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Nota a *ACtHPR, Judgement of 26 May 2017 – African Commission on Human and Peoples' Rights v. Republic of Kenya*

The Application and the African Court's judgement issued on 26 May 2017¹ are in respect of the Ogieks, a historically disadvantaged indigenous community of the Mau forest, which in 2009 have been victim of an eviction and forced relocation perpetrated by the Republic of Kenya. The eviction act came as the last of a series of other similar actions undertaken by the Government since the colonialism period, as well as the lack of legal recognition of the Ogieks as indigenous group. Given the very close relationship between the Ogieks and their ancestral territories, the eviction resulted in a substantial violation of both their basic human right as to live in their homeland and to their cultural, religious, social and economic rights as indigenous people. These rights are protected under international human rights law instruments such as the UN Declaration on Indigenous People's Rights and the African Charter of Indigenous People's Rights.

On 14 November 2009 the African Commission on Human and Peoples' Rights (the "Applicant") received a Communication from the NGOs Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group international (MRGI) as both acted on behalf of the Ogieks community. A few days later, on 23 November 2009, the African Commission issued an Order for Provisional Measures requesting the Republic of Kenya to suspend the implementation of the eviction notice because of its serious implications on the political, social and economic survival of the Ogiek Community. Given the lack of answer from the

^{*} Nota valutata dalla direzione del Focus.

¹ African Court on Human and Peoples' Rights, Judgement of 26 May 2017, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 006/2012.

Republic of Kenya (the “Respondent”), in July 2012 the Commission brought the case before the Court alleging the violation of Articles 1, 2, 4, 8, 14, 17 (2) and (3), 21, and 22 of the African Charter of Human and Peoples’ Rights (the Charter).

The Ogieks are a Kenyan indigenous community that comprises about 20.000 members, mostly located in the Mau Forest, a land mass of about 400.000 hectares. In October 2009, the Kenyan Government issued a 30 days eviction notice to the Ogieks on the grounds that the forest constituted a reserved water catchment zone and the State had to conserve it. This was not an element of novelty for the Ogieks since they had been victims of injustice throughout the XX century² and have suffered from continuous marginalisation and subjugation³. The Government’s decision, according to the Applicant, would have affected the enjoyment of several fundamental rights of the Ogieks, having far reaching implications on the political, social and economic survival of the indigenous community.

The Applicant sought an injunction from the Court to prevent the Respondent on continuing the eviction of the Ogieks from the Mau Forest, and requested a recognition of the Ogiek’s historic land with their proprietary rights. The Applicant also claimed a compensation for Ogieks as to their the proper *in rem* losses and *in personam* losses as a result the violation of their fundamental rights.

On the 28th Ordinary Session, the Court ordered provisional measures since on 9 November 2012, the Ministry of Lands of the Respondent issued a directive that restrictions on transactions for land measuring five acres or less within the Mau Forest Complex Area be lifted. This measure, according to the Applicant, had the potential of causing further damages to the Ogieks

In accordance with the Rules of the Court, article 39, a preliminary examination of the jurisdiction must be conducted, before dealing with the merits. The Respondent raised a series of preliminary objections regarding the jurisdiction of the Court and the admissibility of the Application as follows. Firstly, the Court’s jurisdiction *ratione materiae*, in that the Commission ought to have addressed the Assembly of Heads of States and Government of the African Union instead of the Court, because of the alleged massive violation of human rights. Secondly, *ratione personae* in that the original complainants, CEMIRIDE and MRGI, lacked

² See also Towett J. Kimaiyo, *Ogiek Land Cases and Historical Injustices 1902-2004*, Ogiek Welfare Council, 2004.

³ See also UNCESCR, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Kenya*, UN Doc. E/C.12/KEN/CO/1 and UNHRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of indigenous peoples*, 15 September 2010.

standing to invoke the jurisdiction of the Commission. Thirdly, *ratione temporis* so pursuant to the application of the non-retroactivity principle Kenya was not part to the Charter until 1992 and therefore the Court cannot adjudicate on facts which had occurred prior to that year; referring to the alleged policies of marginalisation and non-recognition of the Ogieks as indigenous group. The Court refused all the objections opposed by the Respondent since the Application respected perfectly all the preliminary requirements: Article 3 of the Protocol and Rule 26 of the Rules govern the material jurisdiction of the Court which is legitimate as long as the rights allegedly violated are protected by the Charter or any other human rights instruments ratified by the State; Article 5 of the Protocol lists the entities entitled to submit the case, including the Commission, and the Court does not have to make a determination on the jurisdiction of the Commission; finally, even though the State became part to the Charter on 10 February 1992 and to the Protocol in February 2004, the evictions were continuing after the entering into force of the two legal instruments.

Concerning the Application's admissibility, the State raised two kinds of objections. The first objection relates to the preliminary procedures before the Commission and the Court in that the Application was pending before the Commission. The second objection is based on the non-compliance with the requirements of admissibility contained in the Charter and the Rules and these are the failure to identify the Applicant and failure to exhaust local remedies. The Court rejected both objections and proceeded with the examination of the merit: firstly, the Commission had decided not to examine the matter itself and to seize the Court, so the case could not be considered pending; secondly, pursuant Article 5 of the Protocol, the Commission is entitled to bring the Application before the Court, while the prolonged proceedings before the domestic jurisdiction made impossible for the Ogieks to timely defend their case, so the Application met the admissibility requirements under Article 56(5) of the Charter and Rule 40(5) of the Rules.

A central and interesting question which was investigated before entering the core of the judgement was the definition of "indigenous population" and whether the Ogieks should have been, or not, defined as such. According to the Court, "this issue is central to the determination on the merits of the alleged violations and shall be dealt from the onset". The Applicant argued that the Ogieks had to be considered, to all effects, an indigenous population and should enjoy the rights guaranteed by the Charter and the general principles of international law. The State, on its defence, argued that "they are not a distinct ethnic group but rather a mixture of various ethnic communities" and they "have adapted themselves to modern life and are currently like all other Kenyans".

The Court strongly disagreed with the State, adopting the four essential identification criteria for an indigenous population outlined in the 1996 working paper of the UN Economic and Social Council⁴ which are as follows:

- 1) Presence of priority in time with respect to the occupation of a specific territory;
- 2) a voluntary perpetuation of cultural distinctiveness;
- 3) self-identification and recognition by other groups or State's authority;
- 4) experience of subjugation, marginalisation, exclusion and discrimination.

According to the Court's decision, the Ogieks are fully recognised as an indigenous population and they deserve a special legal protection due to their vulnerability, as well as the full enjoyment of the rights contained in international legal instruments such as the UN Declaration on Indigenous Peoples Rights.

After this central premise, the Court proceeded with the examination of several articles of the Charter alleged to have been breached by the State. The Court's analysis of the violations perpetrated by the Republic of Kenya against the Ogiek population is central as it provides an outstanding example of enforcement of the international law of human rights for the protection of a vulnerable category as indigenous people.

The first violation is in respect of Article 14 of the Charter which states "the right to property shall be guaranteed. It may only be encroached upon in the interest of public need in the general interest of the community ...". The Court states commenting on Article 14:

"Although addressed in the part of the Charter which enshrines the rights recognised for individuals, the right to property as guaranteed by Article 14 may also apply to groups or communities; in effect, the right can be individual or collective".

Furthermore, the Court recognizes that to determine until which extent indigenous people have an actual right to their ancestral lands, it is necessary to apply the principles contained in international instruments such as the UN General Assembly Declaration 61/295 on the Rights of Indigenous Peoples⁵. These

⁴ United Nations Economic and Social Council, *Standard-setting activities: evolution of standards concerning indigenous people*, E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996.

⁵ In Article 26 of the Declaration, it is provided that indigenous people have the rights to access to the lands they have traditionally occupied, the right to use, develop and control the lands that they possess by virtue of traditional ownership and that States shall give legal recognition and protection to these lands.

considerations would remind us about another two cases brought before the Commission, namely *Open Society Justice Initiative v. Ivory Coast*⁶ and *The Nubian Community v. Republic of Kenya*⁷.

According to these principles, the State had failed to provide any evidence to the effect that the Ogieks' eviction respected the principle of the general and public interest, because it only assumed that their "continued presence in the area is the main cause for the depletion of the natural environment". Given these circumstances, the Court asserted that "by expelling the Ogieks from their ancestral lands [...] without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land [...]".

The second violation concerned Article 2 of the Charter which encapsulated the principle of non-discrimination for every individual in the enjoyment of the rights and freedoms enshrined in the Charter without distinctions of any kind. The Ogieks asserted that they have been at the centre of discrimination policies perpetrated by the Kenyan government since the independence period, which included non-recognition of their tribal and ethnic identity. The Court did not limit itself to find the violation of Article 2 by the Respondent, but it also investigated on the historical process of the demand for recognition carried out by the Ogiek people since the colonial period. Indeed, according to the Court, the first attempt was in 1933, when they were considered by the Kenya Land Commission as "savage and barbaric people who deserved no legal status". This led, also, to the denial of the access to their own land, while other indigenous groups, such as the Maasai, were juridically recognised as tribes. Although the new Kenyan 2010 Constitution recognises special regime of legal protection for indigenous populations, "the right can be effective only when it is actually respected [...] the persisting eviction of the Ogiek [...] demonstrates that the new constitution and the institutions [...] are not fully effective".

The Court assessed, furthermore, the violation of Articles 8, 17 (2) and (3) of the Charter, concerning, respectively, freedom of conscience and religion and access to education, enjoyment of the cultural life and

⁶ The case *Open Justice Initiative v. Ivory Coast* (ACHPR, Communication 318/06, 27th May 2016) concerned the discrimination of the Dioulas people about the concession of the Ivorian citizenship. The Court acknowledged that their right to property had been violated since they were not entitled to the possession of land in Ivory coast.

⁷ The case *The Nubian Community v. Republic of Kenya* (ACHPR, Communication 317/2006, 30th May 2016) presents, for its features, similarities with the Ogieks' case. Indeed, the Nubian community, established in the early 1990s in the territory of Kibera, was considered Sudanese by the British colonizers and, after the independence, the Government had always refused to grant them the Kenyan nationality, as well as the subsequent property rights on their ancestral lands. This resulted in routine forced evictions from their homes in the Kibera territory. The Commission asserted the violation of Article 14 of the Charter.

the protection of moral and traditional values. The Court found Article 8 to have been violated since “the evictions rendered it impossible for the community to continue its religious practice and is an unjustifiable interference with the freedom of religion of the Ogieks’. Similarly, for what regards the right to culture, the Court found that such a right is not to be waived in the relevant circumstances in the case, asserted by the State, as to preserving the natural environment. Therefore, the Court found that the Respondent is culpable of having violated the right to exercise cultural and religious practises since they very strictly interlinked to the Mau Forest.

Other breaches were regarding Articles 21 and 22, concerning the freely disposition of wealth and natural resources for all people, the right to receive fair compensation in case of spoliation, elimination of foreign forms of exploitation and the right to economic, social and cultural development. The Ogieks alleged that their rights have been violated because the State, after the eviction, granted logging concession on their ancestral land without respecting the principle of prior and informed consent. This situation created an important prejudice in the enjoyment of the Ogieks’ rights, since they were not able to have access to the resources on their territory and, consequently, to develop their shared cultural, economic and social life within the Mau Forest. The Court considered that the State had violated Article 21 of the Charter, since “it has already recognised for the Ogieks a number of rights to their ancestral land [...] which presupposes the right of access to land. [...] the Ogieks have been deprived of the right to enjoy and freely dispose of the abundance of food produced by their ancestral land”, and Article 22, because “the Ogieks have been continuously evicted from the Mau Forest without being effectively consulted. The evictions have adversely impacted on their economic, social and cultural development”.

The Court acknowledged also the violation of Article 1 of the Charter regarding the responsibility of Member States of the Organization of African Unity (now African Union) of adapting their national legislation to the principle and duties contained in the Charter. Indeed, the Court asserted that “the Respondent has violated article 1 of the Charter by not taking adequate legislative and other measures to give effect to the rights enshrined under Articles 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter”. Similarly, the Commission had recently asserted the violation of Article 1 in the already mentioned case of *The Namibian Community v. Kenya*, calling for an effective adaptation of Kenyan national legislation to the principles contained in the Charter⁸.

⁸ See points 169 and 170 of the Communication.

Regarding a violation of Article 4 which encapsulates the right to life and inviolability of the human being, the Court assessed that the Respondent did not commit any violation, since it did not subsist a correlation between the eviction and the death of some Ogiek individuals.

Concerning the reparations, the Ogieks considered suitable remedies such as restitution, compensation, satisfaction and guarantees of non-repetition of the human rights violations. The Respondent asserted that the restitution of the ancestral land would not be possible since the Mau Forest is strictly a natural reserve, while the compensation is neither possible since, in its opinion, the Ogieks have adopted a modern lifestyle and they cannot claim to have sustained an economic loss deriving from the evictions. The Court decided to discuss the matter in another separate decision and to order the Respondent “to take all the appropriate measures within a reasonable time frame to remedy all the violations”.

The Ogieks’ case and the decision of the Court are substantially relevant to the enforcement of the indigenous peoples’ rights in Kenya. The recent recognition of the human rights violations perpetrated by the State against a group of individuals is very important in a country where indigenous people have been marginalised for decades.

The Court, in asserting the breaches committed by the State, did not only refer to the Charter, but also to the UN Declaration on Indigenous Peoples Rights, contributing to an effective application of its principles for essential issues such as the right to land, territories and resources which were traditionally owned.

Four main elements can be emanated from the Court's decision that are considered the grounds to provide effective implementation of indigenous peoples’ rights in Kenya and other states:

- 1) The recognition of the collective right, for the Ogieks as an indigenous group, to have access to the land they traditionally owned, posing great emphasis on the rights of possession, occupation, use/utilization of land, together with the recognition of the prior and informed consent principle as *conditio sine qua non* before implementing an expulsion from a territory.
- 2) The acknowledgement of the close interconnection among indigenous peoples’ culture and religious beliefs with their ancestral lands. The territory is not only a mere source of subsistence, but it is also fundamental for the repetition and survival of the indigenous’ traditions.



- 3) The broad legal recognition of the concept of "indigenous people" and its powerful impact. The effective legal recognition of the Ogieks as indigenous group - while in the Kenyan national law there is a substantial lack in this sense – sophisticates them to the rights outlined in the UN Declaration.
- 4) The appreciation of the necessity, of states particularly the Republic of Kenya, to realize an effective and coherent application of the principles contained in the Charter in its national legislation.

Although the Court's decision is influential and fundamental for the enforcement of the international law of human rights in its Member States' national legislations, it institutes only a first step in the direction of an effective respect of the human rights in Africa. Vulnerable categories such as indigenous people have been continuously marginalised and forcedly relocated in the past decades and, in some circumstances, these violations of their fundamental rights are likely to continue. There is still much to do to achieve the human rights effectiveness in Africa and the action of supranational organisms such as the African Court constitute a first attempt in this sense.

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