2 The Right to Culture

The right to culture is enshrined in Article 17 (2) and (3) of the African Charter which provides:

"1. Every individual shall have 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 Recognised by the community shall be the duty of the State."

The world currently hosts 476 million indigenous people, spread across more than 90 countries and part of more than 5,000 different indigenous groups, each of which maintains a strong identity despite decades of colonisation and aggressions from modern states. Having different aspirations, languages and traditions, indigenous communities have the common claim over the preservation of ancestral land. (Amnesty International, n.d.) It is, in fact, their unique and deep connection with their land that shapes their ways of life and view of the world. (Wiessner, 2011) Hence, the possession and access of the ancestral land is a precondition to the survival of the group. (ESCR-Net, 2018; Minority Rights Group International, n.d.)

Recalling the protection enshrined in Article 8 of the UN Declaration on Indigenous Peoples, according to which

"Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture" and States shall provide effective mechanisms to prevent any action aiming at "depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities,"

And the observation of the UN Committee on Economic, Social and Cultural Rights, in its General Comment on Article 15(1)(a), highlighting that

"The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired,"

In The African Commission on Human and Peoples' Rights V. Republic of Kenya (2017), the African Court recalled the vulnerability to discrimination, forced assimilation, exploitation, exclusion and persecution to which indigenous groups have been exposed over the years, and thus the States duty to respect and protect "their cultural heritage essential to the group's identity". In the instant case, the eviction imposed by the government of Kenya has affected the Ogieks' traditions and rituals, violating their right to culture and endangering the preservation of their activities and practices. Such an acknowledgment appears in line with the 2010 Endorois landmark decision condemning the expulsion of the Endorois people from their land in Kenya - the first legal recognition of the right to property of ancestral land by African indigenous peoples. On that occasion, the African Commission concluded that the government of Kenya violated "the Endorois people's right to practice their religion as the contested territory in this case was of fundamental religious significance to all Endorois". (ESCR-Net, 2018; Minority Rights Group International, n.d.) Based on that, the Commission found a violation of the right to culture, recognizing that "eviction from Endorois' sacred lands prevented them from maintaining cultural practices, holding that 'the restriction of cultural rights could not be justified, especially as no suitable alternative was given to the community'." (ESCR-Net, 2018; Minority Rights Group International, n.d.)

In this framework, the right to culture enables us to value the right to property over ancestral land

from a broader point of view, avoiding reducing the "empirical reality of human beings" to a power-wealth relationship. Indeed, describing indigenous peoples exclusively as economic actors, purely pursuing economic benefit from their ancestral lands, would deconstruct the real and deep meaning of human dignity, which refers to the realisation, individually and collectively, of human aspirations, including respect, well-being, affection, skills, enlightenment, and rectitude. In other words, human dignity is linked with "the realm of spirituality", which comprehends the realisation of human values. (Wiessner, 2011) The words of the leader of the Indian Nations Union in the Amazon, Ailton Krenak, are explicative of this sentiment:

"When the government took our land…they wanted to give us another place… But the State, the government, will never understand that we do not have another place to go. The only possible place for [indigenous] people to live and to re-establish our existence, to speak to our Gods, to speak to our nature, to weave our lives, is where our God created us…We are not idiots to believe that there is possibility of life for us outside of where the origin of our life is. Respect our place of living, do not degrade our living conditions, respect this life… [T]he only thing we have is the right to cry for our dignity and the need to live in our land."(World Commission on Environment and Development (WCED) Public Hearing, Sao Paulo (28–29 Oct. 1985), quoted in World Commission on Environment and Development, 1987.)

Remedies and Reparations

Rule 63 of the Rules empower the Court to " rule on the request for reparation submitted in accordance with Rules 34(5) of these Rules, by the same decision establishing the violation of a human and peoples' rights or, if the circumstance so require, by a separate decision". In The African Commission on Human and Peoples' Rights V. Republic of Kenya, the Court reserves the right to rule on reparations in a separate judgement issued on June 23rd, 2022.

The right to remedy is a key and indispensable component of international human rights law. Guaranteeing victims of grave human rights violations reparation for the abuses and harm suffered is the core essence of justice and the prerequisite to demand policies, mechanisms and laws able to ensure accountability for perpetrators and prevention of future violations. The UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) is the major international instrument enshrining the right to remedy and reparations. Other international and regional instruments support the right to remedy, including the UN Declaration on the Rights of Indigenous Peoples (2007) with a specific focus on the right to remedy for indigenous peoples. (Bangiev, Claridge, 2021)

In the African System, Article 27(1) of the Protocol establishes that

"If the Court finds that there has been violation of a human and peoples' rights, it shall make appropriate

orders to remedy the violation including the payment of fair compensation or reparation".

Contrary to the objections of the government of Kenya, the African Court considered any claim for financial compensation admissible for violations that took place before February 10th, 1992 – when the Respondent State became party to the Charter – being each event part of a pattern of international wrong-doings linked to the infringements of the Ogieks rights. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2022) Indeed, as highlighted by the African Commission, "a new government inherits the previous government's obligations, including the responsibility for the previous government's mismanagement" in accordance with international law. (Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi, 1994) This approach has been essential to guarantee to the Ogiek group a full and adequate reparation for damages. The right to "full" reparations refers to the State's responsibility to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed." On the other hand, reparations must be "adequate" in terms of covering both the material and moral damages caused by the Respondent State in the attempt of restoring "an individual(s) to the position that he/she would have been in had he/she not suffered any harm while at the same time establishing means for deterrence to prevent recurrence of violations." (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2022)

Water Tower Project in Mau Forest. Source © Patrick Shepherd/CIFOR, 2017

Ester Kosgei laughing as she tells stories about the forest. Kosgei is an 'Ogiek Minority Woman':

"Our medicinal herbs are being degraded and vanishing because of deforestation. Our medicine is inside the forest and it is our life. You can see my eyes, I have problems, it is because our medicinal plants have diminished. We are actually shocked why people destroy our forest."

"We need the trees, we need the water, we need the wild animals and we need even the livelihoods of bee keeping and sheep rearing so that it will help us to promote our living standards. So that in the future the legacy of the forest is left for our children and grandchildren."

In this framework, repairing the damages caused to indigenous groups is of major importance not only to restore the dignity of the group and its members, but also to overcome stigmatization and discrimination by repairing the rupture between indigenous and the society. (REDRESS, 2013) Therefore, while ruling

in favour of a collective monetary compensation of KES 57. 850. 000 + KES 100. 000. 000, respectively for material and moral prejudice, the awarding of non-pecuniary compensation to the Ogieks marked an important step forward for the recognition and dignity of indigenous peoples worldwide. Most importantly, the Court highlighted the unique right to ownership that indigenous people are entitled to, differentiating it from State ownership. Indeed, "among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community." Ownership of land for indigenous people includes the right to access, but above all it includes the right to "permanent use, occupation and enjoyment" of the land. That is, in order to guarantee the indigenous collective right to the land, the mere right to access is inadequate. Instead, "physical delineation, demarcation and titling" is crucial to fully guarantee the right to property of the Ogiek, which in turn confers them "the right to live freely in their own territory" creating "a conducive context for guaranteeing their continued existence." (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2022) The African Court referred to the jurisprudence of the Inter-American Court, which over the years, elaborated two key steps when proceeding with land restitution: (a) firstly, the presence of a representative of the indigenous community is deemed necessary to identify and delimit the traditional territory; (b) secondly, the State shall proceed with the handing over and titling of the identified and delimited territory to the indigenous community. (UN Special Rapporteur on the Rights of Indigenous Peoples, Expert Testimony at the request of the African Court on Human and Peoples' Rights on reparations in the case of the African Commission on Human and Peoples' Rights v. Kenya, 2020) Where the restitution of land is not possible, the government of Kenya shall either offer "adequate compensation" or "alternative lands of equal extension and quality to be given for Ogiek use and/or occupation." Any further action or plan that could potentially damage or interest the Ogiek must be developed and implemented in consultation with the group, which shall be able to make any choice "in an active and informed manner, in accordance with their customs and traditions." Lastly but not least, to respect and protect the dignity of the Ogiek indigenous group, the Court ruled, in accordance with its judgement on merits, "the full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according to full recognition and protection to the Ogiek language and Ogiek cultural and religious practices…". The adoption of legislative, administrative and any other measures is deemed necessary to prevent the violations enlisted by the Court to happen again, in accordance with the guarantee of non-repetition. (The African Commission on Human and Peoples' Rights V. Republic of Kenya, 2022) Considering the inadequacy of legal systems one of the major causes exposing minorities and vulnerable groups to human rights violations, effective reparation requires reforms to address "structural discrimination." (REDRESS, 2013)

Conclusion

Data shows that traditionally indigenous occupied lands amount to 22 percent of the world's surface, making indigenous groups the inhabitants and guardians of around 80 percent of the planet's biodiversity. Thanks to the unique and deep connection with ancestral lands and ways of life, indigenous peoples have been able to better conserve their ancestral lands, thus demonstrating being strong and crucial contributors to the advancement of SDGs and the fight against climate change. Despite international law strongly protects indigenous groups and advocate for their inclusion in decision-making processes, they continue to face discrimination, marginalization and extreme poverty while being deprived of their land rights through eviction and forced assimilation. (UN Special Rapporteur on the Rights of Indigenous Peoples, Expert Testimony at the request of the African Court on Human and Peoples' Rights on reparations in the case of the African Commission on Human and Peoples' Rights v. Kenya, 2020; Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi, 1994) Discrimination is labelled as the main driver of the socio-economic vulnerability faced by indigenous people, who make up 15% of the world's extreme poor exposed to high rates of landlessness, malnutrition and internal displacement. (Amnesty International, n.d.)

The discrimination and marginalization of indigenous groups is oftentimes supported and perpetrated by States that prioritize economic benefits and interests over human rights of indigenous communities. Because of the harm and suffering they have been subjected to over decades, indigenous groups have the right to receive remedy and reparation from abusive governments in the form of land restitution, compensation, and rehabilitation through medical and psychological care as well as legal and social services. (Bangiev, Claridge, 2021) Guaranteeing such forms of reparation is crucial to confer dignity to indigenous groups unlawfully dispossessed of their lands and protect their very existence. Yet, they are not sufficient to establish a sustainable relationship between them and the States. Instead, the political will of States in building a partnership based on trust and mutual respect, guaranteeing the inclusion of indigenous peoples in every sphere of the society, is the key to fostering a human rights-based approach where the interest and needs of indigenous groups are at the centre. (Krishna Achuthan (on behalf of Aleke Banda), Amnesty International (on behalf of Orton and Vera Chirwa), Amnesty International (on behalf of Orton and Vera Chirwa) v. Malawi, 1994; Bangiev, Claridge, 2021) In this framework, the right to truth in the forms of public apology plays a crucial role both as a grievance and remedy mechanism. Indeed, the jurisprudence of the Inter-American Court and the African Commission recognize public apology as a form of reparation able to provide psychological healing while promoting justice and change future conduct. That is the reason why, after decades of brutal violations, the acknowledgment of the Court, in The Matter of African Commission on Human and Peoples' Rights v. Republic of Kenya (2022), that "a judgement can constitute a sufficient form of reparation and also a sufficient measure of satisfaction," thus making public apology "not necessary", seems depriving the Ogiek group of their right to truth.

On the one hand, the Ogieks have seen their right to restitution of ancestral land, recognition of the status of indigenous people, effective consultation and pecuniary compensation for the damages suffered recognised, all reparation measures that will strengthen their position into the Kenyan society if implemented effectively and promptly. As highlighted by the independent UN rights expert Mr. Calí Tzay, the unprecedented judgement "sends a strong signal for the protection of the land and cultural rights of the Ogiek in Kenya, and for indigenous peoples' rights in Africa and around the world." (UN News, 2022) On the other hand, a public apology would have meant acknowledgment of the truth through "a public statement of remorse or regret related to the wrongful act or acts, or omission, that is

delivered with due respect, dignity and sensitivity to the victims" and "a guarantee of non-recurrence," in accordance to meaning attributed by the United Nations. Indeed, having the capacity of recognizing victimhood and transgressed norms, public apology is framed as a "symbolic and collective reparation measure" oftentimes "more effective than monetary compensation for victims." (Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 2019)

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