

A commentary on the African Court on Human and Peoples' Rights' remedial approach in its ruling on reparations in *African Commission on Human and Peoples' Rights v Kenya*

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ABSTRACT: This commentary examines and highlights some crucial aspects of the reparation ruling by the African Court on Human and Peoples' Rights in *African Commission on Human and Peoples' Rights v Kenya* (Ogiek case), focusing on its reparation approach to formulate adequate solutions. The commentary points out that the Court's remedial approach faces challenges concerning specificity and state-centrism, which hinders the development of an efficient indigenous remedial practice and the implementation of its decisions by third parties. Moreover, the commentary argues that the African remedial approach failed to recognise and provide adequate remedial response to the intergenerational nature of the Ogieks' suffering. Considering these gaps, the commentary advocates a reinforced specificity of the African Court's remedial orders to encourage compliance and minimise state dominance, embrace a participatory approach to undermine state centrism, and adopt a regulatory-participatory method to guarantee more efficient intergenerational remedies. The research methodology used in this commentary was qualitative, and content analysis was adopted as the methodological paradigm.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Commentaire sur l'approche de réparation adoptée par la Cour africaine des droits de l'homme et des peuples dans son arrêt sur les réparations dans l'affaire *Commission africaine des droits de l'homme et des peuples c. Kenya*

RÉSUMÉ: Ce commentaire examine et met en lumière certains aspects cruciaux de l'arrêt *Commission africaine des droits de l'homme et des peuples c. Kenya* (Ogiek) de la Cour africaine des droits de l'homme et des peuples en matière de réparation, en se concentrant sur son approche de la réparation afin de formuler des solutions adéquates. Le commentaire souligne que le modèle de réparation de la Cour est toujours confrontée à des défis concernant la spécificité et centrisme étatique, ce qui entrave le développement d'une pratique réparatrice indigène efficace et la mise en œuvre de ses décisions par des tiers. En outre, le commentaire affirme que l'approche africaine de la réparation n'a pas réussi à reconnaître et à fournir une appréciation

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adéquate de la nature intergénérationnelle de la souffrance du peuple Ogiek. Compte tenu de ces lacunes, le commentaire préconise un renforcement de la spécificité des ordonnances de réparation afin d'encourager la conformité et de minimiser la supériorité de l'État, d'adopter une approche participative pour rabaisser le centrisme étatique et d'adopter une méthode réglementaire-participative pour garantir des réparations intergénérationnelles plus efficaces. La méthodologie de recherche utilisée dans ce commentaire est qualitative et l'analyse de contenu a été adoptée comme paradigme méthodologique.

KEY WORDS: African Court, *Ogiek* reparation decision, remedial approach

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1 INTRODUCTION

The African Court on Human and Peoples' Rights (African Court) handed down a ruling on reparations on 23 June 2023 regarding the forced eviction of the *Ogiek* people, a Kenyan indigenous community numbering between 10 000 and 20 000 people, from their ancestral land in the Mau Forest, a region covering approximately 400 000 hectares. The African Court has predominantly addressed individual cases in its decisions on reparations, with only two instances involving indigenous peoples.¹ The Court has only issued one ruling regarding reparations for indigenous peoples, namely, the *Ogiek* ruling on reparations, the first case issued by an African regional judicial body. This ruling is a significant milestone for indigenous peoples in Africa as it sets binding precedents and outlines Africa's response and approach to reparation for harm caused to indigenous peoples, particularly the *Ogiek* community.

This commentary focuses on some of the key issues in the Court's remedial approach and offers suggestions for improvement to enhance

1 See <https://www.african-court.org/cpmt/decisions> (accessed 8 December 2023) *Twifo Hemmang Community v Ghana* Application 59/2016, African Court on Human and Peoples' Rights (2016). The African Court dismissed the case for lack of temporal jurisdiction. Meanwhile, the *Ogiek* case was declared admissible by the Court, and separate decisions were made on the merits and reparations.

the Court's future handling of similar cases. Since the *Ogiek* reparation practices serve as a representation and articulation of the broader reparation practices of the African Court, this commentary provides a comprehensive overview of the Court's reparation practices, followed by a detailed examination of its approach in the *Ogiek* case. The commentary then identifies the inadequacies of the Court's remedial approach. It concludes with strategies to improve the Court's indigenous remedial practices and enhance the implementation of its decisions by third parties.

This study uses a qualitative methodology, including analytical legal analyses involving primary and secondary data collection methods. The primary materials were obtained from the *Ogiek* reparation judgment to aid in the commentary's examination of the Court's approach in the *Ogiek* case. The analysis involved a desk review of the *Ogiek* reparation ruling. Where relevant, reference was made to the merit decision of the case, other relevant reparation decisions from domestic and supranational bodies, such as the Australian domestic system and the United Nations Committee against Torture, and the Inter-American Court of Human Rights (Inter-American Court). However, it should be noted that this is not intended to make the commentary a comparative analysis; rather, it aims to use these relevant cases as a lens to provide detailed insight and clarity on the analysis arising from the African Court's ruling. Secondary materials were sourced through a desk review deemed appropriate for the analysis derived from exploring the African Court's remedial practice in the case under consideration.

2 SUMMARY OF FACTS AND BRIEF ANALYSIS OF THE *OGIEK* DECISION ON MERITS

Since time immemorial, the *Ogiek* indigenous peoples of Kenya have lived and depended on the land for their socio-economic and cultural survival. Since and before independence, the Kenyan government has regularly and arbitrarily subjected the community to forced evictions from their ancestral land, without consultation or compensation.² The *Ogiek*s' rights over their traditionally-owned lands have been continually denied and ignored. The government has allocated to third parties, and permitted substantial commercial logging to take place, without sharing any of the benefits with the *Ogiek*.

In October 2009 Kenya issued an eviction notice to the *Ogiek* indigenous community and other settlers of the Mau Forest, giving them 30 days to leave. After having exhausted domestic remedies, the *Ogiek* community, with the assistance of the Minority Rights Group International (MRG), *Ogiek* Peoples' Development Programme (OPDP) and Centre for Minority Rights Development (CEMIRIDE),

2 *African Commission on Human and Peoples' Rights v Kenya* Application 6/2012, African Court on Human and Peoples' Rights, ruling on reparations (2022) para 8 (*Ogiek* case).

filed a complaint against Kenya with the African Commission on Human and Peoples' Rights (African Commission) on 14 November 2009. The Ogiek community alleged violations of articles 2, 4, 8, 14, 17(2), 17(3), 21 and 22 of the African Charter on Human and Peoples' Rights (African Charter). On 23 November 2009 the African Commission issued an Order for Provisional Measures, requesting Kenya to suspend the implementation of the eviction order. On 12 July 2012 the African Commission referred the case to the African Court under article 5(1)(a) of the Protocol establishing the Court Protocol due to Kenya's lack of response in what became known as the *Ogiek* case.³ The African Commission on behalf of the Ogiek community alleged that Kenya violated their rights to life, property, culture, natural resources, development and religion, as enshrined in articles 1, 2, 4, 8, 14, 17(2) and (3), 21 and 22 of the African Charter.⁴ The Commission pleaded that the Court ordered Kenya, among others, to stop the evictions and provide a remedy for violations of the rights of the Ogieks.⁵ Kenya requested that the application be dismissed and that there were no violations of Ogieks' rights, as the Commission alleged.⁶ Kenya further contended with the African Commission's lack of standing and the African Court's lack of temporal jurisdiction.⁷

After hearing both parties, the Court held that it had personal and material jurisdiction to entertain the case. For temporal jurisdiction, it stated that although the violations fell outside the critical dates,⁸ the violations were 'continuing'. Here, the Court acknowledges the longstanding and intergenerational injustices⁹ experienced by the Ogiek community.¹⁰ The Court recognised that the Ogieks' suffering had been ongoing since independence, characterised by continued subjugation, marginalisation, denial of access to land and lack of adequate constitutional or judicial remedy.¹¹ Additionally, the African Court declared the case admissible under articles 55 and 56 of the African Charter.¹²

After examining the parties' pleadings on the merits, on 26 May 2017 the Court unanimously ruled that Kenya violated articles 1, 2, 8, 14 17(2) and (3), 21 and 22 of the African Charter. Two of the takeaways in this Court's merits decision relate to its interpretation of the status of the Ogiek and their right to property under article 14 of the African

3 *Ogiek* ruling on reparations paras 1-3.

4 *Ogiek* ruling on reparations para 1.

5 *African Commission on Human and Peoples' Rights v Kenya* Application 6/2012 (2017) decision on merits para 43.

6 *Ogiek* decision on merits para 46.

7 *Ogiek* decision on merits paras 48-62.

8 This is the date that a state legally recognises and becomes subject to the jurisdiction of the Court.

9 Intergenerational suffering is a historic and ongoing human rights violation that impedes indigenous communities from perpetuating their practices, culture and philosophies over time.

10 *Ogiek* decision on merits paras 47-68.

11 *Ogiek* decision on merits paras 111, 130, 141 & 193.

12 *Ogiek* decision on merits paras 69-100.

Charter. It acknowledged that the Ogieks are an indigenous people, with a unique cultural lifestyle, religious practices and historical connection to the Mau Forest.¹³ It recognises the Ogiek traditional land tenure system for property ownership and use and recognises their traditional right to collective property ownership.¹⁴

In its operative paragraphs, the Court held that Kenya must take all appropriate measures within a reasonable period of six months to remedy all the violations established and inform the Court of the measures taken from the decision date.¹⁵ The Court decided that it would rule on reparations in a separate decision, taking into consideration additional submissions from the Ogiek community and Kenya, and granting each party a period of 60 days in which to provide its submissions.¹⁶

On 23 June 2022 the Court issued a judgment on reparation that spelt out measures to be undertaken by the government of Kenya to end enduring violations against the Ogiek community. During the reparation proceedings, between 10 August 2017 and 22 June 2021 the African Court received submissions from the parties and experts during which the African Commission and Kenya made specific requests.¹⁷ The Commission requested that the Court orders Kenya to provide monetary and non-monetary reparations to address their longstanding suffering, including legislative and administrative measures, rehabilitation, restitution, apology, and the erection of monuments.¹⁸ On its part, the African Commission expressed its commitment to implement the African Court's remedial orders, particularly measures of rehabilitation and non-recurrence.¹⁹ It requested the Court to reject the Ogiek survey report and request the relocation of the monument and that the Court had due regard for its economic viability before awarding monetary compensation. It also asked that the Court facilitate an amicable settlement of the dispute. Kenya had contested its liability for violations before 1992, which the Court dismissed, stating that comprehensive reparations should include past events so far as they are connected to recent harms.²⁰

In its decision the Court recalled the parties' positions during the merit proceedings. It concluded that the parties' submissions to the case held opposing views regarding the possibility of an amicable settlement.²¹ The Court then proceeded to award various remedies, including pecuniary and non-pecuniary reparation measures encompassing rehabilitation, restitution, guarantees of non-repetition,

13 *Ogiek* decision on merits paras 105-113.

14 *Ogiek* decision on merits paras 122-131.

15 *Ogiek* decision on merits para 227(xii).

16 *Ogiek* decision on merits para 227(xiv).

17 *Ogiek* ruling on reparations paras 4-20.

18 *Ogiek* ruling on reparations para 22.

19 *Ogiek* ruling on reparations para 23.

20 *Ogiek* ruling on reparations paras 25-27.

21 *Ogiek* ruling on reparations paras 28-32.

and satisfaction.²² The decision demonstrated the African Court's commitment to the efforts of the African human rights system to protect the rights of indigenous minority groups.

This case commentary contends that although the reparation decision of the African Court remains instructive and reflective of genuine judicial efforts to resolve the plight of the indigenous peoples in Africa, its remedial approach still grapples with issues relating to the specificity of its decisions, state-centrism, and insufficient appreciation of its remedies with respect to the intergenerational character of the Ogiek people's suffering.

3 A SYNOPSIS OF THE AFRICAN COURT'S REPARATION PRACTICE

Foremost, it is imperative to emphasise that the African Court's reparation practice is guided by the general principle of state responsibility in international law that acknowledges the state's duty and obligation to provide remedy for violation of an international obligation that causes injury or harm.²³ The Court recognises material and moral harms and acknowledges that such harm may be individual and collective as in the *Ogiek* case. Consequently, it has a collective and individual approach in awarding remedies. Collective remedies are generally awarded to a group of aggregate individuals and collectives such as Indigenous communities. The African Court also has a flexible remedial approach awarding a wide variety of remedial measures envisaged under the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law²⁴ and General Comment 4 on the African Charter on Human and Peoples' Rights on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment,²⁵ ranging from monetary to non-monetary damages, including cash awards, restitution, rehabilitation, satisfaction and guarantees of non-repetition which encompass legislative and administrative measures.²⁶

In terms of the determining and assessing remedial measures, the African Court employs different approaches. Generally, the African Court's practice reveals a state-centric model and accords a large margin of discretion to the state to determine the appropriate award. However, it often uses an equity approach to provide monetary

22 *Ogiek* ruling on reparations paras 15-48.

23 *Reverend Christopher Mtikila v Tanzania* Application 11/2011, African Court on Human and Peoples' Rights, judgment on reparations (2011) para 27.

24 Adopted on 16 December 2005 by UN General Assembly Resolution 60/147; see paras 19-23 on the different forms of remedies.

25 See paras 39-49.

26 African Court on Human and Peoples' Rights 'Comparative study on the law and practice of reparations for human rights violations' (2019) 45-67.

remedies for economic and cultural harms. The African Court typically specifies the exact quantum to be paid to the victim – whenever it determines that monetary compensation must be paid. However, it does not have a standardised approach by which it arrives at a precise quantum. This practice is equally applied for indigenous cases.

Furthermore, in assessing monetary compensation for material harm such as damage to individual property, the African court employs the property's current market value when determining the exact monetary compensation.²⁷ Due to the complexity of determining the value of property, particularly land, expert opinions are often requested and consulted.²⁸ However, where the material damages involve a group of people, or an aggregate of a large number of people, the African Court adopts an equitable remedy approach based on its discretion. This is particularly the approach for moral harms.

In addition, the Court at times uses an amicable settlement approach as a proactive measure for remedying human rights violations.²⁹ However, the African Court has resorted to this approach in relatively few cases.³⁰ The African Charter only deals with amicable settlement in the context of inter-state communications.³¹ The African Court³² has relied on their Rules of Procedure and article 60 of the African Charter to provide remedies through 'individual' settlement procedures. The African Court's approach on the issue of reparation may still be said to be narrow with problems of content specificity characterised by lack of standardised and clear methodology for assessing monetary damages.

4 ANALYSIS OF THE AFRICAN COURT'S REMEDIAL APPROACH IN THE *OGIEK* REPARATION RULING

The *Ogiek* reparation judgment has led to the identification of four primary remedial methods, including communitarian, cultural, judicial discretion, and equitable remedy, and prescriptive methods.

27 See *Mbiankeu v Cameroon* Communication 389/10, African Commission on Human and Peoples' Rights (2015) para 136.

28 *Mbiankeu* (n 27) para 142 (noting that the complainant should have provided an expert assessment);

29 VO Ayeni & TO Ibraheem 'Amicable settlement of disputes and proactive remediation of violations under the African human rights system' (2019) 10 *Beijing Law Review* 406-422.

30 F Viljoen *International human rights law in Africa* (2012) 309-910, 440.

31 African Charter arts 47-52.

32 See Rules 26(1)(c), 56 and 57 of the Rules of the African Court Protocol and art 9 of the Protocol to the African Charter.

4.1 The communitarian approach

The model is grounded in communitarianism and is informed by the Court's interpretation of indigenous rights as a collective right, where land is not only a matter of shared ownership but also serves as a spiritual connection that enables the transmission of culture to future generations. The African Court's communitarian approach stems from its interpretation of the status of the Ogiek people. It recalled its position in its decision on the merits where it found that the Ogiek people are indigenous community³³ with the right to collectively own property,³⁴ further stating that the failure to consult the Ogiek community was violating this communal interest in land.³⁵ The Court also recalled its previous ruling on the matter, emphasising the necessity of the Ogiek people's right to be consulted and participate in any development projects in a way that respects their traditional and cultural practices.³⁶ By affirming the communal character and lifestyle of the Ogiek people, it is apparent that safeguarding this communal interest in land and collective identity logically means adopting an approach that can safeguard and reflect the communal nature of the community. This approach was instrumental in shaping the remedial measures which the Court awarded to Ogieks.³⁷ In fact, in awarding monetary compensation the Court stated that 'given the communal nature of the violations, the Court finds it inappropriate to order that each member of the Ogiek community be paid compensation individually or that compensation be pegged to a sum due to each member of the Ogiek community'.³⁸

Based on the Court's decision on merits, monetary and the non-monetary and non-monetary awards encompassing cash awards, measures of restitution and rehabilitation were granted collectively rather than individually.³⁹ Even in its order for the establishment of a community development fund, the African Court stated that the fund was intended for projects that would benefit the community as a whole.⁴⁰

4.2 Cultural approach

The cultural approach strives to maintain indigenous culture and ways of life. It closely connects with the communitarian model, as it seeks to recognise and uphold indigenous communities' collective cultural

33 *Ogiek* ruling on reparations para 122; see *Ogiek* decision on merits para 112.

34 *Ogiek* decision on merits paras 123 & 127.

35 *Ogiek* decision on merits para 131.

36 *Ogiek* ruling on reparations paras 134-145; see *Ogiek* decision on merits paras 128, 123 & 127.

37 *Ogiek* ruling on reparation paras 76, 112.

38 *Ogiek* ruling on reparation para 76.

39 *Ogiek* ruling on reparation paras 77, 112 & 155.

40 *Ogiek* ruling on reparation paras 151 & 152.

identity and heritage. It emphasises the importance of taking into account customs and traditions in all processes related to indigenous reparation. In its decision on merits, the African Court acknowledged the Ogieks as indigenous peoples having a unique culture and way of life and considered their evictions as violation of their religion and culture.⁴¹

Based on this reasoning, the African Court demonstrated an increasing appeal towards protecting the indigenous traditions and customs in the award of reparations by insisting that Kenya consider the Ogiek traditions and customs in every phase of the reparation process and in implementing the various forms of reparation the reparation order.⁴² For instance, in its decision on reparations, the Court ordered Kenya to ensure compliance with the Ogiek people's culture/customs, during consultation with regard to development, conservation or investment projects on Ogiek ancestral land or/and when adopting legislative, administrative or other measures to protect, recognise, and protect the Ogiek's right.⁴³ The Court further requested Kenya to conform to the Ogiek culture and traditions in all the stages of the reparation process.⁴⁴ Clearly, the Court's appeal to Kenya to take into consideration Ogiek people's cultures and tradition reveals a remedial response that is deeply embedded, shaped, and defined by the traditional and cultural realities of the Ogieks.

4.3 Equitable remedy approach

The African Court's approach in this case was guided by judicial subjectivity and discretion and it is not bound by submissions made by parties nor experts. The Court is considered a free agent with broader powers and latitude to determine what is fair and equitable in ensuring that the remedy is efficient, adequate, and commensurate to the harm suffered by the Ogiek people. The Court's approach finds justification under article 27 of the Protocol to the African Charter on Human and Peoples' Rights (Protocol), which gives the Court extensive powers in exercising its remedial authority.⁴⁵ Therefore, in its reparation ruling it stated that 'while noting the Applicant's effort to deploy a scientific method for determining the compensation due to the Ogiek, holds that the best way forward is to make an equitable award ... resultantly does not consider itself bound by the community survey report submitted by the Applicant'.⁴⁶

41 *Ogiek* decision on merits paras 164-166.

42 *Ogiek* ruling on reparation paras 145 & 160(x).

43 *Ogiek* ruling on reparation paras 142, 144, & 160(ix) & (x).

44 *Ogiek* ruling on reparation para 145.

45 SH Adjolohoun & S Ore 'Between unlimited imperium and restrained decidendi: reparation in the African Court on Human and Peoples' Rights' (2019) 3 *African Human Rights Yearbook* 318-347.

46 *Ogiek* ruling on reparation paras 63 & 23(viii).

The Court acknowledged that ongoing violations affected a particularly vulnerable section of the Ogiek community⁴⁷ and that it was difficult to use a mathematical formula to quantify such enduring violations. Therefore, the Court relied on judicial discretion to make an award in equity.⁴⁸ When determining reparations for moral harm, the Court considered a reasonable exercise of judicial discretion, taking into account the specific circumstances of the *Ogiek* case and based its decision on the principles of equity.⁴⁹

In exercising its discretion in equity, the Court directed Kenya to compensate the Ogiek community with a sum of KES100 000 000 for moral prejudice which is equivalent to US \$679 300.⁵⁰ However, this approach lacks content specificity and clarity, as the Court did not provide any details on how it arrived at the quantum award. Such details are crucial to ensure the legitimacy and transparency of remedial responses.

4.4 Prescriptive approach

An interesting approach that the African Court adopted in the *Ogiek* reparation decision was to use a temporal prescription, which involved setting deadlines for implementing reparation orders. This method may have been employed by the Court to put pressure on Kenya to comply with its decision and provide a framework for ongoing engagement. It brings temporal specificity to the time within which Kenya must implement the required remedial orders. This method was used to determine the timeline for different forms of reparations awarded in the reparation ruling. For the reparation measure of restitution, which includes delimiting, demarcating, and granting collective title to Ogiek, the African Court ordered Kenya to do so within two years from the date of the reparation ruling.⁵¹

Regarding guarantees of non-repetition, the Court instructed Kenya to implement administrative and legislative measures within two years of the decision.⁵² Measures of satisfaction, including recognising Ogiek as an indigenous community, were ordered to be implemented within 12 months.⁵³ The Court ordered the publication of full judgments on the merits of reparations and summaries provided by the registry on an official government website within six months and to remain available for at least one year.⁵⁴ Regarding measures of rehabilitation involving the development of the Ogiek community fund for socio-economic and cultural projects for Ogiek's welfare, Kenya was

47 *Ogiek* ruling on reparation para 66.

48 *Ogiek* ruling on reparation paras 63, 66, 67 & 90.

49 *Ogiek* ruling on reparation para 90.

50 *Ogiek* ruling on reparation para 93.

51 *Ogiek* ruling on reparation paras 166 & 160(x-xvi).

52 *Ogiek* ruling on reparation para 116.

53 *Ogiek* ruling on reparation paras 126 & 160(xiv).

54 *Ogiek* ruling on reparation para 160(xiv).

instructed to establish the fund within 12 months of the decision.⁵⁵ Lastly, the Court ordered Kenya to submit a report on the status of the implementation of its orders within 12 months⁵⁶ and took upon itself to hold a hearing on the status of the implementation of the orders made in the decision on a date to be decided by the Court within 12 months of the reparation hearing.⁵⁷ The Court's approach encourages the temporal specificity of its remedial measures to monitor compliance with decisions and ensure rapid relief for victims.

5 SHORTCOMINGS OF THE AFRICAN COURT'S REPARATION APPROACH

The *Ogiek* reparation ruling undoubtedly is a significant jurisprudential advancement towards the protection of indigenous peoples in Africa. Nonetheless, the Court is still grappling with jutting issues relating to the specificity of its remedial responses and the influence of the state in the remedial process. While the Court can be applauded for its temporal specificity in the *Ogiek* case, it is yet to adopt a holistic approach to specificity that touches various areas and aspects of its approach. This appears to be an issue regarding its general reparation practice. This can lead to the heavy influence of the responsible states or Kenya in the reparation process and may hinder third-party implementation. In addition to these challenges, the Court's remedial approach, particularly for the assessment of monetary compensation may equally lead to insufficient appreciation of the monetary awards for the intergenerational nature of the *Ogiek* people's suffering. These issues must be addressed to ensure that the Court's remedial response is effective and fair to all parties involved.

5.1 Inadequate specificity and clarity in its remedial orders

One of the significant drawbacks of the Court's remedial approach in the *Ogiek* reparation ruling is the lack of clarity regarding remedial measures. Specificity in this context refers to linguistic/content specificity, responsible-state-agent specificity, specificity in the quantification of monetary compensation and paying special attention to the intergenerational character of *Ogiek* evictions and suffering. The Court has not engaged specifically when it comes to this aspect in its reparation approach.

55 *Ogiek* ruling on reparation para 155.

56 *Ogiek* ruling on reparation para 160(xv).

57 *Ogiek* ruling on reparation para 160(xvi).

5.1.1 Insufficient linguistic/content specificity

The clarity and detail of the Court's remedial orders are dependent on content specificity, which refers to the Court's ability to provide clarity and detail concerning its remedial measures. In its judgment on the merits, the Court orders Kenya to take legislative or administrative steps to reconstitute indigenous land and provide a collective title.⁵⁸ Still, it is necessary to clarify the nature of the legislation or administrative reform/measures to be adopted by Kenya. The Court also requires Kenya to ensure the victims' participation in all phases of the redress process, but it does not clarify how participation is to be achieved. Although it had mentioned in paragraph 142 that such consultation be undertaken in 'good faith' and using culturally 'appropriate-procedures', it still needs to elucidate on what is 'good faith' and using 'culturally appropriate procedures'. Such linguistic specificities would solicit state compliance much more than a less detailed decision. Lack of detail may allow states to substitute more convenient measures or to avoid their duties entirely.

5.1.2 Lack of responsible-state-agent specificity

To facilitate the implementation of this decision, the guidelines must be specific to enable state agents to clearly understand their obligations in implementing remedial orders. There was a lack of specificity in identifying the responsible state actors. The Court requested Kenya to take legislative and administrative measures to remedy the harms. Therefore, it was an opportunity to specify the responsible agents in the two arms of government. Given the complexities of national procedures and the variety of actors involved in implementing reparation orders and recommendations, defining each party's role and responsibility is crucial. This will help determine the responsible state agent for implementing a particular remedial order, thus facilitating domestic processes to enforce the decision.

The absence of clear content clarity hinders a productive post-decision dialogue or consultation process between the victim and the responsible state. The lack of a clear line of responsibility may equally lead to a disconnection between the 'reparator' and 'reparatee' after the decision is made, causing the victim or their legal representative to struggle to find implementation mechanisms, and possibilities. This may result in the responsible state – who is both the 'reparator' and violator – to have too much control over the redress process.

5.1.3 Inadequate legal reasoning in the quantification of monetary compensation

Specificity also refers to the depth of reasoning in a decision, particularly regarding how monetary compensation is determined. The

58 *Ogiek* ruling on reparation paras 166, 126.

African Court does not detail how it arrived at monetary awards for the moral and material damages suffered by the Ogiek people. There is no clear standard for how compensation is measured to ensure that the form of payment aligns with the estimate of moral damage. The Court did not clarify how to quantify the moral damages caused by the long and ongoing injustices of dispossession and eviction. In its decision on reparations, it acknowledges that the length of time over which the violations occurred and the number of people affected by the violations, among other factors, make it difficult to arrive at a mathematical formula for determining the amount of monetary compensation for both material and moral prejudice.⁵⁹ The Court rejected the Ogiek community survey report⁶⁰ in arriving at the quantum of compensation and decided to proceed with the amount of compensation based on equitable assessment and judicial discretion. The Court should have expanded on the fair criterion or developed a standardised formula that details how it arrived at monetary value. Limiting its argument to the enduring nature of harm and the number of victims questions its legitimacy and renders its practice ambiguous. The Court was not persuasive enough to decide on monetary awards in equity. This raises doubts about the commensurability, adequacy, and proportionality of quantum awards in their judgment.

5.2 Inadequate remedial appreciation of the intergenerational sufferings of the Ogiek people

One of the major shortcomings of the Court's decision is the inadequate remedial appreciation towards the enduring material and moral prejudice suffered by the Ogiek people. In its decision on merits, referring to the *Kichwa Indigenous People of Sarayaku v Ecuador* (*Kichwa Indigenous case*)⁶¹ and *Saramaka People v Suriname* (*Saramaka case*),⁶² the African Court stated that the violations in the later cases were 'not on all fours' with those of in the *Ogiek* case and acknowledged that the violations of the rights of the latter case have spanned a long period.⁶³ In its decision on the merits, the African Court

59 *Ogiek* ruling on reparation para 66.

60 The survey report was founded on an investigation carried out by the legal representatives and the Ogiek community, intended to assist the African Court in evaluating both pecuniary and non-pecuniary damages resulting directly from the evictions endured by the Ogiek people.

61 *K v E IACHR* (27 June 2012) Ser C/245.

62 *S v S IACHR* (28 November 2007) Ser C/272.

63 *Ogiek* ruling on reparation para 74. Unlike the *Ogiek* case, where evictions of the Ogiek have been ongoing since the colonial era, in the *Moiwana Community case* (*M v S IACHR* (15 June 2005) Ser C) the evictions occurred a year before the critical date. One of the specificities regarding the *Ogiek* case is that the reparations claim concerns violations of the distant past as opposed to the *Kichwa and Saramaka* cases, where the violations were more of a recent history (see para 60 of the *Saramaka* decision). Also, the number of victims in the *Ogiek* case concerns more people than in the *Saramaka* case, with about 120 victims (see para 108 of the *Saramaka* decision).

described the longstanding violations as 'continuing violation'.⁶⁴ The Court's reverence for the continuing violation doctrine is commendable, as it reflects a judicial commitment to address past and ongoing dispossession, marginalisation, exploitation of Ogiek resources, and eviction of the Ogiek community from their ancestral land. However, the Court's reliance on this doctrine might have only served as a basis for entertaining the Ogiek community's claims for land restitution rather than adequately considering the impact and relevance of time in assessing the enduring economic and cultural harms suffered by the Ogiek community. Neglecting the importance of the community survey report was a mistake, as it had significant intergenerational significance. Overall, the Court failed to adequately impute historic and continuing injustices experienced in the valuation of the historical material and moral injustices that the Ogiek faced. In addition to acknowledging that the violations of the Ogieks' rights have been ongoing,⁶⁵ the Court rejected the Ogieks' request for a reparation measure of satisfaction involving apology and the erection of a monument,⁶⁶ which could have provided the community with moral psychosocial healing to past events, dignify victims and fostered respect for cultural diversity. Such remedial measures remain indispensable to addressing longstanding and gross human rights violations.

Moreover, the Court's inadequate attention to the intergenerational nature of the Ogieks' suffering was exacerbated by the insufficient linguistic specificity in its remedial orders. The Court undermined these intergenerational concerns by ignoring the importance of providing clear normative recommendations that can rapidly nullify or amend existing legislation perpetuating colonial laws. A decision highlighting these normative areas or laws would have been more effective in addressing the ongoing struggles of the Ogiek community.

This demonstrated the Court's reluctance to pay attention to the longstanding claims of the Ogiek community.

5.2.1 Preponderance of state centrism

The African Court's remedial approach in the *Ogiek* case raised concerns about the power asymmetry unintentionally created between Ogiek and Kenya in the redress process. The Court directed Kenya to implement legislative, administrative, and other measures in full compliance with the traditions and customs of the Ogiek people and to ensure their full consultation and participation in the process.⁶⁷ This was a complex and dilemmatic recommendation whose implementation remains tricky and ambiguous given that Kenya is responsible for providing the remedy. How much compliance is Kenya going to observe with respect to the victims' tradition remains a major concern.

64 A continuing violation may be defined as an act or a series of acts extending over a duration of time; see Viljoen (n 30) 439.

65 *Ogiek* ruling on reparation para 74.

66 *Ogiek* ruling on reparation paras 129 & 133.

67 *Ogiek* ruling on reparation para 145.

The inadequate linguistic specificity of the court's remedial orders exacerbated the power asymmetry problem. It is worth noting that the court was already aware and dissatisfied with the level of progress made by the Multi-Joint Task Force – an administrative measure established by the respondent state – towards implementing its judgment on the merits.⁶⁸ Given that it was aware of this administrative impasse, it should have cautioned the Court to grant a more detailed and language-specific decision to override Kenya's domineering role in the reparation process. The Court should have requested an efficient institutional mechanism to address the power imbalance between Ogieks and Kenya.

The power asymmetry problem may have been addressed when the Court requested Kenya to engage in good faith consultations and adopt measures using culturally-appropriate procedures. However, the Court should have specified the standards of 'good faith' and what constitutes 'culturally-appropriate' procedures. Allowing Kenya, the discretion to set these standards diminished the victims' role in the redress process.

6 OVERCOMING GAPS IN THE AFRICAN COURT'S INDIGENOUS REPARATION PRACTICE

In the preceding part, the article identifies and elucidates the imminent challenges that are inherent in the *Ogiek* reparation decision. Therefore, the most fundamental question is how we can overcome these gaps to ensure more well-organised decisions in future cases before the African Court. This part focuses on providing strategies for improving the Court's remedial approach with specific attention to the inadequacies already discussed in the preceding analysis. These strategies will also inform the legal practice of other judicial and quasi-judicial institutions, as well as state endeavours towards the implementation indigenous reparation orders.

6.1 Reinforcing the specificity of remedial orders

As earlier mentioned, specificity relates to the content clarity and legal reason of the Court's decision and its ability to identify key state agents responsible for implementing its decisions.

Regarding the issue of content specificity, there is need for greater detail in the Court's decision. A content-specific decision clearly spells out the specific legislative area of reform required to address the victims' claims or the Court's remedial order. For instance, the United Nations Committee against Torture, in its Concluding Observations on Brazil's Second Periodic Report, not only called for legislative measures to combat the offence of torture but also urged Brazil to amend the

68 *Ogiek* decision on merits paras 124 & 141.

definition of the offence in article 1 of Law 9.455 of 1997 of its Law on Torture and revise the necessary legal provisions to prevent the law from being subject to the statute of limitation.⁶⁹ Such linguistic specificities are necessary to enhance state compliance and implementation of decisions. In the *Ogiek* case, given that the Ogiek sufferings stemmed from colonial legislations that are still legally enforceable in Kenya, the Court should have identified and elucidated on the specific legislative reforms/remedy that Kenya could undertake. This will enhance the credibility of its decision, ease implementation and curb state-centrism or reduce state discretion in the redress process.

In addition, the Court should be explicit on the nature of the administrative measure required of the state. It may even produce guidelines on structuring the administrative mechanism as a measure to strive to uphold victims' rights to access to justice during the domestic implementation of its decisions. The *Moiwana Community* case is an example. After directing Suriname to create a committee responsible for implementing the psychosocial rehabilitation programme, the Inter-American Court provided guidelines on the functioning of this administrative body. It further stated that the committee's composition should be determined by the *Moiwana* community and the Suriname government, who shall agree to the third party to be a part of the committee and decide on the specific aspects of the implementation programme.⁷⁰ The Court's ruling lacked specific details about the management of the development fund ordered for the Ogiek community. Specifically, it did not provide any administrative or managerial guidelines on how the fund would be used to benefit the community.⁷¹

Given that the Court was dissatisfied with the progress of the Multi-Joint Task Force in implementing its judgment on the merits, it should have recommended that an independent and impartial institution be established to monitor Kenya's compliance with its decision.⁷² The Court would have recommended guidelines on structuring such an administrative body. Greater precision would reduce disputes between victims and state representatives and expedite the implementation of remedies. The Court must therefore be unequivocal in its remedies to advance greater compliance.

69 Concluding Observations on the Second Periodic Report of Brazil, Committee against Torture (9 May 2023) UN Doc CAT/C/BRA/CO/2 paras 9-11.

70 *Moiwana Community* (n 63) paras 213-215; see also *S V P* (29 March 2006) ser C 146 paras 224-225.

71 *Ogiek* ruling on reparation paras 151-152.

72 Eg, in a particularly innovative recent example, the African Commission in its decision in Communication 393/10, *IHRDA, ACIDH and RAID v Democratic Republic of Congo* June 2016 requires, as part of the reparations listed in the decision, for the state to 'ensure that the implementation of the present decision is supervised by a Monitoring Committee which includes the representatives of victims and their successors, and a Member of the African Commission on Human and Peoples' Rights in charge of the country'. However, it is too early to tell whether this has been effective.

Regarding specificity of responsible state agent, given the array of actors involved in implementing the reparation orders and recommendations, it is crucial to define each party's roles and responsibilities. This will help identify the state agent responsible for implementing a particular remedial order, thus expediting domestic processes to enforce the decision. It will also alleviate the stress of victims or their legal representatives, who will know which government body is responsible for what measures and avoid the need to search for mechanisms. By clarifying responsible state actors, the problems associated with the lack of political will can also be undermined, as victims will better understand which actor is responsible for a specific remedial measure. This can pressure the implementing state actor to hasten implementation strategies and procedures, leading to continuous post-decision communication between parties in seeing effective enforcement of the Court's decision.

To ensure specificity in the legal reasons for its decisions, the Court is encouraged to provide details on how certain remedial measures are reached. For instance, the Court should strive to provide methods for quantifying economic harm and moral loss, as in the Australian system.⁷³ In *Northern Territory v Griffiths* (*Northern Territory case*) the High Court of Australia (HCA) adopted a social judgment test to assess moral damage, which included the permanency and intergenerationality of the harm, the victim's connection thereto, and the effects of legislation on their ancestral land. For economic loss, the HCA adopted a freehold approach calculated through the Spencer test lens.⁷⁴ Implementing a standard method other than the equity approach that relies on the Court's discretion can potentially reduce the Court's propensity to award disparate and incompatible remedies.

6.2 Fine-tuning specificity and embracing a negotiation approach to minimise state-centrism

Regarding the problem of state dominance, the first step in overcoming the impasse is that the African Court fine tune the specificity of its remedial orders as explained in the preceding analysis. The Court must emphasise on linguistic specificity with the aim of informing domestic policies in the responsible state. Such legislative remedial orders could focus on measures for determining beneficiaries, compensation assessment modalities, and encouraging domestic laws of retrospective character. Such specific orders may have a tremendous effect on domestic law, eventually leading to effective victim remedy. For

73 See *Northern Territory v Griffiths* [No 2] [2019] HCA 19 (19 June 2019). In the landmark judgment, the HCA offered interesting criteria to assess monetary compensation for moral and material loss to native title. This case concerned a claim for compensation under sec 61(1) of the Native Title Act 1993 (Cth) (NTA) in relation to native title rights and interests over land and waters within the township of Timber Creek in the Northern Territory which had been partially extinguished by earlier acts and three invalid future acts.

74 *Northern Territory* (n 73) para 60. See *Spencer v The Commonwealth* (1907) 5 CLR 418.

instance, in South Africa there is the Restitution of Land Rights Act 22 as the primary legislative framework regulating indigenous claims to reparations, especially claims for past or historical injustices.⁷⁵ Also in Ghana, there exists the State Land Act that focuses on the payment of compensation for individuals or communities that are victims of past and continuing compulsory land acquisition by the government of Ghana.⁷⁶ In addition, the Court may avoid a state-centric remedial model by subscribing to a negotiation or participation approach in awarding remedies, which enables parties to reach an agreement on reparation measures once responsibility for human rights violations is established. For instance, in Australia, post-*Northern Territory* cases have adopted a consent and conciliation approach between the parties for loss of native title.⁷⁷ This approach may require the Court to re-think the potential of its amicable settlement procedures under article 9 of its Protocol.

6.3 Adopting a regulatory-participatory approach to guarantee adequate intergenerational justice

To reckon with longstanding injustices experienced by African indigenous peoples in future cases, the African Court will have to reform its procedures and adopt a participatory approach that will enable the victims and responsible states to participate in formulating remedial responses. In this way, the victims are given the opportunity to share their vast reservoir of their informal experiences and traditional methods of evaluating and remedying cultural and material injuries of historical and intergenerational significance to them. This would avoid the problem of incommensurate and unwarranted remedies.

This approach can also be described as a regulatory approach. The model suggests a procedural adjustment where the Court makes a merit-based ruling and then allows the state and the indigenous peoples or their representative, reflecting on-the-ground conditions and governmental capabilities, to come to an agreement on the amount of monetary compensation or non-monetary awards to be incorporated in the final judgment for reparation. The resulting agreement, to be approved by the Court, would lend even more legitimacy to the Court's reparation judgment, since the remedies would ultimately be formulated not by distant international judges, but rather by the stakeholders and experts after substantial deliberation.

For instance, in *Wotton v State of Queensland*, following a complaint brought by Aboriginals of the Torres Strait Islander people over allegations of acts of racial discrimination in the conduct of

75 See sec (2)(1)(a)-(e), 4 and 22 of the Restitution of Land Rights Act 1994.

76 State Lands Act 125 of 1962.

77 See *Pearson on behalf of the Tjajuwara Unmururu Native Title Holders v State of South Australia* [2017] FCA 1561 (Tjajuwara Unmururu Native Title Compensation Claim).

investigations into the death of an aboriginal member, the Federal Court of Australia approved the settlement sum agreed by the parties, ordered the state to pay legal costs and make a public apology to the Aboriginal community.⁷⁸

7 CONCLUSION

In this commentary the reparation judgment of the African Court in the *Ogiek* case is critically examined to analyse the Court's response to addressing the plight of indigenous communities across Africa regarding violation of their fundamental rights. The commentary focuses on the Ogiek people's plight as a case study with focus on the Court's remedial approach towards addressing concerns raised by the Ogiek community. In this regard, the Court adopted a multifaceted remedial model to answer to the Ogiek plight. This commentary sheds light on the various models to determine the extent to which their application serves as a remedy to alleviate the conditions of the Ogiek people.

Among other responses, the Court invoked four models to serve as reparations directly channelled to the Ogiek people. These models include the communitarian approach in which the Court expressed its intention to protect the collective identity of the Ogiek as well as their cultural and traditional integrity. In the second model the Court invoked the cultural approach, insisting that the traditions and customs of the people be included in all spheres of the reparation process.⁷⁹ In the third model the Court invoked the judicial discretion and equitable remedy approach to overcome the general difficulties associated with qualifying monetary compensations for material and moral wrongs affecting many members of the Ogiek community. Lastly, the Court utilised the prescriptive approach that concerns the usage of temporary prescription or references to deadlines for the implementation of its reparation orders.

Going by the models enumerated herein, the Court seems to have an advanced policy in the realm of reparations accorded to indigenous communities in Africa for harm suffered due to violation of their rights. However, the commentary further explores the possibility that some characteristics specifically attributed to the dynamics of rights violation across African communities are not reflected in the judgment. This includes among others, the lack of linguistic/content specificity, lack of responsible-state-agent specificity, lack of specificity in the quantification of monetary compensations and many more. Conclusively, the commentary deduced that the African Court in the *Ogiek* judgment did not satisfactorily project a remedial model that considers the dynamics and reality sufferings prevailing in indigenous communities across Africa, particularly the Ogiek community. In this light, the commentary provides strategies for improvement to inform

78 *Wotton v State of Queensland* (2016) 1367 (5th) FCA para 13.

79 *Ogiek* ruling on reparation paras 142, 144 and 160 (ix) & (x).

subsequent judgments of the Court to promote efficiency of its remedial orders and facilitate third party implementation of its decisions.