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*Indigenous Peoples' Rights in International Law:
The Ogiek Decision by the African Court
of Human and Peoples' Rights*

On the 26 May 2017, the African Court on Human and Peoples' Rights (ACtHPR) delivered its first judgement on a case concerning indigenous peoples' rights. The judgment has been extensively welcomed as 'historic', a 'huge victory' and a 'landmark' for the protection of indigenous peoples' rights in Africa. This Chapter first examines the status of indigenous peoples under international law in the current 'states' system', both diachronically and synchronically; it then analyses the legal status of the particular indigenous people of the Ogiek in the African context and in light of said ACtHPR's judgement.

1. *Introduction*

On the 26 May 2017, the African Court on Human and Peoples' Rights (ACtHPR) delivered its first judgement on a case concerning indigenous peoples' rights.¹ The case originated in a complaint submitted by the African Commission on Human and Peoples' Rights (ACommHPR) under Article 5(1) of the 1998 Protocol to the African Charter on Human and Peoples' Rights (ACHPR)² establishing the Court.³ The case dealt with the forced eviction of the Ogieks, a Kenyan hunter-gatherer indigenous community

¹ ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya* ('Ogiek case') Judgement of 26 May 2017, App. No. 006/2012.

² African Charter on Human and Peoples Rights, adopted on 27 June 1981, entered into force on 21 October 1986), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.

³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, adopted on 10 June 1998, entered into force on 25 January 2004, OAU Doc. OAU/LEG/MIN/AFCHPR/PROT.I rev. 2.

of approximately 20,000 members,⁴ from their ancestral lands in the Mau Forest, in the Rift Valley of Kenya. The judgment has been extensively welcomed as 'historic', a 'huge victory', and a 'landmark' for the protection of indigenous peoples' rights in Africa.⁵

Under Article 7 of the Protocol establishing the African Court, cases may be decided by the Court by applying the ACHPR, as well as any other human rights instrument ratified by the state in question. In turn, under Article 45(3) ACHPR the African Commission is mandated to 'interpret all the provisions of the present Charter', while under Article 2 of the Protocol establishing the African Court, this latter shall 'complement the protective mandate' of the Commission, and may arguably take note of the African Commission's decisions and interpretations of the ACHPR.⁶

While the Ogiek's land struggles date back to the 1960s,⁷ their condition worsened in the 2000s when they received a 30-days eviction note from the Kenyan government for forest conservation reasons. In 2009, two NGOs, the 'Centre for Minority Rights Development' (CEMIRIDE) and the 'Minority Rights Group International' (MRGI) filed a communication on behalf of the Ogiek with the African Commission. In 2013, the African Court issued an order of provisional measures on grounds that the eviction was of sufficient gravity.⁸ Since the Kenyan government failed to conform to an African Commission's Order, the case was transferred by the Commission to the Court under Article 84 of the Rules of the Commission. As a result, while in the Commission proceedings the applicants were the

⁴ ACtHPR, *Ogiek* Judgment (note 1 above), para. 103.

⁵ See, for example, Forest Peoples Programme, 'Ogiek of Kenya Win Landmark Land Rights Case', May 2017, at <<https://www.forestpeoples.org/en/legal-human-rights-rights-land-natural-resources/news-article/2017/ogiek-kenya-win-landmark-land>>; Minority Rights Group International, 'Huge Victory for Kenya's Ogiek as African Court Sets Major Precedent for Indigenous Peoples' Land Rights', Press Release, May 2017, at <<http://minorityrights.org/2017/05/26/huge-victory-kenyas-ogiek-african-court-sets-major-precedent-indigenous-peoples-land-rights>>; Cultural Survival, 'African Court Delivers Landmark Judgment on *Ogiek Land Rights* Case against Kenyan Government', June 2017, at <<https://www.culturalsurvival.org/publications/cultural-survival-quarterly/african-court-delivers-landmark-judgment-ogiek-landrights>>.

⁶ ACommHPR, *Social and Economic Rights Action Centre and Another v. Nigeria* ('Ogoni case'), Comm. No. 155/96, 15th Activity Report 2001-2002; *Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* ('Endorois case'), Comm. No. 276/2003, 27th Activity Report, June 2009-November 2009.

⁷ ACtHPR, *Ogiek* Judgment (note 1 above), para. 92.

⁸ ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya (Provisional Measures)* Order of 15 March 2013, App. 006/2012, para. 20.

above-mentioned NGOs, in the Court proceedings the applicant was the Commission itself. Finally, on the 26 May 2017 the Court found against Kenya for the breach of several ACHPR rules.

2. Indigenous Peoples in International Law

International law traditionally (and still today predominantly, although not exclusively) governs the relations between states, which form a 'states system'. Indigenous peoples challenge this very system at root both conceptually and practically. As a result, the application of international law to 'protect' indigenous peoples requires an accommodation that is quite difficult, and often contradictory. Before examining and assessing the *Ogiek* case and indigeneness in Africa, it is convenient to provide a brief sketch of the larger landscape in which it should be seen in terms of international law.

a) The Current 'States System'

A state-centric world governed by the states system is historically a product of injustice since it has been imposed by Europe on all other peoples, displacing their forms of social order and lifestyle. Few European states have dispossessed and embedded peoples, tribes, and other human associations within their structures in the colonial enterprise. Many aboriginal peoples have remained encased in, and subjected to, one or another state, while a number of colonized peoples have attained 'independence' by becoming states under the principle of self-determination. The former have been forced to lose their natural freedom and to obey the encasing state; the latter have been forced to become a state and adjust their original lifestyle to this alien structure. Both have arguably lost their distinctive character for the sake of a more easily governable and, allegedly, more rational global order imagined and built by the European powers for the benefit of those powers. The reasons for the European expansion were exemplarily described by John Westlake when he observed that 'When people of the European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes.'⁹ Tribal peoples have never been asked whether they wished to be subjected to, or

⁹ J. Westlake, *Chapters on the Principles of International Law* (Cambridge: CUP 1894) 141–3.

transformed into, a European-style polity to ensure security and transfer wealth to the Europeans who had decided to travel and stay there, nor has their own social order ever been thought to expand to Europe. The state was considered the 'most advanced' form of political organization and 'civilization' that all peoples on earth were supposed to adopt by a sort of 'catching up' effort.¹⁰

Once embedded in a state or once having attained statehood, non-Western peoples have become part of the global states system and are pressed to meet all the requirements of membership, such as, today, the protection of human rights and democracy. There is no option to exit the states system, nor is there any room on earth left for social organizations other than states to live 'out of the global' dimension. Even those who would like not to live 'globalized' are compelled to do so. There can be no vacuum of power on earth, all humankind must be subjected to one or another state, and all states must be able to rely on others in their ability to carry out what are regarded as the 'typical' functions of a state. Traditional practices at odds with human rights, for example, appear objectively intolerable, while they could be seen as 'physiological' in their original local context and surrounding world environment. The system cannot tolerate 'dysfunctional' states. Once in place, the system needs trust among all its members, hence their basic homogeneity. When a member does not live up to the expectations of all the others, the system necessarily must react for the common good. In so doing, the system seeks to ensure efficiency and justice within itself by limiting the freedom of action of its members on the basis of common rules applying in principle equally to all members. In practice, however, dysfunctional behaviour is far more likely in those members that have been forced to become states regardless of their original features based on geography, climate, etc. Collective reactions by the system may reflect justice within the system itself, yet they blame peoples that prove incapable (or less capable than others) of being a state after statehood has been imposed on them. The problem is not with the state in itself, but with the system of states as a global, rational project to bring all humanity under control.

¹⁰ F. Vitoria adumbrated that the Indians might be 'unfit to found and administer a lawful State up to the standard required by human and civil claims' but did not 'dare' to either affirm or condemn it. See F. de Vitoria, *De Indis et De Jure Belli Relectiones* [1539] (Washington, DC: Carnegie Institution of Washington 1917) 160–1. In *Leviathan* [1651], I, 13, Thomas Hobbes stated, more explicitly, that 'the savage people in many places of America, except the government of small Families, . . . have no government at all; and live at this day in that brutish manner' with 'no common Power to fear.'

A struggle for justice should pursue not only justice within the system but also the justice of the system itself. Most intra-system inequities are ultimately based on the injustice of the global, all-encompassing states system. Hence, scholars have increasingly emphasized the role that non-state actors, subsidiarity, and pluralism can play in global governance to enhance the participation of non-state actors in the global decision-making process beside and beyond statehood. The debate is often inspired by human rights as demands for justice. Nonetheless, human rights pursue justice within the system and do not dare to challenge the very states system itself. Moreover, there is no way to go back to the past (for instance to a world of tribes and non-state polities) and there is no viable political alternative to the state for the imminent future. The struggle for the justice of the system itself is rather difficult and uncertain for three main reasons. First, the process of state globalization is, at this stage, hardly reversible to the modern pre-statehood status (given the size and density of world population, the human interconnectedness of cyberspace, etc.) and today it is not possible for any people to live without participating in the states system in one way or another. Certainly, existing states are not willing to create a new global system based on structures other than states, especially those which most gain therefrom, notably the great powers. Second, critics of the state system as such will presumably be seen and fought as 'global terrorists' who threaten the order and justice that the system secures. The struggle for the justice of the system is a leap in the dark, as long as there is no credible substitute in sight. Third, non-state actors remain fully dependent on, and presuppose, states in many respects. Subsidiarity and pluralism are, once again, thought of in global terms, giving the existence of states for granted. For the time being, 'genuine' pluralism meant as diversity is not embedded in any global project aimed at regulating the autonomy of the local. Even tribal and indigenous peoples might now be reluctant to abandon the states system.

The short- and medium-term justice under the circumstances is within the states system, although the injustice of the system itself should always be given due weight in order for the root causes of intra-systemic injustice to be identified and better remedies devised.¹¹ In this sense, international law as the law of the globalized states system can be credited as a law which ensures justice within the system, although it is historically the product of injustice and perpetuates this broader sense of injustice by forcing all peoples on earth to adjust to a system (at least initially) congenial to others. Far from

¹¹ B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: CUP 2003) 189–95.

challenging the states system itself, non-state actors take it for granted and operate within the same system.

b) *The International Law of Indigenousness*

Before modern states came into existence, the earth was populated by countless 'peoples'. After subjugation by colonial powers, these peoples became 'indigenous' (or 'native', or 'aboriginal') peoples.¹² The story of indigenous peoples is the story of the dispossession of their lands, i.e. the history of colonialism, most notably (but not limited to) European colonialism, and of the rights reclaimed by these peoples today under international and constitutional law.¹³ Many existing states were born out of the extermination of native inhabitants on their territories.¹⁴ While indigenous peoples do raise the problem of colonialism, on a par with decolonized states, most of them do not claim 'decolonization' or secession from the states where they are enclosed, but rather self-government. In fact, indigenous peoples generally do not pursue statehood because they do not conceive themselves in terms of states in the first place. What is claimed is the right to control 'their' ancestral land, to the exploitation of natural resources, to cultural identity and to their own way of life, to representation in the United Nations and on the international stage at large, and to compensation and moral restitution.¹⁵ In recent years the indigenous movement has come under attack on ground that indigeneity is a construction, since the populations concerned no longer live the way they claim they lived in the pre-colonial period.¹⁶

A workable, albeit non-binding, definition of indigenous peoples was provided in 1983 by UN Special Rapporteur José Martínez Cobo, whereby indigenous communities, peoples, and nations are those which 'having

¹² S. J. Anaya, *Indigenous Peoples in International Law* (Oxford: OUP, 2nd ed, 2004) 3.

¹³ P. Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: CUP 2003).

¹⁴ H. Rae, *State Identities and the Homogenisation of Peoples* (Cambridge: CUP 2002). For the devastation and genocidal practices of the early European contact with non-European peoples in Latin America, see e.g. D. Batstone, *From Conquest to Struggle: Jesus of Nazareth in Latin America* (Albany: State University of New York Press 1991). See also B. Kiernan, *Blood and Soil: A World History of Genocide and Extermination from Sparta to Darfur* (New Haven and London: Yale University Press 2007).

¹⁵ Anaya, *Indigenous Peoples in International Law* (note 12 above) 8–9 (arguing for a human rights approach to indigenous peoples within the states in which they are embedded.)

¹⁶ A. Kuper, 'The Return of the Native' (2003) 44 *Current Anthropology* 389; A. Kuper, 'Discussion' (2006) 14 *Social Anthropology* 21. For a critical comment, see J. Friedman, 'Indigeneity: Anthropological Notes on a Historical Variable' in H. Minde (ed), *Indigenous Peoples: Self-determination Knowledge Indigeneity* (Delft: Eburon 2008) 29, 42–6.

a historical continuity with pre-invasion and pre-colonial societies' that developed on their territories, 'consider themselves' distinct from other sectors of the societies now prevailing in those territories or parts of them and form at present non-dominant sectors of society.¹⁷ A definition of tribal and indigenous peoples is also provided by the ILO 1957 Indigenous and Tribal Populations Convention No 107 and the ILO 1989 Indigenous and Tribal Peoples Convention No. 169.¹⁸ Tribal and indigenous peoples are clearly regarded here as part of independent states and their rights as rights conferred by the states which embed them. No right to independence is granted, as is manifestly envisaged in Article 1(3) ILO Convention No. 169 where the term 'people' is denied 'any implications as regards the rights which may attach to the term under international law'. The 2007 UN General Assembly Declaration on Indigenous Peoples (UNDRIP) even avoids defining indigenous peoples.¹⁹ Terms like indigenous and aboriginal denote different meanings, since some indigenous peoples have subjugated aboriginal peoples.²⁰ Also the term 'land' of indigenous peoples is difficult to define.²¹

From the sixteenth to the eighteenth centuries indigenous peoples concluded numerous agreements with colonial powers whose status as 'international treaties' has remained controversial.²² In *Worcester v Georgia* the US Supreme Court characterized the treaties concluded between the United States and the Cherokee as 'international'²³ and described the

¹⁷ UN, 'Study of the Problem against Indigenous Populations, Conclusions, Proposals and Recommendations', 30 September 1983, in UN Doc E/CN.4/Sub.2/1983/21, Add 8, paras 379, 381.

¹⁸ ILO Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, adopted 26 June 1957, entered into force 2 June 1959, 328 *UNTS* 247. As of 29 December 2018, the Convention has been ratified by only 27 states; ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, signed 27 June 1989, entered into force 5 September 1991. As of 29 December 2018, the Convention has been ratified by only 23 states.

¹⁹ UNGA Declaration on the Rights of Indigenous Peoples of 13 September 2007, UN Doc A/Res/61/295.

²⁰ Kuper, 'The Return of the Native' (note 16) 390.

²¹ For possible criteria to identify indigenous peoples, see the 2005 Report of the ACommHPR's Working Group of Experts on Indigenous Populations/Communities, at <www.pro169.org/res/materials/en/identification/ACHPR%20Report%20on%20indigenous%20populations-communities.pdf>, para. 4.2.

²² A. D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 2nd ed, 1961) 53–4.

²³ US Supreme Court, *Worcester v. Georgia* [1832] 31 US 515, 559–60. Previously, in *Johnson v McIntosh*, Judgment of 10 March 1823, 21 US 543, the Supreme Court had described the Indians as 'fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest', hence 'To leave them in possession of their country was to leave the country a wilderness' (at 590).

Cherokee as ‘a distinct community, occupying its own territory, with boundaries accurately described.’²⁴ One year earlier, in *Cherokee Nations v State of Georgia*, the Court likened the Indian tribes to ‘domestic dependent nations’ whose relationship to the United States resembled ‘that of a ward to its guardian.’²⁵ Internationally, in the 1926 *Cayuga Indians Award*, the Arbitral Tribunal stated that the “‘Cayuga Nation”, an Indian tribe...is not a legal unit of international law’ because ‘[t]he American Indians have never been so regarded.’²⁶ In the 1928 *Island of Palmas Award*, the Arbitrator famously stated that ‘[a]s regards contracts between a State...and native princes or chiefs of peoples not recognized as members of the community of nations, they are not, in the international law sense, treaties or conventions capable of creating rights and obligations.’²⁷ In the 1933 *Eastern Greenland Judgment*, the PCIJ acknowledged the indigenous Inuit population in Eastern Greenland but the Court considered the territory’s legal status to be a matter confined to the competing claims made by Norway and Denmark.²⁸

A reverse tendency has emerged in recent decades, especially following the decolonization process in the 1960s. In the *Western Sahara* case the ICJ found that agreements between colonizing states and local rulers were ‘to be regarded as derivative roots of title, and not original titles obtained by occupation of *terra nullius*.’²⁹ In *Land and Maritime Boundary between Cameroon and Nigeria*, Nigeria argued that the pre-colonial city-states in the contested region of Nigeria had enjoyed international treaty-making power.³⁰ In its 2002 Judgment, however, the ICJ held that the agreements between representatives of Great Britain and local chiefs of the Niger Delta near the end of the nineteenth century were not inter-state treaties.³¹ The preamble to the 2007 Declaration on the Rights of Indigenous Peoples asserts ‘the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with

²⁴ *Ibid.* 556.

²⁵ US Supreme Court, *Cherokee Nations v. State of Georgia* [1831] 30 US 1, 17.

²⁶ American and British Claims Arbitration Tribunal, *Cayuga Indians (Great Britain) v. United States*, Award 22 January 1926, 6 RIAA 173, 176.

²⁷ PCA Arbitral Tribunal, *Island of Palmas Case (Netherlands v. United States)* Award 4 April 1928, 2 RIAA 829, 858.

²⁸ PCIJ, *Legal Status of Eastern Greenland (Denmark v. Norway)* Judgment 5 April 1933, PCIJ Series A/B No 53, 146–7.

²⁹ ICJ, *Western Sahara* Advisory Opinion 3 January 1975, [1975] ICJ Rep 12, para. 80.

³⁰ ICJ, *Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening)* Judgment 10 October 2002, [2002] ICJ Rep 303, 403.

³¹ *Ibid.* 405–6.

States', and Article 37(1) of the same UNDRIP provides that indigenous peoples 'have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors.'³²

The IACtHR has insisted, since 2001 by relying upon the ILO Conventions on indigenous peoples under Article 29 ACHR, that the right to property under Article 21 ACHR also applies (and needs to be balanced against possible conflicting rights to property of single individuals) to indigenous peoples' communal property, lands, and resources,³³ a position upheld by the ACommPHR in the 2009 *Centre for Minority Report*.³⁴ In the 2007 *Pueblo Saramaka* Judgment, concerning logging and mining concessions awarded by Suriname on territory possessed by the Saramaka people without their full and effective consultation, the IACtHR conceded that Suriname could grant concessions, but had to avoid undermining the Saramaka's survival as a tribal people and provide effective consultations, prior and informed consent, benefit-sharing, and prior and independent environmental and social impact assessment.³⁵ In the 2007 *Aurelio Cal* Judgment, the Supreme Court of Belize found that the right of indigenous peoples to their lands and natural resources is embodied, in addition to treaty obligations binding on Belize, in customary international law and general principles of international law.³⁶ In the 2009 *Raposa Serra do Sol* Judgment, the Brazilian Supreme Court ruled that the Raposa Serra do Sol reservation had to be maintained as a single continuous territory exclusively for use by the indigenous population and perpetuation of their livelihoods, subject to conditions such as the need to realize specific infrastructure projects on indigenous lands in the national interest without the prior and informed consent of indigenous communities.³⁷

³² Declaration on the Rights of Indigenous Peoples (note 19 above) preamble, para. 14, and Article 37.

³³ IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* Judgment of 31 August 2001, IACtHR Series C No 79, para. 148; *Yakye Axa Indigenous Community v. Paraguay*, Judgment 17 June 2005, IACtHR Series C No 125, para. 143; *Sawhoyamaya Indigenous Community v. Paraguay* Judgment of 29 March 2006, IACtHR Series C No 146, para. 120.

³⁴ ACommHPR, *Endorois* Decision (note 6 above), para. 190.

³⁵ IACtHR, *Pueblo Saramaka v. Suriname*, Judgment 28 November 2007, IACtHR Series C No 52, para. 129.

³⁶ Supreme Court of Belize, *Aurelio Cal et al v. Attorney General of Belize* Judgment of 18 October 2007, at <<https://www.elaw.org/content/belize-aurelio-cal-et-al-v-attorney-general-belize-supreme-court-belize-claims-no-171-and-17>>, para 127.

³⁷ Supreme Court of Brazil, *Raposa Serra do Sol*, Judgment 19 March 2009 (see <<https://www.survivalinternational.org/news/4354>>).

On balance, the limited number of states which have ratified the ILO 1989 Indigenous and Tribal Peoples Convention, the resistance of several states, and the legally non-binding language adopted by the 2007 Declaration on the Rights of Indigenous Peoples suggest that the legal relevance of indigenous peoples remains basically a matter for the domestic constitutional law of the states concerned and, as regards international law, of human rights and environmental justice to be protected within the frameworks of existing states.

3. *The Ogiek Judgment*

In the *Ogiek* Judgment, widely endorsing the Commission's allegations, the Court held that the Government of Kenya had violated several of the Ogieks' rights under the ACHPR, including their rights to equality (Article 2), to property (Article 14), to freedom of religion and culture (Articles 8 and 17), to free disposal of wealth and natural resources (Article 21), and to economic, social and cultural development (Article 22). Only with regard to the right to life (Article 4) the Court found no violation.

More specifically, on *jurisdiction*, the Court unanimously dismissed the objections to its material, personal, and temporal jurisdiction, thus declaring its jurisdiction.³⁸ On *Admissibility*, the Court dismissed four objections to the admissibility of the application on grounds that (a) the matter was pending before the ACommHPR, (b) the Court did not conduct a preliminary examination of the application's admissibility, (c) the Commission was not the aggrieved party in the complaint and, finally, (d) on grounds of failure to exhaust local remedies, thus declaring the application admissible.³⁹ Turning to the *merits*, to which this article is limited, the Court declared that Kenya had violated Articles 1, 2, 8, 14, 17(2) and (3), 21, and 22 ACHPR but had not violated Article 4 ACHPR. As a result, the Court ordered Kenya to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six months from the date of the judgment; it reserved its ruling on reparations and requested the Commission to file submissions on reparations within 60 days from the date of the judgment, noting that Kenya would have to file its response thereto within 60 days of receipt of

³⁸ ACtHPR, *Ogiek* Judgment (note 1 above), paras 47-68.

³⁹ *Id.* paras 69-100.

the Commission's submissions on Reparations and Costs.⁴⁰ This being said, let us now examine any issue concerning the merits of the case.

a) Definition of the Ogieks as an 'Indigenous Population'

The Court preliminary focused on the question as to whether the Ogieks are an 'indigenous people', finding that this issue was central to the determination of the merits. The Commission argued that the Ogiek are an indigenous people who 'have been living in the Mau Forest for generations since time immemorial.'⁴¹ Kenya countered that the Ogiek 'are not a distinct ethnic group but rather a mixture of various ethnic communities', indeed an indigenous population but 'different from those of the 1930s and 1990s having transformed their way of life through time and adapted themselves to modern life', thus 'currently like all other Kenyans.'⁴²

The Court noted that the concept of indigenous population is not defined in the ACHPR and that 'there is no universally accepted definition of "indigenous population" in other international human rights instruments', although '[t]here have...been efforts to define indigenous populations.' In this respect, the Court 'drew inspiration' from the work of the ACommHPR through its 'Working Group on Indigenous Populations/Communities', which had adopted certain criteria to identify indigenous populations.⁴³ The Court 'drew inspiration' also from the approach taken in

⁴⁰ Id. paras 101–217. For commentary, see R. Roesch, 'The Ogiek Case of the African Court on Human and Peoples' Rights: Not So Much News After All?', *EJIL Talk!*, 16 June 2017; R. Rosch, 'Indigenesness and Peoples' Rights in the African Human Rights System: Situating the *Ogiek* Judgement of the African Court on Human and Peoples' Rights', (2017) 50 *Verfassung und Recht in Obersee* (VRO) 242; E. Tramontana, 'The Contribution of the African Court on Human and Peoples' Rights to the Protection of Indigenous Peoples' Rights', *Federalismi*, 14 March 2018.

⁴¹ ACtHPR, *Ogiek* Judgment (note 1 above), para. 103.

⁴² Id. para. 104.

⁴³ Id. para. 105. See also ACommHPR/IWGIA, 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples', at <http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf>, para. 12. According to the African Commission 'a definition [of indigenous peoples] is not necessary or useful as there is no universally agreed definition of the term and no single definition can capture the characteristics of indigenous populations. Rather, it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa', *ibid.* para. 10. The characteristics proposed, as reproduced in the *Ogiek* Judgment, are: '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

1996 by E.-I. A. Daes, the former Chairperson of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, which set out four criteria to identify indigenous peoples, namely: (a) priority in time with respect to the occupation and use of a specific territory; (b) perpetuation of cultural distinctiveness, including aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; (c) self-identification, and recognition by other groups or State authorities, as a distinct group; and (d) experience of subjugation, marginalisation, dispossession, exclusion or discrimination.⁴⁴ Needless to say, both sets of criteria are not legally binding in themselves, let alone on the ACtHPR. In light of the above, the Court did recognize the Ogiek ‘as an indigenous population . . . deserving special protection deriving from their vulnerability’⁴⁵ since, with regard to Daes’ criteria, they ‘have priority in time, with respect to the occupation and use of the Mau forest’,⁴⁶ ‘exhibit a voluntary perpetuation of cultural distinctiveness’⁴⁷ and ‘have suffered from continue subjugation and marginalisation.’⁴⁸

Undoubtedly, the Ogiek’s indigenous status was one of the most contentious issues in the case. The ACHPR does not refer to ‘indigenous peoples’, although it provides for a number of ‘collective’ human rights pertaining, inter alia, to ‘peoples’ which are potentially applicable to such peoples. On this point, the reasoning of the Court is little persuasive. The Court actually relied on the UN Daes’ criteria rather than on the African Union’s Working Group, thus aligning with the *Endorois* decision by the ACommHPR,⁴⁹ without shedding any light on the underlying rationale. It displayed its willingness to align the African human rights system with the UN-backed international concept of indigenous rights. In fact, the two sets of criteria differ remarkably and there certainly is a specific of indigenesness in Africa compared to elsewhere, such as in the Americas, Australia, and New Zealand. In particular, the ‘priority in time’ or aboriginality was one of the

discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model’.

⁴⁴ Id. para. 106. See also Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Working Paper by the Chairperson- Rapporteur, Mrs. Erica-Irene A. Daes, on the Concept of “Indigenous People”’, UN Doc. E/CNA/Sub.2/ACA/1996/2, 10 June 1996, para. 69.

⁴⁵ Id. para. 112.

⁴⁶ Id. para. 109.

⁴⁷ Id. para. 110.

⁴⁸ Id. para. 111.

⁴⁹ ACommHPR, *Endorois* Decision (note 6 above), paras 151, 154, 157.

criteria deliberately rejected by the AU Working Group.⁵⁰ Besides, certain UN criteria are open to question. The 'voluntary perpetuation of cultural distinctiveness' and the recognition by other groups or the state are contentious features, while 'cultural distinctiveness' may be considered included in the principle of self-identification and apparently fails to consider that culture is constantly changing through endogenous and exogenous influences. More generally, the concept of indigenesness is particularly controversial in sub-Saharan Africa and the distinction between minorities, indigenous peoples, and 'peoples' is anything but clear.⁵¹ Many African states, scholars and communities, are critical of the idea of indigenous rights in Africa as an 'artificial construction' and fear that it may favour certain ethnic groups over others, reinforce colonial stereotypes and catalyse secessions.⁵²

b) Right to Land (Article 14 ACHPR)

The Commission contended that Kenya's failure to recognize the Ogiek as an indigenous community 'denied them the right to communal ownership of land as provided in Article 14 of the Charter'.⁵³ Kenya objected that 'the Constitution of Kenya takes away land rights from the communities concerned and vests it in government institutions like the Forestry Department', that 'other communities such as the Kipsigis, Tugen and the Keiyo also lay claim to the Mau Forest', that the Ogiek could not 'claim exclusive ownership of the Mau Forest' and, in any event, 'were consulted and notified before every eviction was carried out . . . in accordance with the law'.⁵⁴

The Court noted, first, that 'although addressed in the part of the Charter which enshrines the rights recognised for individuals, the right to property as guaranteed by Article 14 may also apply to groups or communities'.⁵⁵ Secondly, in order 'to determine the extent of the rights recognised for indigenous communities in their ancestral lands', the Court held that 'Article 14 of the Charter must be interpreted in light of the

⁵⁰ ACommHPR/IWGIA, 'Indigenous Peoples in Africa: The Forgotten Peoples?', June 2006, at <https://www.iwgia.org/images/publications/0112_AfricanCommissionSummaryversionENG_eb.pdf>, 11.

⁵¹ Roesch, 'The Ogiek Case', cit. (note 40 above); Rosch, 'Indigenesness', cit. (note 40 above) 246–247.

⁵² F. Mukwiza Ndahinda, *Indigenesness in Africa: A Contested Framework for Empowerment of Marginalized Communities* (The Hague: Springer 2011) 59.

⁵³ ACtHPR, *Ogiek Judgment* (note 1 above), para. 114.

⁵⁴ Id. paras 115–116, and 120.

⁵⁵ Id. para. 123.

applicable principles especially by the United Nations,⁵⁶ in particular Article 26 UNDRIP.⁵⁷ As a result, according to the Court ‘the rights that can be recognised for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning.’⁵⁸ As to the public interest Kenyan justification relying on the preservation of the natural ecosystem, the Court stated that Kenya ‘has not provided 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’ and, in any event, the eviction could not ‘be necessary or proportionate to achieve the purported justification’.⁵⁹ The Court concluded that Kenya had violated Article 14 ACHPR.

Undoubtedly, in the *Ogiek* case, land played a key role. The indigenous right to land is expressly recognized by Articles 13 and 14 ILO Convention No. 169 and Article 25 UNDRIP. The ACHPR does not provide for it and in the related previous jurisprudence such right has been impliedly derived from the right to property (Article 14),⁶⁰ the right to practice religion (Article 8)⁶¹ and the right to culture (Article 17),⁶² besides being found relevant in relation to other ACHPR provisions. In the *Ogiek* case, the Court aligned itself with such jurisprudence and with the jurisprudence of other regional human rights courts, as well as with the ILO Convention No. 169 and the UNDRIP,⁶³ by deriving a communal right to land from the right to property, as both an individual and a collective right, against the ‘classical’ (supposedly individualistic, Western) understanding of property’.⁶⁴

⁵⁶ Id. para. 125.

⁵⁷ Id. para. 126.

⁵⁸ Id. para. 127.

⁵⁹ Id. para. 130.

⁶⁰ ACommHPR, *Malawi African Association and Others v. Mauritania* Decision of 11 May 2000, Comm. Nos. 54/91, 61/91, 98/93, 164/97 to 196/97 and 210/98, para. 128; *Ogoni* Decision (note 6 above), paras 61 ff.; *Endorois* Decision (note 6 above), paras. 188–189, 190, 232. Similarly, see e.g. IACtHR, *Mayagna Community (Sumo) Awas Tingni v. Nicaragua* (n. 33 above), para. 148; *Yakye Axa Indigenous Community v. Paraguay* (note 33 above), para. 23; *Sawhoyamaxa Indigenous Community v. Paraguay* (n. 33 above), para. 120.

⁶¹ ACommHPR, *Endorois* Decision (note 6 above), paras. 165, 172, 173.

⁶² Ibid, para. 244.

⁶³ J. Gilbert, *Indigenous Peoples’ Land Rights under International Law: From Victims to Actors* (Leiden: Brill/Nijhoff, 2016, 2nd ed, 2016) 105. For a summary of the relevant international case law and a critical assessment of this section of the *Ogiek* Judgment, see Tramontana, ‘The Contribution’ (note 40 above) 8–10.

⁶⁴ ACtHPR, *Ogiek* Judgment (note 1 above), paras 123, 128, 164.

c) *Right to Non-discrimination (Article 2 ACHPR)*

The Commission contended that 'the differential treatment of the Ogieks and other similar indigenous and minority groups within Kenya, in relation to the lack of respect for their property rights, religious and cultural rights, and right to life, natural resources and development under the relevant laws, constitute[d] unlawful discrimination' and was a violation of Article 2 ACHPR.⁶⁵ Kenya denied that any discrimination was carried out against the Ogiek and argued that no evidence had been provided to the contrary.⁶⁶

The Court noted that the Ogieks' 'request for recognition as a tribe goes back to the colonial period', where the then Kenya Land Commission rejected their request in 1933, asserting that the Ogieks 'were a savage and barbaric people who deserved no tribal status'.⁶⁷ Furthermore, the Court reiterated that 'the Mau Forest has been allocated to other people in a manner which cannot be considered as compatible with the preservation of the natural environment and that the Respondent itself concedes that the depletion of the natural ecosystem cannot be entirely imputed to the Ogieks'.⁶⁸ As a result, the Court concluded that 'by failing to recognise the Ogieks' status as a distinct tribe like other similar groups and thereby denying the rights available to other tribes', Kenya had violated Article 2 ACHPR.⁶⁹

The principle of non-discrimination is firmly established in human rights treaties, such as, at the universal level, in Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination, in Article 26 of the International Covenant on Civil and Political Rights and in Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. As commonly understood in the international jurisprudence, a differential treatment is unduly discriminatory when there is no objective and reasonable justification and when it is not proportionate.⁷⁰ In the *Ogiek* judgement, the Court found that the Ogiek were discriminated against based on their 'ethnicity and/or other status'. As a commentator noted, '[i]t seems to be a rather obvious choice to subsume indigenous groups under ethnicity as a prohibited ground' of non-discrimination, yet the Court failed to rely on the equality of 'peoples' enshrined in Article 19 ACHPR and, as a

⁶⁵ Id. para. 134.

⁶⁶ Id. para. 135.

⁶⁷ Id. para. 141.

⁶⁸ Id. para. 145.

⁶⁹ Id. para. 146.

⁷⁰ Id., para. 139; ACommHPR, *Kenneth Good v. Republic of Botswana* Decision of 26 May 2010, Comm. 313/05, para. 219.

result, to align itself with the African Commission's understanding of non-discrimination and equality.⁷¹

d) Right to Life (Article 4 ACHPR)

According to the Commission 'forced evictions may violate the right to life when they generate conditions that impede or obstruct access to a decent existence'⁷² and in the instant case 'the Ogieks relied on their ancestral land in the Mau Forest to support their livelihood, their specific way of life and their very existence'.⁷³ Kenya objected that 'the Mau Forest Complex is important for all Kenyans, and the government is entitled to develop it for the benefit of all citizens'.⁷⁴

The Court observed that 'Article 4 of the Charter relates to the physical rather than the existential understanding of the right to life'⁷⁵ and, although there was 'no doubt that their [Ogieks'] eviction has adversely affected their decent existence in the forest', the Commission had 'not established the causal connection between the evictions of the Ogieks by the Respondent and the deaths alleged to have occurred as a result'.⁷⁶ Consequently, the Court found that there was no violation of Article 4 ACHPR.⁷⁷ As hinted earlier, this is the only point that the Court found in favour of Kenya.

The conclusion of the Court reflects the mainstream of international law.⁷⁸ The 'special protection' deserved by the Ogiek is not evidently a sufficient justification for going beyond such standard.

e) Right to Freedom of Conscience and Religion (Article 8 ACHPR)

The Commission argued that the Ogiek 'practise a monotheistic religion closely tied to their environment and that their beliefs and spiritual practices are protected by Article 8 of the Charter and constitute a religion

⁷¹ Id.; *Malawi Decision* (note 60 above), para. 131; *Open Society Justice Initiative v. Cote d'Ivoire*, Decision 27 May 2016, Comm. 318/06, para. 155; *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Decision 27 May 2009, Comm. 279/03-296/05, para. 222.

⁷² ACtHPR, *Ogiek Judgment* (note 1 above), para. 147

⁷³ Id. para. 148.

⁷⁴ Id. para. 150.

⁷⁵ Id. para. 154.

⁷⁶ Id. para. 155.

⁷⁷ Id. para. 156.

⁷⁸ Niels Petersen, 'Right to Life', *Max Planck Encyclopaedia of Public International Law*, at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-97801_99231_690-e841>.

under international law'.⁷⁹ In fact, according to the Commission, 'the sacred places in the Mau Forest, caves, hills, specific trees areas within the forest were either destroyed during the evictions which took place during the 1980s, or knowledge about them has not been passed on by the elders to younger members of their community, as they can no longer access them'.⁸⁰ The Commission added that 'though some of the Ogieks have adopted Christianity, this does not extinguish the religious rites they practise in the forest'.⁸¹ Kenya denied that the Commission had adduced adequate evidence on this point.⁸²

The Court recognized that 'the practice and profession of religion are usually inextricably linked with land and the environment'⁸³ and in the instant case 'the Ogiek population can no longer undertake their religious practices due to their eviction from the Mau Forest'⁸⁴. Besides, according to the Court, 'there were other less onerous measures that the Respondent could have put in place that would have ensured their continued enjoyment of this right while ensuring maintenance of law and order and public health'⁸⁵ and 'not all the Ogieks have converted to Christianity'.⁸⁶ The Court thus concluded that Kenya had violated Article 8 ACHRP.

On this point the Court, by emphasizing that the 'practice and profession of religion are usually inextricably linked with land and the environment', espoused the African Commission's *Endorois* decision, which found an infringement of the indigenous community's right to access religious sites as a violation of Article 8 ACHRP.⁸⁷

f) Right to Education and to Participation in Cultural Life (Article 17(2) and (3) ACHPR)

The Commission contended that Kenya had violated the cultural rights of the Ogieks by restricting their 'access to the Mau forest which hosts their cultural sites'⁸⁸, assuming the broad definition of culture that it had defined in the *Endorois* decision.⁸⁹ In this context as well, Kenya objected that 'while

⁷⁹ ACtHPR, *Ogiek* Judgment (note 1 above), para. 157.

⁸⁰ Id. para. 158.

⁸¹ Id. para. 159.

⁸² Id. para. 161.

⁸³ Id. para. 164.

⁸⁴ Id. para. 166.

⁸⁵ Id. para. 164.

⁸⁶ Id. para. 168.

⁸⁷ ACommHPR, *Endorois* Decision (note 6 above), para. 165.

⁸⁸ ACtHPR, *Ogiek* Judgment (note 1 above), para. 170.

⁸⁹ ACommHPR, *Endorois* Decision (note 6 above), para. 241 ('Culture could be taken to

protecting the cultural rights [of the Ogieks], it also ha[d] the responsibility to ensure a balance between cultural rights vis-a-vis environmental conservation in order to undertake its obligation to all Kenyans, particularly in view of the provisions of the Charter and its Constitution'.⁹⁰ Furthermore, Kenya contended that the lifestyle of the Ogieks 'has metamorphosed and the cultural and traditional practices which made them distinct no longer exist.' Actually, according to Kenya, they 'no longer live as hunters and gatherers, thus, they cannot be said to conserve the environment' and 'have adopted new and modern ways of living, including building permanent structures, livestock keeping and farming which would have a serious negative impact on the forest if they are allowed to reside there'.⁹¹

After pointing out that the right to culture in Article 17 ACHPR 'is to be considered in a dual dimension, in both its individual and collective nature',⁹² the Court stated that such right 'goes beyond the duty, not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group's identity'.⁹³ Besides, while '[i]t is natural that some aspects of indigenous populations' culture such as a certain way of dressing or group symbols could change over time', 'the invisible traditional values embedded in their self-identification and shared mentality often remain unchanged'.⁹⁴ The Court then noted that Kenya 'has interfered with the cultural rights of the Ogieks through the evictions' and that such interference 'cannot be said to have been warranted by an objective and reasonable justification', Kenya having failed to specify 'which particular activities and how these activities have degraded the Mau Forest'.⁹⁵ Therefore, the Court concluded that there was a violation of Article 17(2) and (3).⁹⁶

There is an obvious, often recognized, connection between land rights and cultural/religious rights, on the assumption that the enjoyment and

mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs and any other capabilities and habits acquired by humankind as a member of society – the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups and in that it encompasses a group's religion, language, and other defining characteristics').

⁹⁰ ACtHPR, *Ogiek* Judgment (note 1 above), para. 174.

⁹¹ Id. para. 175.

⁹² Id. para. 177.

⁹³ Id. para. 179.

⁹⁴ Id. para. 185.

⁹⁵ Id. para. 189.

⁹⁶ Id. para. 190.

preservation of indigenous peoples' culture and religion require access to their ancestral lands.⁹⁷

g) Right to Natural Resources and to Food (Article 21 ACHPR)

The Commission exposed Kenya's alleged breach of the rights of the Ogieks 'to freely dispose of their wealth and natural resources in two ways', that is, '[f]irstly, by evicting them from the Mau Forest and denying them access to the vital resources therein, and secondly, by granting logging concessions on Ogiek ancestral land without their prior consent and without giving them a share of the benefits in those resources'.⁹⁸ Kenya objected, here again, that 'States are the entities that would ultimately exercise the enjoyment of the right in the interest of the people, and efforts are being made to maintain a delicate balance between conservation, a people-centred approach to utilisation of natural resources and the ultimate control of natural resources'.⁹⁹

The Court first examined the notion of 'peoples' in Article 21 ACHPR, whereby 'All peoples shall freely dispose of their wealth and natural resources', thus posing the question 'whether the notion "people" used by the Charter covers not only the population as the constituent elements of the State, but also the ethnic groups or communities identified as forming part of the said population within a constituted State'.¹⁰⁰ The Court answered in the affirmative, 'provided such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter's consent'.¹⁰¹ The Court then observed that Kenya also violated Article 21 ACHPR 'since the Ogieks have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands'.¹⁰²

⁹⁷ UN Sub-Commission on the Promotion and Protection of Human Rights, 'Study on the Protection of Cultural and Intellectual Property of Indigenous Peoples', UN Doc. E/CN.4/Sub.2/1993/28, 28 July 1993, para. 4. In line with this understanding, see the 'Principles & Guidelines for the Protection of the Heritage of Indigenous People', UN Doc. E/CN.4/Sub.2/1995/26, 21 June 1995, para. 6. On the interplay between land rights and cultural rights see for instance V. Vadi, 'When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law' (2011) 42 *Columbia Human Rights Law Review* 3 797–889 and Citroni and Vadi's respective chapters in this volume dealing with the linkage between land rights and cultural rights in the jurisprudence of the Interamerican Court and the jurisprudence of investment treaty arbitral tribunals respectively.

⁹⁸ ACtHPR, *Ogiek* Judgment (note 1 above), para. 191.

⁹⁹ Id. para. 194.

¹⁰⁰ Id. para. 198.

¹⁰¹ Id. para. 199.

¹⁰² Id. para. 201.

According to the Court, therefore, indigenous rights in the ACHPR entail no right of secession and, impliedly, the world states system must be maintained. The ‘special protection’ deserved by the Ogiek does not justify secession. In the Court’s view, which follows the African Commission’s case law, communities within a state can well be right holders, providing that they ‘do not call into question the sovereignty and territorial integrity of the State without the latter’s consent’.¹⁰³

As to the right to natural resources, it is widely recognized that indigenous peoples’ distinctive relationship with their ancestral lands encompasses the natural resources found therein.¹⁰⁴ Article 15 ILO Convention No. 169 and Article 26(2) UNDRIP provide for the right to natural resource. In the *Endorois* decision, the African Commission admitted that restrictions to the right to natural resources are possible in the public interest and in accordance with national laws.¹⁰⁵ In the *Ogoni* decision, the Commission asserted that natural resources vest in indigenous peoples inhabiting the land in question even when they do not make use of them.¹⁰⁶

With regard to the right to food, the Court appears to derive it, as a right of indigenous peoples to use their land for agriculture, from the right to natural resources. This approach is novel compared to the Commission’s *Endorois* decision, which found a violation of Article 21 only in respect of the extraction of ruby, while the applicants had claimed that the ‘fertile soil’ was a natural resource.¹⁰⁷ The *Ogiek* judgment is also innovative on this point in comparison with the common trend espoused in the *Ogoni* decision, where the African Commission derived the right to food from the right to life (Article 4), the right to health (Article 16) and the right to development (Article 22) and found a violation of such rules on grounds that the development activities involved prevented the Ogoni people from feeding themselves.¹⁰⁸

¹⁰³ Id. para. 199.

¹⁰⁴ See, for example, IACtHR, *Pueblo Saramaka v Suriname* Judgment (note 35 above), para. 122; Sub-Commission for the Promotion and Protection of Human Rights, ‘Indigenous Peoples and Their Relationship to Land – Final Working Paper Prepared by the Special Rapporteur’, UN Doc. E/CN.4/Sub.2/2001/21, 11 June 2001, paras 11-13; ‘Indigenous Peoples’ Permanent Sovereignty over Natural Resources: Final Report of the Special Rapporteur, Erica-Irene A. Daes’, UN Doc. E/CN.4/Sub.2/2004/30, 13 July 2004, paras 38–51.

¹⁰⁵ ACommHPR, *Endorois* Decision (note 6 above), para. 267.

¹⁰⁶ ACommHPR, *Ogoni* Decision (note 6 above), para. 48.

¹⁰⁷ ACommHPR, *Endorois* Decision (note 6 above), paras 124, 267.

¹⁰⁸ ACommHPR, *Ogoni* Decision (note 6 above), para. 64 ff.

h) Right to Development and to Free, Prior, and Informed Consent (Article 22 ACHPR)

According to the Commission, Kenya had failed to recognize the Ogieks' right to development as indigenous people, 'with the right to determining development priorities and strategies and exercising their right to be actively involved in developing economic and social programmes affecting them and, as far as possible, to administering such programmes through their own institutions'.¹⁰⁹ Kenya had objected that 'consultations were held with the Ogieks' democratically elected area representatives'.¹¹⁰

After reiterating that 'all peoples' in the ACHPR, in particular in Article 22, means 'all populations as a constitutive element of a State',¹¹¹ the Court found that 'the Ogieks have been continuously evicted from the Mau Forest by the Respondent, without being effectively consulted' and 'have also not been actively involved in developing and determining health, housing and other economic and social programmes affecting them'.¹¹² The Court concluded that there was a violation of Article 22 ACHPR. As hinted earlier, the lack of 'prior consultations' constituted also a violation of the right to property.¹¹³

The ACHPR is the only binding international human rights instruments which provides for the right to development. The *Ogiek* judgment has been criticized, in this respect, inasmuch as it failed to develop the jurisprudence of the African Commission, in particular the *Endorois* decision.¹¹⁴ In contrast, the right to free, prior, and informed consent (FPIC) is not expressly contemplated by the ACHPR, although it has been examined by the African Commission and other regional organizations in the last years.¹¹⁵ In the *Ogoni* decision, the African Commission derived the obligation to provide information, as well as meaningful opportunities to be heard and to participate from the right to a healthy environment; in particular, the failure to involve the Ogoni people in the oil production also constituted, according to the Commission, a violation of the right to development

¹⁰⁹ ACtHPR, *Ogiek* Judgment (note 1 above), para. 202.

¹¹⁰ Id. para. 206.

¹¹¹ Id. para. 208.

¹¹² Id. para. 210.

¹¹³ Id. para. 131.

¹¹⁴ ACommHPR, *Endorois* Decision (note 6 above), para 277; Tramontana, 'The Contribution' (note 40 above) 17-18.

¹¹⁵ R. Roesch, 'The Story of a Legal Transplant: The Right to Free, Prior and Informed Consent in Sub-Saharan Africa', (2016) 16 *African Human Rights Law Journal* 505.

set out in Article 21.¹¹⁶ In the *Endorois* decision the right to consultation was derived from the right to development.¹¹⁷ The African Commission's 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights' understand the right to self-determination as imposing a duty to obtain the FPIC from indigenous groups for matters concerning their traditional lands.¹¹⁸ It has been critically observed that the Court 'has missed an opportunity to clarify and extend the African Commission's position on FPIC and to contribute to the development of a coherent understanding of FPIC', when considering that '[c]onsultations do not necessarily amount to consent and generally do not give communities the right to veto development projects' and that '[a]t the same time, the fact that the duty to consult was derived from the right to development and the right to property indicates that the African institutions, unlike the majority of international documents, seem to detach it from the right to self-determination'.¹¹⁹ However, the *Ogiek* judgment is said to strongly indicate that the African Union organs do not understand the right to self-determination as the only legal source of FPIC, and '[d]espite the vague wording of the judgement, a general move towards the full recognition of FPIC can be observed on the African continent in view of the growing recognition of FPIC both nationally and in the regional organizations'.¹²⁰

i) Right to the Adoption of Legislative or Other Measures (Article 1 ACHPR)

The Commission urged the Court 'to apply its own approach' and the one of the Commission itself in their previous jurisprudence in respect of Article 1 ACHPR. Accordingly, 'if there is a violation of any or all of the other Articles pleaded, then it follows that the Respondent is also in violation of Article 1' ACHPR.¹²¹ Kenya made no submission on this point.¹²²

The Court noted that Kenya had 'taken some legislative measures to ensure the enjoyment of rights and freedoms protected under the Charter' but 'these laws were enacted relatively recently' and it 'failed to recognise

¹¹⁶ ACommHPR, *Ogoni* Decision (note 6 above), para. 53.

¹¹⁷ ACommHPR, *Endorois* Decision (note 6 above), para. 290.

¹¹⁸ ACommHPR, 'Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter of Human and Peoples' Rights', November 2010, at <<http://www.achpr.org/instruments/economic-social-cultural>>, para. 44.

¹¹⁹ See Roesch, 'The *Ogiek* Case', (note 40 above); Roesch, 'Indigenoussness' (note 40 above) 256.

¹²⁰ *Ibid.* 256–257.

¹²¹ ACtHPR, *Ogiek* Judgment, para. 212.

¹²² *Id.* para. 213.

the Ogieks, like other similar groups, as a distinct tribe, leading to denial of access to their land in the Mau Forest and the consequential violation of their rights under Article 2, 8, 14, 17(2) and (3), 21 and 22', nor had Kenya demonstrated that it had taken other measures to give effect to such rights.¹²³ The Court thus concluded that there was also a violation of Article 1 ACHPR.

4. Conclusion

The *Ogiek* judgment is a success for the Ogiek people and no doubt reinforces the idea that indigenous rights are gaining importance in the context of the African human rights system, particularly in relation to the right to food under the right to natural resources and the willingness of the African Court to interpret the right to property as a communal right to land. However, the line between indigenous communities, minorities, and peoples (namely, the meaning of indigenes in sub-Saharan Africa) as well as the scope and implications of FPIC remain uncertain and the Court failed to contribute to develop the right to equality and non-discrimination.

Of special interest in the *Ogiek* case is the role played by the Commission, acting like a pro-indigenous people NGO in defence of the Ogiek. Noteworthy, although foreseeable, is the confirmation (and hence, indirectly, a reinforcement) by the Court of the present 'states system'. A change in the system to address the historical injustices suffered by indigenous peoples is clearly not envisaged for the time being, so the only way to protect them is within existing states, although this generates frequent problems.

A most salient aspect of the case, which has not attracted much attention in the literature, is the clash between different and *prima facie* conflicting 'general interests' and the rejection by the Court of all public-interest concerns invoked by Kenya. These included the state's 'responsibilities' to protect the ecosystem, public health, and public order for the benefit of all Kenyan citizens (including future generations). In the *Ogiek* case, the meaning itself of 'public' was basically in issue: whether it referred to either a local-indigenous community, or to the national community, or even to the international community as a whole. In *all* these cases, the interest at stake is indeed 'public', inasmuch as it refers to a 'community' in opposition

¹²³ Id. para. 216.

to individual members thereof or private actors, but in different and even antagonist forms. Kenya invoked the 'public' interest of all Kenyans (and their equality, whether indigenous or not), such as the interest in the protection of the ecosystem or order, if not the 'public' interest of the international community to have all forests on Earth protected for the benefit of humankind, whereas the Commission prioritized the 'public' interest (as protected by international law and in particular the ACHPR) of protecting the Ogiek. The Court did not sympathize at all with the 'general interests' relied on by Kenya, finding that either they were unsubstantiated or had to give way to the opposing general interest of protecting the Ogiek as an indigenous population 'deserving special protection'. In sum, the Court found for the Ogieks' public interest, and, while relying on a UN-inspired rather than an African-elaborated concept of indigeness, apparently proved inclined to protect an international-indigenous rather than a local-state public interest. A more detailed discussion of the issue, notably why certain public-interest values should be prioritized over others, would have been welcome.

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