Dispensing justice through reparations: benchmarking the decision of the African Court on Human and Peoples' Rights in the *Ogiek* case in protecting indigenous peoples' right to development in Tanzania

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ABSTRACT: This article discusses the pivotal role of the African Court on Human and Peoples' Rights (African Court) in advancing the collective right to economic, social, and cultural development of indigenous peoples in Tanzania, using the Court's landmark decision in *African Commission on Human and Peoples' Rights v Kenya* (*Ogiek* case) as a crucial benchmark. It does so by relying on the reparations remedy that may ultimately be attained by litigating indigenous peoples' rights before the African Court just as it was the successful outcome for the Ogiek community from Kenya. The Court's jurisprudential exploration and the discovery of this remedy were instigated by the fact that Tanzania withdrew its declaration accepting the competence of the African Court to receive cases directly from individuals and non-governmental organisations. Notably, indigenous communities in Tanzania have frequently faced state-led expropriation, severely impacting their traditional livelihoods and collective development rights, as mandated by the African Charter on Human and Peoples' Rights. Such injustices are traced from the colonial regimes in the country. This legacy infused in the Tanzanian legal framework past the colonial period has continued affecting the social, economic and cultural rights of communities self-identifying as indigenous peoples in Tanzania. This article establishes how the African Court remains a viable forum for reparations of the long-term injury to the indigenous peoples' collective rights in Tanzania, given the country's adverse position towards communities self-identifying as 'indigenous peoples' in Tanzania. This position is informed by the African Court's order for comprehensive reparations in the *Ogiek* case, which encompassed restitution, compensation, and guarantees of non-repetition of proven collective rights violation. The findings underscore that the Court's ruling establishes a crucial precedent for the dispensation of justice through restorative measures, recognizing that true remedy for collective rights violations requires affirmative state action beyond mere financial relief.

TITRE ET RÉSUMÉ EN FRANÇAIS

L'administration de la justice à travers les réparations: mise en perspective du rôle de la Cour africaine dans l'affaire des *Ogiek* pour la protection du droit collectif des peuples autochtones au développement économique, social et culturel en Tanzanie

RÉSUMÉ: La présente contribution examine le rôle déterminant de la Cour africaine des droits de l'homme et des peuples (Cour africaine) dans la promotion du droit collectif au développement économique, social et culturel des peuples autochtones en Tanzanie, en prenant comme point de référence central l'arrêt emblématique *Commission africaine des droits de l'homme et des peuples c. Kenya* (affaire des *Ogiek)*. L'analyse s'appuie sur le recours aux réparations

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susceptibles d'être obtenues à l'issue du contentieux relatif aux droits des peuples autochtones porté devant la Cour africaine, à l'instar de l'issue favorable obtenue par la communauté Ogiek du Kenya. L'exploration jurisprudentielle de la Cour et l'identification de ce recours ont été suscitées par le retrait, par la Tanzanie, de sa déclaration reconnaissant la compétence de la Cour africaine pour recevoir des requêtes émanant d'individus et d'organisations non gouvernementales. Il est en outre relevé que les communautés autochtones en Tanzanie ont fréquemment été confrontées à des expropriations menées par l'État, portant gravement atteinte à leurs moyens de subsistance traditionnels et à leurs droits collectifs au développement, tels que garantis par la Charte africaine des droits de l'homme et des peuples. Ces injustices trouvent leur origine dans les régimes coloniaux ayant prévalu dans le pays et dont les effets persistent jusqu'à ce jour. Cet héritage, incorporé dans le cadre juridique tanzanien au-delà de la période coloniale, continue d'affecter les droits économiques, sociaux et culturels des communautés qui s'auto-identifient comme peuples autochtones en Tanzanie. La contribution démontre que la Cour africaine demeure un forum pertinent pour l'octroi de réparations visant à remédier aux atteintes de longue durée portées aux droits collectifs des peuples autochtones en Tanzanie, compte tenu de la position défavorable adoptée par l'État à l'égard des communautés s'auto-identifiant comme «peuples autochtones» en Tanzanie. Cette analyse s'appuie sur l'ordonnance de réparations exhaustives rendue par la Cour dans l'affaire des *Ogiek*, laquelle comprenait la restitution, l'indemnisation et les garanties de non-répétition des violations avérées des droits collectifs. Les résultats de l'étude mettent en évidence que la décision de la Cour établit un précédent essentiel en matière d'administration de la justice par des mesures réparatrices, en reconnaissant qu'une réparation effective des violations de droits collectifs requiert une action positive de l'État allant au-delà d'une simple réparation financière.

TÍTULO E RESUMO EM PORTUGUÊS

Distribuição da justiça através das reparações: referenciando o papel do Tribunal Africano nos Direitos Humanos e dos Povos no caso *Ogiek* na proteção do direito coletivo dos povos indígenas ao desenvolvimento na Tanzânia

RESUMO: Este artigo discute o papel fundamental do Tribunal Africano dos Direitos Humanos e dos Povos (TADHP) no avanço do direito ao desenvolvimento económico, social e cultural dos povos indígenas na Tanzânia. Tem no histórico caso *Comissão Africana dos Direitos Humanos e dos Povos v República da Tanzânia* (caso *Ogiek*) uma referência crucial. Esta análise parte da perspetiva de que a eficácia do remédio de reparação que poderá ser alcançado ao litigar os direitos dos povos indígenas perante a TADHP, tal como foi o resultado bem-sucedido para a comunidade *Ogiek* do Quénia. A exploração jurisprudencial do Tribunal e a descoberta deste recurso foram motivadas pelo facto de a Tanzânia ter retirado a sua declaração, aceitando a competência da TADHP para receber casos de indivíduos e organizações não governamentais. Notavelmente, as comunidades indígenas na Tanzânia têm frequentemente enfrentado expropriações lideradas pelo Estado, afetando gravemente os seus meios de subsistência tradicionais e os direitos de desenvolvimento coletivo, conforme exigido pela Carta Africana dos Direitos Humanos e dos Povos. Tais injustiças são atribuídas aos regimes coloniais no país, que ainda hoje persistem. Este legado, impresso no quadro jurídico tanzaniano após a descolonização, continuou a afetar os direitos sociais, económicos e culturais das comunidades que se identificam como povos indígenas na Tanzânia. Este artigo concluiu acerca do papel do TADHP como fórum viável para reparações do dano a longo prazo aos direitos coletivos dos povos indígenas na Tanzânia. Dada a posição adversa do país em relação às comunidades que se autoidentificam como 'povos indígenas' na Tanzânia. Esta posição é informada pela ordem da TADHP para reparações abrangentes no caso *Ogiek*, que incluía restituição, compensação e garantias de não repetição da violação comprovada dos direitos coletivos. As conclusões sublinham que a decisão do Tribunal estabelece um precedente crucial para a administração da justiça através de medidas restaurativas, reconhecendo que o verdadeiro remédio para violações coletivas de direitos requer uma ação afirmativa do Estado para além do mero alívio financeiro.

KEY WORDS: collective rights; indigenous peoples; reparations; right to economic, social and cultural development; Tanzania; *Ogiek* case

CONTENT:

1 INTRODUCTION

The case of the *African Commission on Human and Peoples' Rights v Kenya*[1] (*Ogiek* merits case) by the African Court on Human and Peoples' Rights (African Court) is a landmark decision. It sets a significant precedent for the restitution of ancestrally owned land to indigenous and forest communities in Africa. By ruling in favour of the Ogiek and ordering land restitution and reparations, the Court provided a powerful legal mechanism to address the enduring negative consequences of colonial land policies and their continuation in the post-colonial era.

As is the case with the Ogiek in Kenya, communities self-identifying as indigenous peoples in Tanzania such as the Maasai, Ilparakuiyo and Barbaigs (Datooga) have and continue to suffer injustice stemming from both the German and British colonial legal systems that once operated in the country. Most of these injustices relate to the establishment of nature reserves and implementation of colonial land laws and policies that changed hands during independence but were substantially retained by the independent government. At and after independence, the colonial land administration held on to the inherited land tenure systems, leading communities self-identifying as indigenous peoples in Tanzania before courts of law to seek restoration of their indigenous rights to property – ancestral lands, culture and access to natural resources.[2] The legal framework governing land and use of natural resources in Tanzania, for instance the Village Land Act, 1999, the Land Act, 1999, the Wildlife Conservation Act, 2009 and their

1 *African Commission on Human and Peoples' Rights v Kenya,* Application No. 006/2012 (*Ogiek merits* case).

2 See the cases of *Lekengere Faru Paratu Kamunyu and 52 Others v Minister for Tourism, Natural Resources and Environment and Others,* Consolidated Civil Case No. 33 of 1994, High Court of Tanzania at Moshi, (Munuo J), and *Mondorois Village Council and 2 Others v Tanzania Breweries Limited and 4 Others*, Land Case No. 26 of 2013, High Court of Tanzania at Arusha, (Moshi J).

associated policies in Tanzania, restrain courts of law from pronouncing indigenous rights to land and utilisation of natural resources as they should. This is largely due to lack of specific legal provisions which directly address indigenous peoples' rights in the Tanzanian legislation which would form legal basis for courts' decisions on relevant cases.

Given this situation, recourse has been sought by the communities self-identifying as indigenous peoples in Tanzania before the East African Court of Justice (EACJ). The EACJ is an attractive option because it does not pose the requirement of exhaustion of local remedies – despite the fact that this Court lacks primary human rights jurisdiction.[3] Nevertheless, not even the EACJ has rendered a judgment as revolutionary as that of the African Court in the *Ogiek* case which involved the rights of an indigenous community in Kenya.

This article sets out to establish how the African Court remains a viable forum for reparations of the long-term injury to the indigenous peoples' collective rights in Tanzania given the country's withdrawal of the declaration accepting the competence of the ACtHPR to admit cases from individuals and NGOs from Tanzania and its impact on communities self-identifying as 'indigenous peoples' in Tanzania.

2 CONCEPTUALISING INDIGENOUS PEOPLES IN TANZANIA

'Denial of the existence of indigenous peoples in Africa has tended to be the official position of African governments, who argue that "all Africans are indigenous," thereby suggesting that there is no legitimate grounds for what they maintain is preferential treatment of a sector of their societies.'[4] As is the case in most other African countries, the status of indigenous peoples in Tanzania is not formally recognised. There are many factors which have led to this position, but specifically for Tanzania, it is the result of historical, socio-political and economic events in the country. During the German colonial period, all non-European persons in Mainland Tanzania were considered as 'natives'.[5] As for the British colonial administration in Tanganyika (now Mainland Tanzania), two important agreements for the administration of this territory were signed between the British and the League of Nations and later the United Nations. These were the Mandate Agreement for the Territory of Tanganyika, 1922, and the Trusteeship Agreement for the Territory of Tanganyika, 1946. In the two agreements, the word 'native' was also used to refer to the non-European population. There is no suggestion in those Agreements that the term 'native' meant the

3 See for example the case of *Ololosokwani Village Council & 3 Others v the Attorney General of the United Republic of Tanzania,* Reference No 10, 2017 (EACJ).

4 ACHPR and IWGIA, *Report of the African Commission's Working Group of Experts* (2005) 60.

5 J Iliffe *A modern history of Tanganyika* (1979) 209.

original occupiers of land or those who have used it for the longest period of time. Section 22 of the Land Ordinance, 1923 defined a 'native' as 'any native of Africa, not being of European or Asiatic origin or descent, and shall include a Swahili and a Somali'.[6] Gastorn posits that, during the era of British colonial administration, the designation of individuals as 'native' was not predicated upon the objective criterion of birth within a specific geographical location in Tanganyika (modern-day Tanzania). Instead, this status was primarily a political and hierarchical construct determined by the condition of subordination or domination by the European colonisers.[7]

After independence, the spirit of national unity was strongly cultivated. A nationalistic ideology sought to attain equality to and patriotism by all citizens of Tanganyika who later became Tanzanians. Swahili was embraced as a national language and chiefdoms were banned in 1963.[8] This systemic modification effectively diluted the internal structural integrity of traditional communities that had persisted since the pre-colonial era. Furthermore, the public display of traditional attire was officially proscribed, serving as an explicit regulatory measure to suppress visible markers of distinct ethnic or communal identity.[9] In 1967, the criterion of 'tribe' was abolished in the census records.[10] The government formed under the Tanganyika African National Union Party (TANU) which is now Chama cha Mapinduzi (CCM)[11] after merging with the Afro-Shiraz Party in 1977, installed the administration, which oversaw all affairs of all citizens in the country to-date.

Against this background, communities self-identifying as indigenous peoples in the country are faced with a deep rooted and long-established culture of nationalism. Also, the foreigners versus non-foreigner dichotomy does not allow room for accommodating indigenous peoples' position in defining the nature of Tanzanian population. Nevertheless, the Government of Tanzania does recognise communities that depend on nature for survival. In various incidents, such as in the preparation of the Universal Periodic Review (UPR) reports before the United Nations Human Rights Council, it has referred to such communities as one of the 'special groups' needing

6 Unlike the Germans, the British ruled the natives with indirect rule. Chiefs played the role of agents of the British colonial administration in communities that were self-organised and already had their own Chiefs. In areas where there were no organisations of this kind, the British persuaded the communities to make similar arrangements for easy administration of the colony.

7 K Gastorn 'The emerging constitutional indigenous peoples land rights in Tanzania' (2016) 2 *Journal of Law, Property and Society* 192.

8 This was legally done by passing the law called Chiefs (Abolition of Office: Consequential Provisions) Act, 1963.

9 ACHPR and IWGIA, *Research and information visit to the Republic of Tanzania* (2015) 37.

10 Gastorn (n 7) 197.

11 CCM was founded in 1977, when TANU merged with Afro-Shiraz Party.

special protection within the country.[12] The Tanzania Social Action Fund (Draft 2012) Indigenous Peoples' Policy Framework (IPPF), acknowledged the African Commission's Report of the Working Group of Experts on Indigenous Populations/Communities, which recognises the presence of indigenous communities in Tanzania according to the criteria it has developed to be adopted in the African context.[13]

In the case of the African continent, indigenous peoples are not defined based on the aboriginality criterion,[14] but by considering the contemporary issues that continue to affect some traditional communities, long after the colonial period. Such issues include discrimination by the dominant societies and their respective national governments.[15] Despite the guidance to defining indigenous peoples in Africa provided by the African Commission, Tanzania has only gone as far as considering communities self-identifying as indigenous peoples in the country as 'vulnerable or marginalised' groups.

3 COLONIAL LEGACY ON INDIGENOUS PEOPLES' COLLECTIVE RIGHTS IN TANZANIA

Tanzania underwent two layers of colonial regimes: the German colonial administration (1880s-1916) and the British colonial administration (1916-1961). In both eras, laws affecting indigenous communities' economic, social and cultural rights were enacted with the objective of safeguarding colonial interests. These included land and conservation laws.

3.1 Land laws

The Imperial German Colonial Government introduced the first colonial land law, known as the Imperial Ordinance on the Creation, Acquisition and Conveyance of Crown Land and Alienation of Real Estates in German East Africa, 1895. Through the enactment of this legislation, a radical centralisation of land tenure was achieved. The Ordinance resulted in the expropriation of all land within the

12 See for example Human Rights Council: Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15 (a) of the Annex to Human Rights Council Resolution 5/1: United Republic of Tanzania*, A/HRC/WG.6/12/TZA/1 (2011), para 44, https://documents.un.org/doc/undoc/gen/g11/149/13/pdf/g1114913.pdf (accessed 20 December 2025).

13 United Republic of Tanzania, '(Draft) TASAF III Indigenous Peoples Policy Framework' (2012) 4-5 (unpublished).

14 The aboriginality criterion correlates with the fundamental principle of 'historical continuity,' which is one of the core criteria used to identify Indigenous groups globally. This criterion, often phrased as 'descent from the original inhabitants,' is essential to the common working definitions of Indigenous peoples. See ACHPR and IWGIA (n 4) 48 and 91 for further elaboration of this criterion.

15 ACHPR and IWGIA (n 4) 92.

geographical confines of the territory now constituting Mainland Tanzania, regardless of its current state of occupation. Consequently, absolute title and ownership of this entire domain were formally vested in the German Empire. This decisive legislative act effectively nullified pre-existing indigenous communal land rights, thereby serving as the core legal basis for the subsequent colonial landholding system.

The same was the case with the British colonial land regime whereby the Tanganyika Order in Council of 1920 was issued for the authoritative administration of Tanganyika under the Foreign Jurisdiction Act of 1890. The Order in Council vested all the land in Tanganyika (now Mainland Tanzania) in the British Governor, who held it in trust on behalf of the British Crown. It declared all land in the territory as public land to the extent that communities' land ownership ceased to exist from the perspective of the new legal regime. The same Order in Council empowered the Governor to make laws for governing the territory as though Tanganyika was a British colony.[16] The British introduced English land law to Tanganyika through the enactment of the Land (Law of Property and Conveyancing) Ordinance, Cap. 114 and the Land Ordinance, Cap. 113. The laws governed land matters in the territory whereby citizens of Mainland Tanzania would only *occupy* land legally through the 'right of occupancy' established by these land laws.[17] The notion of 'owning' land by individuals or communities was abolished. This legal position persists in Tanzania today in the sense that indigenous peoples' claims on collective rights to own ancestral lands are illusory. The title of 'Governor' in the colonial land laws has been substituted with 'President' in the current land law regime in Tanzania regime. Any person who had title to land before the British colonial land regime in Tanzania lost such 'privilege' during the British colonial era. No one could occupy or use land but by the consent of the Governor. The Land Act maintains this status up to date in the sense that all land in Tanzania continues to be held under the custody of the President for and on behalf of all Tanzanians.[18] Tanzanian citizens may either hold titles to occupy land under the customary right of occupancy, or be granted a right of occupancy for a renewable term of thirty three, sixty six or ninety-nine years.[19]

This position established by land laws in Tanzania accounts for the government's approach towards promoting and protecting indigenous peoples' right to ancestral lands in the country. The Tanzanian Minister of Constitution and Legal Affairs once stated clearly that 'we do not have anyone within Tanzania who has indigenous rights'; and that 'we do not have any minority groups in Tanzania'.[20] The Minister further

16 It should be noted that the British administered Tanganyika as a Mandate Territory under the League of Nations from 1920 and as a Trust Territory under the United Nations from 1945 to 1961 when the country got independence.

17 Gastorn (n 7) 191.

18 Section 4(1) Land Act, 1999.

19 Section 4(3) read together with section 32(1), Land Act.

20 Maelezo TV, 'The Truth about Loliondo Game Controlled Area and Ngorongoro Conservation Area', https://www.youtube.com/watch?v=GMGMoQXW16w&t=12s (accessed 12 March 2024).

asserted that the principle of private land ownership is absent within the legal framework of Tanzania (Mainland). Instead, all land is designated as public property and is vested in the President in trust for the populace. Citizens acquire access to this land through a right of occupancy, which is essentially a leasehold instrument that can be formally granted for fixed, renewable durations, specifically 33, 66, or 99 years. To this effect, he stated, 'there is no Maasai land in Tanzania'.[21] This is clearly an amplification of the colonial legacy in the Tanzanian land administration. The situation is the same with conservation laws.

3.2 Conservation laws

The origin of unrelenting struggles for land tenure security by the Maasai, Barbagis and Ilparakuiyo pastoralists in Tanzania traces its roots back to the German colonial administration. The German Colonial Government enacted the Game Ordinance in 1908. The Ordinance gave the Governor the competence to declare any area as a game reserve for purposes of 'wildlife conservation' and hunting for sport. For the same purpose, the British colonial administration enacted the Fauna Conservation Ordinance in 1951.[22] This law created various degrees of fauna conservation including game reserves, game-controlled areas and partial game reserves.[23] It was in the same year that the first game reserve was established in the then Tanganyika. Section 58 of the Fauna Conservation Ordinance explicitly vested in the relevant Minister the requisite statutory competence to promulgate regulatory instruments. This delegation of power was precisely defined by the twin objectives of achieving the enhanced preservation of fauna (biodiversity conservation) and simultaneously ensuring the safeguarding of both human life and material property within the delineated boundaries of designated game reserves. This included imposing restrictions on certain activities such as grazing and cultivation in the reserves as well as controlling the number of residents and animals entering the reserves.

This legal provision laid the foundation for the eviction of the Maasai pastoralists from Mkomazi Game Reserve in the 1980s, with the aftermath of loss of habitats and property by a substantial number of such pastoralists. The Mkomazi Game Reserve was upgraded to Mkomazi National Park in 2006. Such an upgrade came with even stricter rules regarding entry (other than tourism and management

21 Speech to the Ambassadors and Consular Officials on Tanzania's strategies in the Management of Natural Resources rendered in Dar es Salaam on 25 March 2022. See Maelezo TV (n 21).

22 Ordinance No. 17 of 1951, Cap. 302.

23 This law has evolved to the Wildlife Conservation Act, 2009 applicable in Mainland Tanzania today which retains a substantial part of the colonial restrictions.

activities), residence and economic activities in the Park.[24] The National Parks Ordinance of 1948, which was re-enacted in 1959, terminated all land rights of the local communities living in the areas established as national parks.[25] This being the case, clashes between pastoralists and Mkomazi National Park administration have become permanent. For example, on 5 July 2022, a Maasai teenager named Ngaitepa Marias Lukumay was shot dead by the park rangers in the course of seizing the livestock that he was grazing within the national park. This sparked a public outcry calling for justice for indigenous pastoralists in Tanzania. The Tanzania National Parks Authority (TANAPA) took responsibility for the life lost and issued a public apology on 12 July 2022.[26]

Similarly, the establishment of the Serengeti National Park and the Ngorongoro Conservation Area through the enactment of the National Parks Ordinance, 1959, and the Ngorongoro Conservation Area Act, 1959, left the Maasai pastoral community in a continued struggle for land tenure security and access to natural resources for survival in these protected areas. In recent years, the solemn pledge that was made by the British Colonial Administration to the indigenous Maasai community, as they were being relocated from the Serengeti National Park to the Ngorongoro Conservation Area, has been broken. The pledge was for the protection of pastoralists' pre-existing rights in case of a conflict between their interests and those of nature conservation. The Government has initiated a project for voluntary relocation of the Maasai from the Ngorongoro Conservation Area to Msomera village in the Tanga region to 'depopulate' the property. Aside from this case, it is also important to note that part of the Ngorongoro Conservation Area was designated as a forest reserve. This includes the designation under the German Administration of the Northern Highland Forest Reserve (NHFR) in 1914 - shortly before the British takeover of Tanganyika - to protect the natural resources therein, specifically the watersheds. Previously, this conservation area had been home to the Maasai long before the establishment of German East Africa as a colony.

Further, the declaration of the NHRF was the foundation for the Maasai land tenure insecurity in that geographical area before other of the same community were relocated thereto from the Serengeti National Park and restrictions that followed such as limitations on performing economic activities in some locations of the property that came with the post colonial legal regime.[27] Up to when the decision to relocate the Maasai from this conservation area was reached, they had undergone frequent restrictions to accessing some parts of the property that are lucrative for livestock grazing as well as being banned from

24 These restrictions which are still operational today were firstly introduced in Tanganyika by the National Parks Ordinance enacted by the British Colonial Administration in 1959.

25 Section (1), National Parks Ordinance,1948.

26 International Work Group for Indigenous Affairs (IWGIA), *Indigenous World 2023: Tanzania* (2023) 129.

27 See for example section 14 of the Game Parks Laws (Miscellaneous Amendments) Act, 1975 which introduced restrictions on cultivation in the property.

cultivating in the property to supplement their diet which is largely dependent on livestock. The Maasai indigenous peoples' restrictions to accessing and using natural resources in this area and other parts of the conservancies is a direct result of post-colonial implementation of the colonial legacy which sowed the seed of demarcating protected areas in Tanzania. The same situation in Kenya, captured in the jurisprudence surrounding collective rights to ancestral lands experienced by indigenous peoples, particularly the Ogiek, provide salient instructional value for communities in Tanzania that currently self-identify as indigenous peoples.

4 TRACING THE ORIGINS AND LITIGATION OF OGIEK PEOPLE'S RIGHTS TO THE MAU FOREST BEFORE THE AFRICAN COURT

The road for the Ogiek to litigate their collective rights to the Mau Forest before the African Court was shaped by historical injustices. Such injustices are traced from the colonial to the post-independence period. This community sought recourse before the African regional human rights mechanisms due to lack of effective local remedies. Such path is traced in what follows.

4.1 British colonial period

The African Court decision in the *Ogiek* case is deeply intertwined with colonialism due to the historical injustices perpetuated against the Ogiek people during and after the British colonial era. In this case, the Court notes the root cause for the denial of the Ogiek people's collective rights to the Mau Forest is linked to their non-recognition as a tribe by the British colonial administration.[28] It shows how their request to be granted such recognition was refused by the Land Commission in 1933 whereby they were referred to as 'savage and barbaric people who deserved no tribal status'.[29] The Kenyan (Colonial) Land Commission proposed that the Ogieks assimilate into a tribe in which they have most similarity in order to be accorded with the recognition they were seeking.[30] The Court highlights that recognition as a tribe by the British colonial administration in Kenya was the only way for any community to be granted land as 'special or communal reserve'; something that has continued being the position of the post-colonial Kenyan Government.[31] This denial of recognition of the Ogiek as one of the tribes or indigenous population in Kenya was the foundation for the impediment of the Ogiek's access to their ancestral lands in the Mau Forest in decades.[32] These evictions had led to a systematic denial of

28 *Ogiek merits* case (n 1) para 141.
29 As above.
30 As above.
31 As above.
32 *Ogiek merits* case (n 1) paras 111 and 141.

the Ogiek's traditional way of life, which was deeply dependent on the forest.[33]

4.2 Post independence period

Even after Kenya gained independence, it remained obvious that the post-colonial government upheld and, in some cases, intensified the policies of land alienation and dispossession that originated during colonial rule. The argument for 'conservation' of the Mau Forest has often been used to justify the Ogiek people's continued evictions from such vicinity, mirroring the British colonial administration which mostly disregarded indigenous land tenure systems and knowledge. In October 2009, the Kenyan Government through the Kenya Forestry Service issued the Ogiek with the 30 days eviction notice demanding them to vacate the Mau Forest.[34] The notice indicated that such forest was firstly part of the government land per section 4 of the Government Land Act and secondly the same constitutes a reserve of water catchment area.[35]

4.3 Litigation before the African Commission

Upon the Ogiek community receiving a thirty-day eviction notice from the Kenya Forestry Service in late 2009 to vacate the Mau Forest, the Ogiek Peoples' Development Program (OPDP) and the Centre for Minority Rights Development formally submitted a communication to the African Commission on Human and Peoples' Rights (ACHPR). They were later joined by the Minority Rights Group International (MRGI). This case was instituted on behalf of the Ogiek people and specifically requested the Commission's intervention to safeguard the economic, social, cultural, and political interests of the Ogiek, which were deemed to be under imminent threat.[36] As the case demonstrated serious human rights violations, the African Commission resolved to refer it to the African Court.

4.4 Litigation before the African Court

Upon receiving the case by the African Commission on behalf of the Ogiek people,[37] which was later qualified by an application for provisional orders by the Court to order Kenya to halt activities in the disputed property (the Mau Forest complex) pending determination of

33 *Ogiek merits* case (n 1) para 109.

34 *Ogiek merits* case (n 1) para 7.

35 *Ogiek merits* case (n 1) para 8.

36 Minority Rights Group, '*African Commission on Human and Peoples' Rights v Kenya*,' https://minorityrights.org/african-commission-of-human-and-peoples-rights-v-kenya-the-ogiek-case/ (accessed 10 November 2025).

37 See n 2.

the main application; the African Court granted such a prayer.[38] This was not heeded by the Kenyan Government.

In the main application, the Ogiek people argued non-consultation by the Kenyan Government before the decision to evict them was a failure of the same government to recognise the crucial role played by the Mau Forest in the survival of the Ogiek community. They contended that a series of evictions conducted after the colonial period is a perpetuation of historical injustices they have been suffering as a community.[39] The Ogiek community further indicated that, just as it was the case with the British colonial administration, the post-colonial practices of forced evictions of the community violated their fundamental rights including their rights to property, culture, religion, and access to natural resources.

Specific to the African Charter on Human and Peoples' Rights (African Charter) to which Kenya is a party;[40] the Ogiek alleged violation of rights to life and respect of their dignity, freedom of conscience and religion and right to property as per articles 1, 2, 4, 8 and 14 of the Charter. They further asserted infringement of their right to participate in their group's cultural life, protection of their morals and traditional values, free disposal of their wealth and natural resources, and economic, social and cultural development, as per articles 17(2) and (3), 21, and 22 of the Charter.

As the root cause for limiting the Ogiek people's rights to the Mau Forest was non-recognition of their status as indigenous peoples with ancestral ties to the Mau Forest by the British colonial administration and later the post-colonial Kenyan Government, the African Court tackled this question first while disposing the case on the merits. The issue as to whether the Ogiek constituted an indigenous people was found central to the entire disposal of the case.[41] The Court asserted that there was no agreed definition of the term 'indigenous people' in the African Charter.[42] Hence, it drew inspiration from reports of various studies conducted on the indigenous peoples' rights subject and relevant international instruments according to articles 60 and 61 of the Charter to come up with the standard for identifying an indigenous people. It noted the following as the relevant criteria:[43]

> presence of priority in time with respect to the occupation and use of a specific territory; a voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity; and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination, whether or not these conditions persist.

38 *African Commission on Human and Peoples' Rights v the Republic of Kenya,* Application No. 006/2012 (Order on Provisional Measures), particularly para 25.

39 *Ogiek merits* case (n 1) para 8.

40 Kenya acceded to the African Charter on 23 January 1992.

41 *Ogiek merits* case (n 1) para102.

42 *Ogiek merits* case (n 1) para 105.

43 *Ogiek merits* case (n 1) para 107.

The Court, having articulated and delineated the requisite criteria, formally recognised the Ogiek as an indigenous people. Consequently, the Court determined that the members of the Ogiek community are entitled to special protection under the theory of vulnerability, a legal principle equally applicable to all indigenous populations globally.[44]

Following the affirmation of the Ogiek's status as an indigenous community in Kenya, and having duly considered the merits of the submissions presented by both litigant parties, the Court proceeded to adjudicate the outstanding legal issues.

Regarding the Ogiek's right to communal property, the Court determined that the established indigenous status necessitated the application of a correlative international standard. Consequently, this right was deemed to be governed by article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007. The Court explicitly interpreted this right as encompassing not merely the entitlement to legal ownership, but extending comprehensively to the unhindered rights of possession, utilization, and occupation of the ancestral land.[45] The Court further addressed Kenya's assertion that the eviction of the Ogiek from the Mau Forest was justifiable based on the public interest objective of natural ecosystem preservation.

Crucially, the Court determined that Kenya had failed to furnish adequate evidence demonstrating a causal nexus between the continued presence of the Ogiek community within the forest and the alleged environmental degradation of the ecosystem. In absence of this requisite proof of justification, the evictions were declared unjustifiable and therefore constituted a violation of article 14 of the African Charter on Human and Peoples' Rights (the right to property).[46]

Regarding the allegation of discrimination against the Ogiek, the Court adopted a stringent interpretation of article 2 of the Charter (Prohibition of Discrimination). The Court held that differential treatment constitutes discrimination *per se* when it lacks the following three essential legal thresholds i.e. a specified legitimate purpose, reasonable justification and demonstrable necessity and proportionality.[47] The Court definitively concluded that insufficient evidentiary basis existed to attribute the destruction of the Mau Forest ecosystem exclusively to the presence of the Ogiek community. Furthermore, the Court noted the existence of other anthropogenic activities within the forest, which were carried out by non-Ogiek communities and, significantly, by corporate entities sanctioned by Kenya's government.[48] This finding effectively discredited the State's argument of singular causation and highlighted the discriminatory application of conservation policies, underscoring that the Ogiek were being unfairly targeted for degradation caused by a broader, State-sanctioned complex of activities.

44 *Ogiek merits* case (n 1) para112.
45 *Ogiek merits* case (n 1) para 127.
46 *Ogiek merits* case (n 1) paras 129 and 130.
47 *Ogiek merits* case (n 1) para 139.
48 *Ogiek merits* case (n 1) para 145.

The Court observed that other minority groups in Kenya, whose livelihoods were similarly predicated upon the natural environment, were not subjected to restrictions preventing access to their primary means of subsistence, namely the natural resources at their disposal.[49] It underscored that, notwithstanding the fact that the 1963 Kenyan Constitution lacked the comprehensive provisions addressing peoples' rights found in the subsequent 2010 Constitution, the Government of Kenya, in its capacity as a State Party to the African Charter, was already bound by an affirmative responsibility to protect and uphold these fundamental rights under the international legal instruments.[50]

As to the alleged violation of the right to life (article 4 of the African Charter), the Court formally acknowledged that the eviction of the Ogiek from the Mau Forest constituted a demonstrable disruption of their traditional mode of life and their existential dependence upon the forest's natural resources. Notwithstanding this acknowledgment, the Court ultimately held that a violation of this right was not substantiated against Kenya. This conclusion was predicated upon the absence of admissible evidence establishing a direct causal link between the eviction measures and the instances of mortality recorded within the Ogiek community across disparate temporal junctures.[51]

This ruling implies that while the consequences of the eviction were severe, the specific legal standard for demonstrating the State's responsibility for individual deaths under article 4 was not met due to the lack of clear proof of causality.

Pertaining to the right to participate in one's culture (article 17(2) and (3) of the Charter), the Court determined that the State's eviction action constituted an unjustifiable curtailment of the Ogiek's ability to engage in cultural practices, including religious rites, within the Mau Forest.[52] This was predicated on the finding that Kenya failed to discharge the burden of proof by demonstrating a causal link between the Ogiek's presence and engagement with the forest (their cultural activities) and the alleged destruction of the natural ecosystem. The Court thus concluded that the forced removal arbitrarily restricted the community's fundamental cultural rights.

Regarding the alleged violation of the right to freely dispose of wealth and natural resources (article 21 of the Charter), the Court held that a consequential violation was evident. Since Kenya had already been found to have violated multiple antecedent rights—specifically through the forcible eviction of the Ogiek from the Mau Forest—it was determined that this action simultaneously and inevitably infringed upon the Ogiek's right to the free disposal and exploitation of the natural resources available within that ancestral territory. The finding of a direct violation of other rights through eviction established the *prima facie* breach of the right to dispose natural resouces.[53]

49 *Ogiek merits* case (n 1) para 142.
50 *Ogiek merits* case (n 1) para 143.
51 *Ogiek merits* case (n 1) paras 155-156.
52 *Ogiek merits* case (n 1) paras 198.
53 *Ogiek merits* case (n 1) paras 200-201.

Concerning the right to development (article 22 of the African Charter), the Court employed a method of contextual interpretation, deeming it necessary to consider this provision as dealing with the same subject matter as article 23 of the UNDRIP. The Court highlighted three critical elements mandated by article 23 of the UNDRIP. First, indigenous peoples have an autonomous right to determine and define their own development approach. Second, there must be full inclusion and consultation in all proposed development programmes affecting them. Third, indigenous communities have the right to administer and manage development programmes through their own established institutions.[54] Given that the eviction of the Ogiek from the Mau Forest occurred without prior consultation and lacked their free, prior, and informed consent (FPIC), the Court concluded that Kenya had failed to adhere to these prescribed international standards. Consequently, the Ogiek's right to social, economic, and cultural development was definitively ruled to have been violated.

Finally, concerning the alleged violation of article 1 of the Charter, which imposes a positive obligation on Member States to operationalise the rights, duties, and freedoms articulated within the Charter through the enactment of corresponding domestic legislation or other effective measures, the Court delivered a conclusive opinion.[55]

The Court determined that, irrespective of the existence of general Kenyan domestic legislation acknowledging some Charter rights, the Government of Kenya failed to substantiate the specific measures taken to give effect to articles 2, 8, 14, 17(2) and (3), 21, and 22 of the Charter in the particular context of the Ogiek community. This demonstrated failure to implement the protective provisions for the Ogiek which was thus ruled to constitute a substantive violation of article 1 of the African Charter, establishing that the State's inaction rendered the Charter's guarantees ineffective.

Ultimately, the Court concluded that Kenya was in violation of a comprehensive set of provisions within the African Charter, specifically articles 1, 2, 8, 14, 17(2) and (3), 21, and 22. The Court subsequently decided to issue a separate ruling on the question of reparations for the Ogiek community.[56] This Court's final determination serves as an effective mechanism for acknowledging and addressing the long-term impact of the historical injustices suffered by the Ogiek concerning the Mau Forest, thereby establishing a significant legal precedent for other related cases involving indigenous and minority rights.

54 *Ogiek merits* case (n 1) paras 209-210.

55 *Ogiek merits* case (n 1) paras 216 and 217.

56 Restitution, compensation, satisfaction and guarantees of non-repetition by the Kenyan Government. See *Ogiek merits* case (n 1) para 218.

5 AFRICAN COURT AS PRESENT-DAY MECHANISM FOR REMEDIES OF INDIGENOUS PEOPLES' COLONIAL INJUSTICES

The African Court began its operation in 2004. Over the years it has played a major role in vindicating individual and peoples' rights enshrined in the African Charter and other human rights instruments ratified by parties to the Court Protocol. However, it was only on 26 May 2017 that it rendered the groundbreaking decision on the Ogiek indigenous peoples' collective rights to ancestral lands, economic, social and cultural rights and the right to development. The Court followed this judgment with separate reparations proceedings, culminating in a judgment on reparations on 23 June 2022, more than five years after the judgment on merits was rendered.[57]

The reparations ordered in favour of the Ogiek community comprise both pecuniary and non-pecuniary remedies. As to the pecuniary reparations, financial compensation was awarded against the Kenyan Government to redress the material and moral injustices experienced by the Ogiek people. Specifically, the awards were set at KES 57,850,000 for material damages and KES 100,000,000 for moral damages, both stipulated as tax-exempt.[58] The non-pecuniary reparations encompassed a series of legal and administrative measures designed to secure the Ogiek people's collective title to their ancestral lands within the Mau Forest. Key directives by the Court included a land tenure and dialogue whereby Kenya was ordered to engage in an inclusive dialogue with the Ogiek community and all other relevant stakeholders to achieve an amicable resolution. Strategies for enabling the Ogiek to benefit from existing concessions and lease agreements granted to third parties on their land were recommended. Should this dialogue prove unsuccessful, Kenya was ordered to nullify the said concessions or lease agreements and provide due compensation to the affected parties.

Additionally, Kenya was ordered to confer full legal recognition upon the Ogiek as an indigenous people within Kenya, which necessarily included formal acknowledgment of their language, cultural, and religious practices.[59] The state was further ordered to guarantee the full inclusion of the Ogiek in all development programmes projected to impact on them, requiring consultation in a manner consistent with their customary practices. To prevent future

57 Application 6/2012 (Reparations Judgment of 23 June 2022) (*Ogiek reparations* case). It was acknowledged by the Court's Vice President (Judge Blaise Tchikaya) in the separate opinion (para 2) to the Reparations Judgment that the *Ogiek case* was the longest finalised case ever recorded in the history of the Court in the past sixteen years.

58 *Ogiek reparations* case (n 58) para 160(1).

59 *Ogiek reparations* case (n 58) para 160(iv) to (vi).

rights violations, total inclusion of the Ogiek in the implementation of the reparations judgment was also ordered.[60]

To give full effect to the judgment's terms, Kenya was required to enact legal and administrative provisions, notably the establishment of an Ogiek Community Development Fund, to serve as the custodian for all awarded financial payments, along with the creation of a Management Committee for this fund.[61] Further, Kenya was directed to widely publish the outcomes of both the merits and reparations judgments across the Government Gazette, national newspapers, and official government websites.[62] Furthermore, a comprehensive implementation report was to be submitted to the Court within one year of the judgment's notification. Critically, the Court reserved the right to hold a hearing to review the status of the reparation order implementation precisely twelve months following the judgment's promulgation.[63]

In ordering reparations for the Ogiek community, the Court applied both cultural and communitarian approaches. Regarding the cultural approach, the Court's order on legal and administrative recognition of the Ogiek as an indigenous people in Kenya due to their cultural distinctiveness and way of life paints a clear picture of its profound concern for cultural survival of this indigenous community. The Court considered the Ogiek's eviction from their communal land as a direct violation of their right to freely practise their culture and religion, because these practices are attached to their land.[64] As to the communitarian approach, the Court's order for formalisation of Ogiek ownership of land in the Mau Forest in the form of a collective title signifies its communitarian approach to the right to property under the Charter. Further, as to the measures for coordinating payment and management of their compensation, the Court ordered the setting up of a community development fund and a committee to oversee the fund for the benefit of the entire community. Compensation was not ordered to be paid on an individual basis but to the whole community.

6 PROSPECTS FOR INDIGENOUS PEOPLES' RIGHTS IN TANZANIA

In adherence to the provisions of article 5(3) and 34(6) of the Court Protocol, Tanzania on 29 March 2010 deposited a declaration accepting the competence of the African Court to receive cases from individuals and NGOs against it. Tanzania subsequently, on 14 November 2019,

60 *Ogiek reparations* case (n 58) para 160(x).

61 *Ogiek reparations* case (n 58) para 160(ix) to (xiii).

62 *Ogiek reparations* case (n 58) para 160(xiv).

63 *Ogiek reparations* case (n 58) para 160(xiv) to (xvi).

64 For more discussion on the communitarian and cultural approach of the Court in the O*giek reparations* case, see NB Mbu & FT Endoh '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*' (2023) 7 *African Human Rights Yearbook* 362.

signed a notice for withdrawal of this declaration and submitted it to the African Union Commission on 21 November 2019. The withdrawal became formally effective one year following its notification.

Tanzania's withdrawal represents a significant impediment to initiatives aimed at securing access to justice for indigenous peoples through the African Court. The outcome is rendered paradoxical given that the African Court maintains its official seat in Arusha, Tanzania. Notwithstanding this development, alternative avenues of access persist. Indigenous peoples and affiliated non-governmental organizations (NGOs) retain the ability to bring matters before the Court by leveraging the procedural mechanisms of the African Commission. Article 5 of the Court Protocol explicitly authorises the African Commission to seize the Court. Following the precedent set in cases such as the *Ogiek* case, where the African Court was accessed via the Commission, indigenous groups seeking reparations for protracted historical grievances will likely be inspired to use this established Commission-mediated path.

7 CONCLUSION

In essence, the *Ogiek* case highlights how colonial land policies created a foundation for injustice that continues to affect indigenous communities for decades after independence. The Court's decision represents a crucial step towards decolonising land rights and affirming the self-determination and cultural integrity of indigenous peoples in Africa. In Tanzania, historical injustices stemming from the German and British colonial administration towards communities self-identifying as indigenous people continue to mount. This fails to meet the objective of article 22 of the African Charter, to which Tanzania is a party, which provides for peoples' right to economic, social and cultural development. Non-recognition of indigenous status by the Government of Tanzania remains the primary source for disregard and non-implementation of indigenous peoples' rights in the country. This is the same reason that the Ogiek in Kenya have endured a series of evictions from the Mau Forest. The African Court's decision to recognise them as indigenous peoples in Kenya, entitled to use and access their ancestral lands, is a good start to pursuing rights to ancestral lands for indigenous peoples of Tanzania.