

Revisiting the *Endorois* and *Ogiek* cases: is the African human rights mechanism a toothless bulldog?

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ABSTRACT: The African Charter on Human and Peoples' Rights (African Charter) has been lauded and criticised in equal measure. One of the distinct features of the Charter, which is absent in other universal and regional human instruments, is the conception of collective rights. The African Court on Human and Peoples' Rights (African Court) and the African Commission on Human and Peoples' Rights (African Commission) have handed down decisions in landmark cases such as the *Ogiek* and *Endorois* cases. These decisions are celebrated by affected groups as well as non-governmental organisations (NGOs). However, the Court and Commission's interpretation of the African Charter still leaves some questions unanswered. The Kenyan government has also been reluctant to implement these decisions despite pressure from stakeholders including the United Nations treaty bodies such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, as well as NGOs. This case discussion undertakes a desk review of the two cases and relevant literature to provide an analysis of the African human rights framework and to determine whether it is effective in securing the rights of minority and indigenous groups. This analysis focuses on the Commission and the Court's interpretation of the relevant provisions of the African Charter, their implications and the challenges faced in promoting and protecting human rights as envisioned by the Charter. Drawing from the two case studies, the analysis concludes that the existing African human rights mechanism is indeed adequate but more needs to be done to ensure that the rights of minority and indigenous groups are protected. The case discussion also offers recommendations on how the current framework can be improved in this regard.

TITRE ET RÉSUMÉ EN FRANCAIS:

Réévaluer les affaires *Endorois* et *Ogiek*: le mécanisme africain des droits humains est-il un chien édenté?

RÉSUMÉ: La Charte africaine des droits de l'homme et des peuples (Charte africaine) a fait l'objet d'éloges tout autant que de critiques. L'une des particularités de la Charte africaine, que n'ont pas d'autres instruments des droits de l'homme tant universels que régionaux, est la conception des droits collectifs. A cet égard, la Cour africaine des droits de l'homme et des peuples (Cour africaine) et la Commission africaine des droits de l'homme et des peuples (Commission africaine) ont rendu des décisions dans des affaires emblématiques telles que les affaires *Ogiek* et *Endorois*. Ces décisions sont célébrées par les populations cibles ainsi que par les organisations non gouvernementales (ONG). Cependant, l'interprétation de la Charte africaine par la Cour et la Commission laisse encore quelques questions sans réponse. Le gouvernement kényan a également hésité à mettre en œuvre ces décisions malgré la pression des parties prenantes, notamment les mécanismes des traités des Nations

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Unies tels que le Comité des droits de l'homme et le Comité des droits économiques, sociaux et culturels, ainsi que des ONGs. Ce commentaire de décision entreprend une revue documentaire des deux cas et de la littérature pertinente pour fournir une analyse du cadre africain des droits de l'homme et déterminer son efficacité à garantir les droits des groupes minoritaires et autochtones. L'analyse se concentre sur l'interprétation par la Commission et la Cour des dispositions pertinentes de la Charte africaine, leurs implications et les défis rencontrés dans la promotion et la protection des droits de l'homme tels qu'envisagés par la Charte. S'appuyant sur les deux études de cas, l'article conclut que le mécanisme africain des droits de l'homme existant est effectivement adéquat mais qu'il faut faire plus pour garantir que les droits des groupes minoritaires et autochtones soient protégés. L'article fait également des recommandations sur la manière dont le cadre actuel peut être amélioré à cet égard.

KEY WORDS: African Charter on Human and Peoples' Rights, collective rights, minorities, indigenous peoples, *Ogiek* case, *Endorois* case

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1 INTRODUCTION

The discourse on indigenous peoples' rights is as controversial in the global context as it is regionally. In Africa, governments, scholars and human rights mechanisms still grapple with the content and scope of indigenous rights. Issues such as collective rights, the right to self-determination, the definition of indigenous people and their rights to land, resources and development, are still a subject of debate. Two landmark decisions of the African Commission on Human and Peoples' Rights (African Commission) and the African Court of Human and Peoples' Rights (African Court) best illustrate these issues. Referred to the Court by the Commission,¹ the *Ogiek* case was the African Court's first case on indigenous peoples' rights,² while the *Endorois* case was the first occasion on which the Commission pronounced itself on the right to development.³ Both cases were brought against the Kenyan government in respect of violation of rights of indigenous peoples – the

1 The case was filed before the Commission in 2009.

2 Application 6/2012, *African Commission on Human and Peoples' Rights v Kenya*, African Court on Human and Peoples' Rights, 26 May 2017 (*Ogiek* case).

3 *Centre for Minority Rights Development and others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

Ogiek and the Endorois communities living in the Mau Forest and the Lake Bogoria region, respectively.

This case discussion acknowledges that indigenous peoples are entitled to a wide range of rights, both individual and collective. However, it deals with the more complex issue of collective peoples' rights, analysing the African framework in this regard. As Anaya notes, while tracing the development of indigenous rights within the modern era of human rights, indigenous peoples continue to seek recognition of their collective rights.⁴ This conceptualisation of rights usually collides with the individual/state dichotomy which lingers in society and trickles down to international standards.⁵ The African context is unique because Africa embraces collective rights, usually credited to its *ubuntu* culture. As Mutua notes, in Africa, the human being is not an isolated and abstract individual but an integral member of a group animated by a spirit of solidarity.⁶ This philosophy of a group-centred individual ensures the existence of the community to perpetuity.⁷ Yet African governments still fail to secure indigenous peoples' rights or implement decisions deriving from the African Charter.

This case note is divided into various parts. First, it addresses the question whether indigenous peoples have the right to self-determination. It then looks at the definition of indigenous peoples, both globally and as interpreted in the African context. Next, using the *Endorois* and *Ogiek* cases, the note looks at three specific and related indigenous peoples' rights which are mostly violated by states – the right to land, natural resources and development. The two bodies dealt with various rights including the right to culture and religion, but this contribution limits its discussion to these three rights, relating them to the rights of indigenous peoples to self-determination. Lastly, the note gives an overview of the African human rights mechanisms, focussing on the Commission and the Court. This section critiques the two bodies, noting challenges faced in promoting and protecting rights of indigenous people and offering recommendations to address them.

2 INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION

One of the controversial issues raised in the indigenous peoples' rights discourse is the right to self-determination. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) talk about 'all peoples' having the right to self-determination, but as authors such as

4 JS Anaya *Indigenous peoples in international law* (2004) 59.

5 As above.

6 M Mutua 'Human rights: a political and cultural critique' in J Steiner, P Alston & R Goodman (eds) *International human rights in context: law, politics and morals* (2007) 507.

7 As above.

Castellino note,⁸ there is still no clarity as to which ‘people’ are covered – do they include indigenous peoples? Another critical issue is whether self-determination as a right can exist in a post-decolonisation phase, and also, in my opinion, in the non-political sense. Most of the material written on self-determination looks at the concept from a public international law perspective, addressing peoples within a state looking to break away from oppressive regimes – usually associated with colonialism. Self-determination is also analysed from three main standpoints – the creation of independent states, free association of peoples with an existing state, or integration with another state.⁹ As Castellino notes, it is ‘colonial peoples’ who first come to mind in discussions of people entitled to self-determination. Yet, as he also correctly notes, indigenous peoples probably have the best case for claiming the right to self-determination and challenging the colonisation rhetoric.¹⁰ Indigenous communities such as the Endorois and Ogiek have lived on their ancestral lands prior to and after colonisation, having stronger claims to the land in question and its resources. Indigenous peoples, bearing similarities with colonial peoples – dispossession of their land and a history of subjugation – should be considered within the meaning of peoples to allow them to benefit from the right to self-determination.

While taking into account literature on this issue, it is important to note that the Endorois and Ogiek communities, similar to other indigenous communities across the continent, did not and do not claim political independence from Kenya, but only claim recognition as a distinct community. They also claim autonomy in the use of and access to their ancestral land to enable their livelihood, culture and religion.¹¹ This seems to fit well with the contemporary human rights conception of self-determination, particularly that envisaged under article 1(2) of the ICCPR and ICESCR. Accordingly, all peoples have the right to freely dispose of their natural wealth and resources and they should not be deprived of their own means of subsistence. Several authors refer to this as the resource-based right to self-determination,¹² which indigenous people also enjoy.¹³ Although I agree with Castellino’s proposed hierarchy, I am of the view that if the Endorois or Ogiek were to claim political self-determination based on article 1 of the ICCPR and the ICESCR, they would theoretically have a viable claim, considering that they inhabit distinct territories, in this case, the Lake Bogoria and Mau Forest areas, respectively. Later in this article, this ‘resource-based right to self-determination’ is discussed in the context of the indigenous peoples’ right to natural resources. This non-political

8 J Castellino ‘International law and self-determination: peoples, minorities, and indigenous peoples’ in C Walter, A von Ungern-Sternberg & K Abushov (eds) *Self-determination and secession in international law* (2014).

9 As above, 37.

10 As above.

11 This was the main thrust of the applicants’ cases before the African Commission and the Court.

12 Castellino (n 8) 38.

13 P Jones ‘Human rights, group rights and peoples’ rights’ (1999) 21 *Human Rights Quarterly* 1, 107

conception of self-determination guarantees access to human rights law while seeking to address issues of personal autonomy.¹⁴

Despite states' insistence on its traditional conception, the right to self-determination continues to evolve. New variations of the right keep emerging, even promising application to modern forms of oppression such as in events of widespread and consistent denial of rights of recognised groups, including indigenous peoples.¹⁵ While some argue that indigenous peoples do not have the right, the exercise of their rights usually follow the same pattern as that of self-determination.¹⁶ Some rights which indigenous peoples enjoy also stem from the right to self-determination, for example, the crucial requirement of consultation.¹⁷

3 THE CONCEPT OF INDIGENOUSNESS

Universally, the concept of indigenous rights is still a subject of debate. However, some have argued that in sub-Saharan Africa, the concept is more controversial than in other regions.¹⁸ For instance, Kymlicka analyses the traditional distinction between indigenous peoples and minority groups. He notes that the traditional distinction of these two groups is clearer in the West (European national minorities and New World indigenous peoples) than it is in parts of Africa, Asia and the Middle East.¹⁹ In post-colonial Africa, natives who were minorities were subsumed or dominated by neighbouring groups and not white settlers. The Endorois and Ogiek, for example, form just two of the many homeland (minority) groups in Kenya. Some would argue that all the communities in Kenya, majority or not, are natives and, therefore, are all indigenous to the land. According to Kymlicka, using the traditional dichotomy, such a group would fit the European national minority dichotomy and not the indigenous peoples' concept. However, in order to take advantage of the visibility and protection within the international law framework, the UN approach has been to consider homeland minorities in post-colonial states as deserving of autonomy and accommodation as 'traditional indigenous peoples'. Accordingly, it is their vulnerability and domination by others that matters.²⁰ Besides, it is true that in most if not all African countries, dominant groups continue to suppress marginalised groups, a phenomenon which the African indigenous movement seeks to redress.²¹

14 Castellino (n 8) 40.

15 Castellino (n 8) 41.

16 R McCorquodale 'Group rights' in D Moeckli and others (eds) *International human rights law* (2018) 353.

17 As above.

18 R Roesch 'The Ogiek case of the African Court on Human and Peoples' Rights: not so much news after all?' (2017) *Ejil:Talk!*

19 W Kymlicka 'The internationalization of minority rights' (2008) 6 *I-CON* 1, 12.

20 Kymlicka (n 19) 13.

21 African Commission, 'Report of the working group of experts on indigenous populations/communities in Africa' (2005).

The question of which groups should be designated as indigenous for the purposes of international law is a difficult one to answer.²² Could regional frameworks of protection provide any answers? In the African context, the distinction between ‘peoples’, ‘indigenous peoples’ and ‘minorities’ is not clear-cut.²³ Yet, for the interpretation of the African Charter provisions, establishing the status of a community is crucial because the enjoyment of the Charter’s provisions is dependent on status. The Commission and the Court had to clarify this in both cases.

At the time of the complaint before the African Commission, the Endorois comprised approximately 60 000 people occupying the Lake Bogoria area for centuries.²⁴ They consider themselves a distinct community, whose livelihood, culture and religion is dependent on their ancestral land. Before the Commission, they traced their history with their ancestral land, before, during and after colonialism. They contended that when the High Court of Kenya decided the matter in 2002,²⁵ it refrained from addressing the issue of the community’s ‘collective right to property’ and referred to them as ‘affected individuals’ with no ‘proper identity’.²⁶ The complainants argued that they fit within the definition of ‘people’ under the African Charter hence benefitting from its collective rights.²⁷ The state disputed this, stating that the Endorois should prove their distinctiveness from the larger Kalenjin tribe.²⁸ In the *Ogiek* case, the state admitted that the community constituted an indigenous population in Kenya, but argued that the Ogiek of today ‘are different from those of the 1930s and the 1990s having transformed their way of life through time and adapted themselves to modern life and are currently like all other Kenyans.’²⁹

Both the Commission and the Court acknowledged that the concepts of ‘peoples’ and ‘indigenous peoples’ lack universal definitions,³⁰ and are contested, and that these controversies prevented drafters of the Charter from defining them.³¹ Alluding to the ICCPR and ICESCR’s lack of definition of ‘peoples’, the Commission stated that it did not feel at ease elaborating on rights where concrete international jurisprudence did not exist.³² However, the Commission noted that the Charter is unique, and unlike other regional and universal treaties, places emphasis on the rights of peoples. Noting the criteria set out by the its Working Group of Experts on Indigenous

22 Kymlicka (n 19) 4.

23 As above.

24 *Endorois* case (n 3) para 3.

25 High Court of Kenya, *William Ngasia and others v Baringo County Council and others*, Miscellaneous Civil Case No 183 of 2000.

26 *Endorois* case (n 3) para 12.

27 *Endorois* case (n 3) para 75.

28 *Endorois* case (n 3) para 14.

29 *Ogiek* case (n 2) para 104.

30 *Ogiek* case (n 2) para 105.

31 *Endorois* case (n 3) para 147.

32 As above.

Populations/Communities,³³ and identifying some of the shared characteristics among indigenous groups in Africa, the Commission found that the Endorois satisfy these requirements.³⁴ In the *Ogiek* case, the Court noted the AU Working Group's criteria but instead applied the criteria proposed by the former Chairperson of the UN Sub-Commission on the Prevention and Protection of Minorities, Erica-Irene Daes to find that the Ogiek comprised such peoples.³⁵ In my opinion, just because universal treaties do not reach a conclusion on a definition does not mean that the African human rights mechanisms cannot pronounce themselves on the issue. It is laudable that they actually did in both cases, even though inadequate.³⁶

The question of which communities fit the 'indigenous peoples' definition is not an issue which only the African human rights bodies have had to grapple with. In the *Saramaka* case, the Inter-American Court had to establish whether the Saramaka people, who comprise one of the six distinct Maroon groups in Suriname, constituted a tribal community.³⁷ The Suriname government argued that inclusion into modern society had eroded the Saramaka people's distinctiveness. In the case, the Court found that the community made up a tribal community which had economic, social and cultural characteristics which are different from the national community and this could be attributed to their relationship with the land they claimed as their ancestral land, as well as their customs and traditions.³⁸

4 SELECTED INDIGENOUS PEOPLES' RIGHTS

This part deals with three selected rights in the *Endorois and Ogiek* decisions, namely right to land, right to development and right to natural resources.

4.1 Right to land

One of the main collective rights which indigenous peoples litigate on is the right to their ancestral land. One of the recurring themes in respect of indigenous peoples' land ownership is colonialism, which is oftentimes linked with survival of customary land rights. As Ayana rightly puts it, the concern within the international system for indigenous peoples derives from the larger concern for those segments of humanity that have experienced colonisation and still suffer the

33 As above, para 150: occupation and use of a specific territory; voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity and recognition by other groups; experience of subjugation, marginalisation, dispossession, exclusion or discrimination. Also see *Ogiek* (n 2) paras 105-113.

34 *Endorois* case (n 3) para 161. See also n 34 above, para 198-200.

35 *Ogiek* case (n 2) para 107.

36 Roesch (n 18).

37 *Saramaka People v Suriname* (28 November 2007) Ser C/ 185, para 80.

38 As above.

consequences of such histories.³⁹ Just like in the African context, cases litigated in other regions show a common trend where the state places a burden on indigenous people to prove title to their ancestral land. The *Saramaka*, *Yakye Axa* and *Sawhoyamaxa* cases decided by the Inter-American Court provide good examples.

It is important to note that, while indigenous peoples' right to land is recognised by the ILO Convention No 169 and the UN Declaration on the Rights of Indigenous Peoples, this right is not explicitly written out in the African Charter. Instead, the right to land has been derived from or read into three different rights: the rights to religion, property and culture – rights which are inextricably linked to land.⁴⁰ At this juncture, it should be noted that Kenya is one of the states that have not ratified the ILO Convention No 169, and even if it had, its provisions, in my opinion, would be controversial because there is always a balance between the rights of indigenous peoples and the state's sovereignty when it comes to indigenous land rights. Tully discusses this in the Canadian context, when he critiques the criteria used in defining aboriginal rights by courts.⁴¹ The burden of proof lies with aboriginal people who are presumed not to have such a title in the first place. Even if such proof were to be established before a court, it does not guarantee that it would be accepted as sufficient proof. Besides, the title has to be reconciled with the sovereignty of the Crown. The interests of the sovereign are usually aligned with that of the larger society in most cases, the latter's rights trumping those of indigenous peoples.

Both the *Endorois and Ogiek cases* are perfect examples of this, where the state took into account the interests of the larger society, infringed on the ancestral land rights of these communities and poorly compensated part of the community for it. In the *Endorois case*, for instance, the government insisted on the implementation of the Trust Land Act, which made the Endorois peoples' land subject to a trust. This essentially gave them beneficial title to the land and not actual ownership.⁴² According to the African Commission, this system was inappropriate in protecting the peoples' rights. It also reiterated that mere access does not suffice, because lack of ownership makes indigenous peoples passive beneficiaries subjecting them to even more vulnerabilities.⁴³ This was the same logic used by the Inter-American Court in the *Saramaka case*.⁴⁴ In *Yakye Axa*, the court went further to

39 Anaya (n 4) 53.

40 Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), articles 8, 14 and 17. See also *Ogiek case* (n 2) para 164.

41 J Tully 'The struggles of indigenous peoples for and of freedom' in D Ivison, P Patton & W Sanders (eds) *Political theory and the rights of indigenous peoples* (2000) 47-49.

42 *Endorois* (n 3) para 199.

43 As above, para 204.

44 *Saramaka case* (n 37) para 110.

require the state to individualise title to traditional lands as a measure of reparation.⁴⁵

Courts are known to enable infringement of indigenous land rights. In Tully's example of the *Delgamuukw* case,⁴⁶ he discusses how courts back up the state during such infringements. In this specific case, the court outrightly said that the government could infringe on aboriginal title so long as there was a compelling and substantive legislative objective and if such objective was consistent with the fiduciary relationship between the crown and the aboriginal peoples.⁴⁷ The court cited some of the grounds that would necessitate such infringement, including environmental protection and general economic development.⁴⁸ These were some of the grounds cited by the Kenyan government to justify the eviction of the Endorois and Ogiek communities from their ancestral land – tourism and wildlife conservation,⁴⁹ as well as preservation of the Mau Forest natural ecosystem.⁵⁰ In the *Endorois* case, the African Commission applied the two-pronged conjunctive test under article 14 of the African Charter to justify encroachment on property – public or community interest and compliance with appropriate law.⁵¹ It applied the legitimate aim, proportionality and necessity tests, noting that the threshold for indigenous land is higher than for individual private property.⁵² After assessing the reasons given by the government to evict the community, and the meagre compensation given to them, the Commission concluded that there was severe encroachment of their land, which was neither proportionate to any public need nor in accordance with national and international law.⁵³ In the *Ogiek* case, the Court used a similar criteria to find that the continued eviction from and denial of access to the Mau Forest was not necessary and proportionate to achieve the government's purported aim of preserving the forest's natural ecosystem.⁵⁴

4.2 Right to development

Indigenous people increasingly face marginalisation and socio-economic exclusion the world over, featuring among the world's poor and vulnerable,⁵⁵ despite increased international and regional

45 *Yakye Axa Indigenous Community v Paraguay* (17 June 2005) Ser C/ 125, para 80.

46 *Delgamuukw v British Columbia* (1997) 3 SCR 1010.

47 Tully (n 41).

48 As above.

49 *Endorois* case (n 3) and *Ogiek* (n 3) para 120.

50 *Ogiek* case (n 2) para 130.

51 *Endorois* case (n 3) para 211.

52 *Endorois* case (n 3) paras 212-213.

53 *Endorois* case (n 3) para 238.

54 *Ogiek* case (n 2) para 130.

55 United Nations Office of the High Commissioner on Human Rights 'Information note: the right to development and indigenous peoples' (2016).

recognition. Many countries deny indigenous peoples' recognition domestically, and due to weak legal frameworks and unwillingness on the part of the state to implement policies in their favour, their right to development is threatened. This right is closely linked to their right to land ownership as well as access to and use natural resources on the land. However, states tend to tilt the scale in favour of the majority to the detriment of indigenous peoples and other minorities, citing the general economic development of the society at large.

At the global level, the right to development is elaborated in the UN Declaration on the Right to Development, a soft law document.⁵⁶ There seems to be no prospects of elaborating a universal legally binding treaty soon. Regionally, the right has only been guaranteed in two human rights treaties – the African Charter and the Arab Charter on Human Rights.⁵⁷ Under the former, the right of all peoples to their socio-economic and cultural development is guaranteed. The Charter envisages that this right shall be implemented with due regard to the peoples' freedom and identity and in equal enjoyment of the common heritage of humankind,⁵⁸ and member states have the individual and collective duty to ensure the exercise of this right.⁵⁹ The African Commission had the occasion to clarify this right in the *Endorois* case, which also marked the first decision, globally, to address the implementation of the right to development by states.⁶⁰ The complainants contended that due to the creation of the game reserve and the state's failure to adequately involve the Endorois community in the development process, their right to development was violated.⁶¹ The state argued that based on participatory democracy, communities are tasked with contributing to the well-being of society at large, instead of selfishly caring for their own community.⁶² In applying a two-prong test, constitutive and instrumental, the Commission reiterated that the right to development is both a means and an end.⁶³ Accordingly, a violation of the procedural or substantive element of the right would constitute a violation. Simply fulfilling one of the two prongs in the absence of the other would not suffice.⁶⁴ The Commission also noted that this right requires that people are given the ability to choose,⁶⁵ and the forced eviction of the Endorois from the game reserve eliminated such choices, including where to live.

56 United Nations General Assembly, Declaration on the right to development: resolution – adopted by the General Assembly (4 December 1986) A/RES/41/128.

57 Arts 22 and 37 respectively.

58 African Charter (n 40) art 22.

59 As above.

60 SP Marks 'Poverty' in D Moeckli and others (eds) *International human rights law* (2018) 616.

61 *Endorois* case (n 3) para 269.

62 *Endorois* case (n 3) para 270.

63 *Endorois* case (n 3) para 277.

64 As above.

65 As above.

The interpretation of the right by the Commission (as well as by the Court)⁶⁶ is in line with and closely linked to the requirement under article 23 of the UN Declaration on Development,⁶⁷ which requires active, free and meaningful participation in development. Not only were the Endorois not meaningfully included in the decisions that led to their eviction,⁶⁸ this also trickled down to their post-eviction circumstances. The requirement of participation has also been stressed by other courts such as the Inter-American Court. In the *Saramaka* case,⁶⁹ the Court was of the opinion that in order that the Saramaka peoples' survival was not threatened by granting concessions for exploration of natural resources, the state had to abide by several safeguards, including that it had to ensure effective participation of the Saramaka people in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan on their territory.⁷⁰

The African Commission went further to state that participation requires the state to disseminate information and ensure that consultations are done in good faith through culturally appropriate procedures.⁷¹ In my view, such consultation is crucial because arbitrary decisions taken by states not only affect indigenous peoples' right to development but also related rights. For example, the Endorois community was evicted to less-productive semi-arid land hindering their pastoral way of life, access to clean drinking water as well as other needs crucial for their sustenance.⁷² As correctly reiterated by the Commission, it is the state that bears the burden of creating conditions favourable for a peoples' development and ensuring that indigenous peoples are part of the development process and the benefits accruing from it.⁷³ It also found that the failure of the Kenyan government to provide adequate compensation and benefits to the Endorois peoples was a violation of this right.⁷⁴ In the *Ogiek* case, the African Court also had to determine whether the right to development was violated as a result of the community's eviction from the Mau Forest, and the failure by the state to consult the community regarding the development of their shared cultural, economic and social life within the Forest.⁷⁵ In holding the state in violation of article 22, the Court found that the evictions adversely impacted the community's economic, social and cultural development.⁷⁶

66 *Ogiek* case (n 2) para 209.

67 Declaration on the Right to Development (n 57).

68 *Endorois* case (n 2) para 290.

69 *Saramaka* case (n 37) para 129.

70 As above.

71 *Endorois* case (n 3) para 289.

72 *Endorois* case (n 3) para 286.

73 *Endorois* case (n 3) para 298.

74 As above.

75 *Ogiek* case (n 2) para 202-211.

76 As above.

Some developing states prioritise economic development at the expense of human rights, a phenomenon explained by Marks as states being convinced that economic progress would suffer if human rights were to be advanced before a certain level of prosperity has been achieved.⁷⁷ While some countries have developed rapidly in the backdrop of human rights deprivation, many states have equally developed without placing human rights at the periphery.⁷⁸ Another conviction of state officials, especially those in charge of the economy, is that citizens pursue human rights litigation as a form of political opposition to their governments.⁷⁹ According to Marks, whose view I support, there are compelling reasons why human rights should be mainstreamed in development and anti-poverty objectives of states. If anything, both human rights and development are aimed at the same thing – human welfare. Human rights could also make development more sustainable and equitable. For indigenous peoples, prioritising pro-poor human development that incorporates human rights would not only promote equality and freedom but also allow them to choose and lead a life that they value and which enhances their well-being.⁸⁰ Human rights enable an environment where indigenous peoples can develop their full potential and lead creative lives.⁸¹ States should move from making people objects of their history and allow them to know, claim and realise their human rights instead of making them objects.⁸² Decisions such as the *Endorois* and *Ogiek* cases promote this.

4.3 The right to natural resources

It is understood that indigenous people have the right to natural resources based on their historical presence and ownership of the land which they occupy. While this right is not absolute, it can only be limited under compelling and urgent circumstances.⁸³ I agree with Castellino's previously discussed point that flowing from the right of indigenous peoples to self-determination as interpreted by article 1(2) of the ICCPR and ICESCR, they have the right to freely dispose of their natural wealth and resources and that in no case may they be deprived of their own means of subsistence.⁸⁴ For there to be a limitation to this right, there has to be an urgent need on the part of the state, and where limited, there has to be just and fair compensation. Oftentimes, as noted by the UN Special Rapporteur on the rights of indigenous

77 Marks (n 60) 616.

78 As above.

79 As above.

80 Marks (n 60) 617.

81 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), para 5 of Preamble.

82 Marks (n 60).

83 Castellino (n 8).

84 Castellino (n 8) 37.

peoples, states do not have urgent compelling reasons for taking away indigenous lands and resources.⁸⁵

This right is closely linked to indigenous peoples' right to land ownership and their right to development. In the *Yakye Axa* case, the Inter-American Court drew the link between the destitute conditions in which the community lived with the lack of access to their land and natural resources.⁸⁶ As the court correctly stressed, for indigenous peoples, access to the use and enjoyment of natural resources found on ancestral lands is closely related to their enjoyment of socio-economic rights, especially the right to food and access to clean water.⁸⁷

While in other regions access to natural resources is usually linked to other rights, including basing them on provisions of the ICCPR and the ICESCR,⁸⁸ one of the unique features of the African Charter is that it recognises the right to natural resources as a stand-alone right.⁸⁹ The African Commission has previously held that the right to natural resources vests in indigenous peoples by virtue of them inhabiting the land.⁹⁰ In the *Endorois* case, the complainants alleged that the creation of a game reserve on their ancestral land led to the violation of their right to natural resources which they had relied on for years. These included natural salt licks which they used to feed their cattle and the land on which they grazed their cattle to sustain a nomadic lifestyle.⁹¹ The government, on the other hand, cited conservation and tourism as the main reasons for their eviction.⁹² Interestingly, after the eviction, the government gave a ruby mining concession to a private company.⁹³ In the *Ogiek* case, there were allegations that the state granted logging concessions upon evicting the community.⁹⁴ If the government was genuinely concerned about conserving natural resources, the Endorois and Ogiek communities would be better placed to ensure such conservation. Activities such as logging, and exploration of natural resources lead to more environmental degradation than the alleged damage caused indigenous communities occupying the land.

When discussing the rights of indigenous peoples to natural resources, the debate on whether they have permanent sovereignty over these resources is also common. While the African Charter explicitly provides for this right, other regional and international instruments do not. In my opinion, even though there exists a gap, the right to natural resources exists in various forms and can be deduced from the positive

85 Final report of the Special Rapporteur, 'Prevention of discrimination and protection of indigenous peoples: indigenous peoples' permanent sovereignty over natural resources' (13 July 2004) E/CN.4/Sub.2/2004/30.

86 *Yakye Axa Indigenous Community* (n 45) paras 164, 167.

87 *Yakye Axa Indigenous Community* (n 45) para 167.

88 Art 1(2) of both Covenants.

89 *African Charter* (n 40) art 21.

90 Roesch (n 18).

91 *Endorois* case (n 3).

92 As above.

93 As above.

94 *Ogiek* case (n 2) para 191.

recognition of some other rights enjoyed by indigenous peoples. Rights such as the right to self-determination under the ICCPR and the ICESCR, the right to development, the right to land and even the freedom from non-discrimination can be used by indigenous peoples as a basis for litigation.

An important international instrument containing provisions on indigenous peoples and the control over their natural resources is the 1989 ILO Convention No 169.⁹⁵ Article 15 guarantees the rights of 'peoples' to natural resources, including their participation in the use, management and conservation of these resources.⁹⁶ Unfortunately, to date, the Convention has only been ratified by 23 states, while many other countries such as Kenya have not. Indigenous peoples in states which have ratified the Convention can claim and enjoy limited forms of sovereignty and management authority thanks to this provision as read with provisions such as article 7 which guarantees among other rights, the right to decide their own priorities. The Protocol establishing the African Court also grants the Court the right to apply, aside from the Charter, international instruments ratified by AU member states.⁹⁷ This might not be necessary, though, given the Charter expressly sets out the right.

5 IMPLEMENTATION STATUS

5.1 *Endorois case*

Following the Commission's landmark decision, it was anticipated by many, especially the Endorois community, that the government of Kenya would implement the Commission's recommendations. The Commission's recommendations were as follows: recognise rights of ownership to the Endorois and restitute Endorois ancestral land; ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle; pay adequate compensation to the community for all the loss suffered; pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve; grant registration to the Endorois Welfare Committee; engage in dialogue with the Complainants for the effective implementation of these recommendations; and report on the implementation of these recommendations within three months from the date of notification.⁹⁸

The implementation process has been marred by a lack of political will on the part of the government. To date, it has neither explicitly recognised the Endorois' rights of ownership nor restituted their

95 International Labour Organization (ILO), *Indigenous and tribal peoples Convention, C169*, 27 June 1989, C169.

96 As above.

97 African Charter (n 40) art 7.

98 *Endorois case* (n 3) 80.

ancestral lands.⁹⁹ Furthermore, it has not provided the affected groups adequate compensation for the loss they had suffered.¹⁰⁰

While these substantive recommendations of the Commission have not been complied with, some small gains have been made. First, thanks to advocacy, domestically and at the international level, the Endorois have access to the Lake Bogoria area, where they graze their cattle and carry out religious and cultural rights.¹⁰¹ Second, there have been efforts to ensure that the community receives royalties from economic activities carried out within the National Reserve. For example, in 2014, the Kenya Wildlife Service (KWS) struck a deal with the biotech company Novozymes to pay royalties to the community for the exploitation of bioenzymes in the Lake.¹⁰² Later, the community managed to negotiate a 10% revenue share with the Baringo County Government.¹⁰³ In line with the Commission's recommendation, some members of the community have also benefited from employment opportunities at the Reserve.¹⁰⁴ Third, the Endorois Welfare Committee was registered before the Commission's judgment was issued,¹⁰⁵ and has collaborated with NGOs in the Global South and beyond to put pressure on the government to implement the Commission's recommendations. Fourth, the government set up a Task Force in 2014 to engage with the community and to oversee the implementation process. However, it was criticised for not including any representatives from the Endorois community in its setup, and for consulting the community only once. Its mandate was also framed in questionable terms, and its term was not renewed.¹⁰⁶ Last, the government failed to report on the implementation process within the stipulated three months. Efforts by the Commission to salvage the situation included the convening of an implementation hearing, and a resolution issued in 2013 requiring the government to take steps to implement the recommendations and file a report on the matter.¹⁰⁷ In

99 ESCR-Net, *The emerging leadership of Endorois women: an indirect impact of the Endorois case* (2019) https://www.escr-net.org/sites/default/files/the_emerging_leadership_of_endorois_women_-_en.pdf (accessed 21 September 2020) 13.

100 As above.

101 As above.

102 Z Odhiambo 'Kenya signs deal to exploit microbial goldmine' (2007) SciDevNet <https://www.scidev.net/global/policy/news/kenya-signs-deal-to-exploit-microbial-goldmine.html> (accessed 23 September 2020).

103 ESCR-Net (n 99) 11.

104 As above.

105 The Committee was registered in 2007 as a result of the exchanges that took place during the hearing stage.

106 Government of Kenya, *The Task Force on the implementation of the decision of the African Commission on Human and Peoples' Rights contained in communication no 276/2003 (Centre for Minority Rights Development on behalf of the Endorois Welfare Council v Kenya* (Gazette Notice no 6708, 26 September 2014) http://kenyalaw.org/kenya_gazette/gazette/volume/MTA3Nw--/Vol.CX.VI-No.115/ (accessed 23 September 2020).

107 African Commission on Human and Peoples' Rights, *Resolution Calling on the Republic of Kenya to Implement the Endorois Decision* (ACHPR/Res.257(LIV)2013).

2013, a meeting of the Working Group on Indigenous Populations was also held in Nairobi, bringing together delegates from all over, except from the government.¹⁰⁸

While some of the efforts undertaken to implement the Commission's recommendations are laudable, they are not directly attributed to the government, but to the political mobilisation of the community, with the support of NGOs, to demand compliance.

5.2 *Ogiek case*

Three years on, the Government of Kenya has not implemented the judgment in the *Ogiek* case. The Court ordered that the government 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 of the judgment.¹⁰⁹ A separate application for reparations was filed by the Applicants, but the Court has not yet ruled on it.¹¹⁰ As was the case in the *Endorois* case, the government set up a Task Force in 2017 and renewed its term in 2019.¹¹¹ The Task Force, which was initially tasked with publishing a report on the implementation process in May 2019, missed its deadline and only submitted it in March 2020.¹¹² However, while the government received the report, it has yet to publish its contents.¹¹³ As recently as July 2020, amid the Covid-19 pandemic, the government carried out further evictions of families from the Mau Forest, showing utter disregard to the judgment.¹¹⁴

108 The meeting was attended by representatives of the Endorois Community, NGOs and representatives of international organisations, including the UN Special Rapporteur on the Rights of Indigenous Peoples. According to reports, Kenyan government officials were absent.

109 *Ogiek* case (n 2) 68.

110 The application is still in its hearing phase. African Court on Human and Peoples' Rights, 'African Court begins 56th ordinary session on Monday' (2020) <https://en.african-court.org/index.php/news/press-releases/item/340-african-court-begins-56th-ordinary-session-on-monday> (accessed 27 September 2020).

111 Government of Kenya, *Taskforce on the implementation of the decision of the African Court on human and peoples' rights issued against the Government of Kenya in respect of the rights of the Ogiek community of Mau and enhancing the participation of indigenous communities in the sustainable management of forests: extension of time* (Gazette Notice no 4138, 30 April 2019) http://kenyalaw.org/kenya_gazette/gazette/volume/MTk2OA--/Vol.CXXI-No.53/ (accessed 23 September 2020).

112 M Chepkorir 'The Ogiek still hoping for implementation of African Court ruling three years later' (2020) Natural Justice <https://naturaljustice.org/the-ogiek-still-hoping-for-implementation-of-african-court-ruling-three-years-later/> (accessed 24 September 2020).

113 Minority Rights Group International 'Kenya flouts African Court judgment, continues to evict Ogiek in the midst of COVID-19 pandemic' (2020) <https://minorityrights.org/2020/07/17/ogiek-evictions/> (accessed 3 July 2020).

114 As above.

6 AN APPRAISAL OF THE HUMAN RIGHTS MECHANISMS

When it comes to litigation of indigenous peoples' rights anywhere in the world, the reality is that the domestic court system, which is oftentimes made up of judges from the majority communities in a state, and whose interest is to safeguard the state's interests, may not achieve justice for indigenous people and minorities. Decisions such as the *Endorois* case before the High Court of Kenya serve as an example.¹¹⁵ Because indigenous peoples do not trust that their own national courts can assist them in upholding justice between the majority and minority within the state,¹¹⁶ impartial bodies such as regional and universal human rights mechanisms are important in monitoring compliance with indigenous peoples' rights. Kymlicka gives examples of the indigenous peoples in Canada and the US to explain why impartial bodies are important for monitoring compliance.¹¹⁷ In my view, following how the *Endorois* case was litigated at the domestic level, such bodies as the African Commission and Court are needed to address the legitimate reservations that indigenous people have regarding domestic courts. This section provides an overview of the two main human rights bodies in the African context.

6.1 The African Commission

The African Commission was established under article 30 of the African Charter, with the aim of promoting human and peoples' rights and to ensure their protection in the continent.¹¹⁸ Located in Banjul, The Gambia, the Commission became operational in 1986, and reports to the African Union (AU) Assembly of Heads of State and Government.

Comprising 11 commissioners, the Commission draws expertise from personalities with the highest reputation, high morality, integrity, impartiality and competence in the area of human and peoples' rights.¹¹⁹ Its mandate is laid down in Chapter II of the Charter, in particular article 45. The Commission exercises jurisdiction over the rights set out in the Charter and in doing so, draws inspiration not only from international law but also African instruments, practices, customs and general principles recognised by African states.¹²⁰ The Commission presides over communications from states, non-governmental organisations and individuals.¹²¹ However, communications other than those by states shall only be considered

115 *Endorois* case (n 3).

116 Kymlicka (n 19) 233.

117 As above.

118 African Charter (n 40) art 30.

119 African Charter (n 40) art 31.

120 African Charter (n 40) 60-61.

121 African Charter (n 40) art 55.

upon verifying that local remedies have been exhausted, or where it is obvious that they have been unduly prolonged.¹²² Apart from adjudicating claims, the Commission also works with the system of Special Measures comprising Special Rapporteurs and working groups, which bodies complement its work.

6.2 The African Court

The African Court was established in 2004 pursuant to article 1 of the Protocol to the African Charter, with a view to complementing the protective mandate of the African Commission.¹²³ Currently the acting judicial organ of the AU, the Court's jurisdiction is exercised in respect of the interpretation of the African Charter, the Court Protocol as well as other human rights instruments ratified by state parties.¹²⁴ Unlike the Commission, the Court can issue advisory opinions upon the request of AU member states as well as its organs.¹²⁵ While individuals and NGOs can bring communications before the Commission,¹²⁶ access to the Court is limited to the Commission, states and African intergovernmental organisations.¹²⁷ Individuals and NGOs with observer status before the Commission can only access the Court if the respondent state has deposited a declaration with the Chairperson of the African Union Commission accepting the Court's competence to receive such cases.¹²⁸

One of the important features of the Court is that it issues binding decisions. To-date, only 30 African states have ratified the Court Protocol.¹²⁹ Out of these, only ten states ever made declarations under article 34(6) of the Protocol. However, Rwanda, Benin, Tanzania and Côte d'Ivoire have withdrawn their declarations, reducing the number to six.¹³⁰ In deciding cases before it, the Court applies the Charter as well as human rights instruments ratified by the states concerned, as well as its Rules and Procedures.¹³¹

122 As above, art 56.

123 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol), articles 1 and 2. It is worth noting that in 2004, the Court was merged with the African Court of Justice, but the new court (the African Court of Justice and Human and Peoples' Rights) is not operational.

124 As above, art 3.

125 As above, art 4.

126 So long as local remedies have been exhausted.

127 Court Protocol (n 123) art 5.

128 Court Protocol (n 123) art 34(6).

129 See www.au.int (accessed 1 July 2020).

130 As above.

131 Court Protocol (n 123) art 7.

6.3 Complementarity between the Court and the Commission

Upon the Court's creation, it was envisaged that it would complement the Commission's work and reinforce its functions.¹³² This complementarity can be seen in the interaction between the two institutions. First, the Commission can lodge a complaint with the Court pursuant to article 5 of the Court Protocol. Second, article 6 of the Court Protocol permits the Court to request the Commission's opinion when determining the admissibility of cases before it. Third, before issuing advisory opinions, the Court must ensure that the Commission is not already seized of the matter.¹³³ Fourth, the Court may transfer cases to the Commission,¹³⁴ and the Commission may refer cases to the Court. Finally, upon issuing a judgment, the Court notifies the Commission and states concerned.¹³⁵

7 CHALLENGES FACING THE MECHANISMS

The low implementation rate of decisions is arguably the main challenge facing human rights mechanisms such as the Commission and Court. One of the weaknesses of the African Charter is that it gives the Commission a supervisory and not a judicial role.¹³⁶ It can issue recommendations, which, unfortunately, are not binding on states. Furthermore, the Charter does not specify the remedies which the Commission may recommend, only that they should be 'useful' in the particular case.¹³⁷ The Commission has previously recommended compensation but has often not specified how much – only stating that it should be adequate.¹³⁸ For victims, these remedies stated in unspecified terms are prone to abuse by states which do not feel compelled to comply. This is compounded by the lack of monitoring mechanisms for the recommendations issued by the Commission. The Court, on the other hand, cures these inadequacies as it issues binding decisions.¹³⁹ Besides, the Court can issue remedies such as compensation or reparations.¹⁴⁰ In cases of extreme gravity and

132 The Rules and Procedures of the Court also require that the Court considers the complementarity between it and the commission when considering cases before it. Also see the Preamble to the Protocol.

133 Court Protocol (n 123) art 4.

134 Court Protocol (n 123) art 6(3).

135 Court Protocol (n 123) art 29.

136 A Zimmermann & J Bäumlner 'Current challenges facing the African Court on Human and Peoples' Rights' (2010) 7 *KAS International Reports* 38, 49.

137 Open Society Justice Initiative 'African Commission on Human and Peoples' Rights' (2013). <https://www.justiceinitiative.org/publications/african-commission-human-and-peoples-rights> (accessed 1 July 2020)

138 In the *Endorois case*, for example, the Commission recommended that Kenya 'pay adequate compensation to the community for all the loss suffered'.

139 Court Protocol (n 123) art 28(2).

140 Court Protocol (n 123) art 27(1).

urgency, it may also issue provisional measures to avoid irreparable harm.¹⁴¹ The challenge for the Court, however, is that it can only issue decisions involving states which have ratified the Protocol.

Another downside to the African Charter is that it does not provide for an enforcement mechanism for the Commission's recommendations. One way of curing the gap left by the Charter, enforcement-wise, is the referral mechanism – from the Commission to the African Court, as illustrated by the *Ogiek* case. However, the Court itself also faces challenges. Unlike the Charter, the Protocol provides for an enforcement process. Accordingly, the Court stipulates a time period within which a state has to comply with the execution of its judgment.¹⁴² The Executive Council, which is also notified of the judgment, monitors its execution by the relevant state.¹⁴³ During each regular session of the Assembly, the Court reports on its work, including cases of non-compliance by states.¹⁴⁴ While these measures are more concrete than those of the Commission, they are still weak. At the end of the day, implementation rests on the goodwill of states, and as illustrated by the cases analysed herein, this seems to lack.

The requirement that states have to make a declaration to allow NGOs and individuals to bring cases before the Court is another hindrance to the promotion and protection of Charter rights by the African Court. The implication of the requirement is that NGOs and individuals in states like Kenya, which have not made such a declaration, can only rely on referrals by the Commission, another state party to the Protocol or an African international organisation, for their grievances to be determined by the Court. It is a challenge for the Commission and Court to discharge their functions where political will and state cooperation lacks.

Other challenges affecting the Commission and Court include lack of adequate resources to effectively discharge their functions;¹⁴⁵ lack of independence (oftentimes a critique of the Court whose judges are elected by the Executive Council and appointed by Heads of State); slow determination of cases; and lack of synergy between the two bodies.

8 WAY FORWARD

In order to ensure that the Commission and the Court better protect and promote the rights espoused in the Charter, more has to be done.

First, to cure the implementation issue, the Commission and the Court should render decisions and judgments with more specificity.

141 Court Protocol (n 123) art 27(2).

142 Court Protocol (n 123) art 30.

143 Court Protocol (n 123) art 29.

144 Court Protocol (n 123) art 31.

145 The Commission's budget is limited. The Court's budget, for instance, is borne by AU member states, which is not much. Allocations to the Commission are also inadequate.

Such decisions should be drafted in a manner that allows implementation to be measured.¹⁴⁶ Various studies have linked low implementation rates with non-specificity and lack of clarity of decisions. A recent study by Murray and Sandoval maps out the extent to which authorities in nine states implement the decisions of supranational bodies, including those of the African Commission and Court.¹⁴⁷ According to the study, some correspondents believed that greater specificity contributes to better implementation as it makes it easier for state authorities to implement decisions while preventing them from doing as they pleased.¹⁴⁸ Specificity, for example, in terms of the content of decisions and deadlines is also useful in levelling the playing field and avoiding instances where the state has to negotiate with affected persons in order to implement decisions.¹⁴⁹ The *Endorois* and *Ogiek* cases best illustrate the conundrum in which victims find themselves when it comes to engaging with state actors. Greater specificity also promotes better monitoring and supervision by national bodies and actors such as NGOs.¹⁵⁰ Some may argue that specificity may limit the state in providing better recourse to affected groups than what human rights mechanisms may have ordered. The study by Murray and Sandoval captures these sentiments, particularly by African government officials, who cited unrealistic remedies that do not take into account complexities of the domestic context.¹⁵¹ While such sentiments may be valid, this should not be an excuse by states not to implement decisions altogether. Specificity of remedies or not, political will is crucial in the implementation process. For human rights mechanisms, understanding domestic contexts and the practicality of implementation should inform their drafting of decisions to limit such excuses by states.

Second, to enable the Commission and Court issue decisions which clarify concepts such as 'indigenouness', the two bodies should leverage the resources at their disposal. Functions such as the Commission's ability to issue general recommendations and the Court's advisory role can be used to clarify on gaps left by the Charter as well as jurisprudence of the two bodies. NGOs and academia also have a role to play in promoting such clarification through research. Universal and regional human rights mechanisms such as the Human Rights Committee and the Inter-American and European Courts can also offer useful reference points, especially in respect of interpretation and clarification of rights in international instruments also ratified by AU states.

Third, more efforts should be directed towards promoting state cooperation and commitment to the Charter and the Protocol

146 R Murray & C Sandoval-Villalba 'Balancing the specificity of reparation measures and states' discretion to enhance implementation' (2020) 12 *Journal of Human Rights Practice* 71.

147 As above.

148 Murray & Sandoval (n 146) 111-112.

149 Murray & Sandoval (n 146) 105-107.

150 Murray & Sandoval (n 146) 111-112.

151 Murray & Sandoval (n 146) 113.

establishing the Court. While the Commission and the Court issue decisions safeguarding the rights of citizens of member states, it is ultimately how these decisions are implemented on the ground that matters. Some of these decisions have been lauded for their progressiveness and potential to promote and protect human and peoples' rights, yet little has been done to turn these decisions into reality for affected groups.

Fourth, more states should be encouraged to ratify the Protocol establishing the Court. Considering that the Commission's decisions are not binding on states, the Court can cure this inadequacy in the exercise of its jurisdiction in contentious cases. However, the Court can only issue binding decisions in respect to states parties to its Protocol. So far, only 30 out of 55 AU states have ratified the Protocol. The Court's functions are further crippled by the requirement for declarations by states to allow NGOs and individuals to bring cases before it. This could be remedied by the Commission's ability to refer cases to the Court, as was in the *Ogiek* case. However, this may not suffice as many cases would not reach the Court. Another alternative would be for the Protocol to be amended to allow direct access to the Court by NGOs and individuals. However, it is highly unlikely that states would agree to such an amendment. It is only hoped that more states would make declarations but with the on-going trend (states withdrawing their declarations), the prospects of this are bleak.

9 CONCLUSION

This article has attempted an analysis of the rights of indigenous peoples in the African context. Touching on the issues of self-determination, indigenosity and selected rights which states mostly violate, the article notes that one of the difficulties in implementing the rights of indigenous peoples is the reluctance by states to envisage indigenous peoples as having these rights. The state also balances rights of indigenous peoples against those of the majority or its own interests. Unless states change their stance, indigenous peoples' rights will continue to be violated domestically. However, impartial bodies, such as regional mechanisms, hold hope for indigenous peoples. The Commission and the Court elaborated on pertinent issues relating to human and peoples' rights despite the states' unwillingness to implement the decisions analysed above. In my view, this is not a failure on the part of the African human rights mechanisms. All relevant stakeholders, especially states, must cooperate to give effect to decisions of the two bodies for the benefit of affected peoples as intended by the African Charter.