

Litigation as a Tool for Community Empowerment: The Case of Kenya's Ogiek

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Abstract

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In May 2017, the Ogiek indigenous community of Kenya successfully challenged the denial of their land and associated rights before the African Court of Human and Peoples' Rights ('the Court'). In the first indigenous peoples' rights case considered by the Court, and by far the largest ever case it has had to consider, the Court found violations of the Ogiek's rights to freedom from discrimination, to free practice of religion, to property, to cultural life, to natural resources and to development and other measures under the African Charter on Human and Peoples' Rights¹ ('the African Charter').² It therefore created a major legal precedent. In addition, the litigation itself and Ogiek's participation in the various stages of the legal process provided a model for community engagement, through which the Ogiek were empowered to better understand and advocate for their rights. This article will first explain the history of the case and the Court's findings and then move on to examine in further detail methods employed to build the

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1. Specifically, Arts. 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter, together with a violation of Art. 1 as a result of the Government of Kenya failing to take legislative or other measures to protect these rights.
2. *ACHPR v. Kenya*, App. no. 006/2012, judgment of African Court of Human and Peoples' Rights, issued 26 May 2017 (the 'Ogiek judgment'), available at: <http://en.african-court.org/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf>.

Ogiek's capacity throughout, and even beyond, the litigation.

1 The Ogiek: A History of Dispossession and Marginalisation

The Ogiek, who number some 30,000,³ are some of Africa's last remaining forest dwellers. Traditionally honey-gatherers, they survive mainly on wild fruits and roots, game hunting and traditional beekeeping. The Ogiek have lived since time immemorial in Kenya's Mau Forest and are the custodians of the environment on which they depend. They have a unique way of life well adapted to the forest. To them, the Mau Forest is a home, school, cultural identity and way of life that provides the community with an essential sense of pride and destiny. In fact, the term 'Ogiek' literally means 'caretaker of all plants and wild animals'. Unsurprisingly, the survival of the ancient Mau Forest is therefore inextricably linked with the survival of the Ogiek.

Since independence, and indeed prior to it, the Ogiek have been routinely subjected to arbitrary forced evictions from their ancestral land by the Kenyan Government, without consultation or compensation. The Ogiek's rights over their traditionally owned lands have been systematically denied and ignored. The Government has allocated land to third parties, including political allies, and permitted substantial commercial logging to take place, without sharing any of the benefits with the Ogiek. The eviction of the Ogiek from their ancestral land and the refusal to allow them access to their spiritual home has prevented the Ogiek from practising their traditional cultural and religious practices. The culmination of all these actions has resulted in the Ogiek being prevented from practising their traditional hunter-gatherer way of life, thus threatening their very existence.

Over the last 50 years, the Ogiek have consistently raised objections to these evictions with local and national administrations, task forces and commissions

3. The Ogiek judgment refers to the Ogiek, comprising about 20,000 members (at para. 6), but a more accurate number is provided above and as set out in para. 2 of the Applicant's Submissions on the Merits, available at: <http://minorityrights.org/wp-content/uploads/2015/03/Final-MRG-merits-submissions-pdf.pdf>.

and have instituted several rounds of judicial proceedings in the national courts, to no avail.

In October 2009, the Kenyan Government, through the Kenya Forestry Service, issued a 30-day eviction notice to the Ogiek and other settlers of the Mau Forest, demanding that they leave the forest. Concerned that this was a perpetuation of the historical land injustices already suffered and having failed to resolve these injustices through repeated national litigation and advocacy efforts, the Ogiek decided to lodge a case against their Government before the Commission,⁴ with the assistance of Minority Rights Group International (MRG), Ogiek Peoples' Development Programme and Centre for Minority Rights Development (CEMIRIDE).⁵ They argued violations of their rights to property, natural resources, religion, culture, development, life, freedom from discrimination and equality, pursuant to the African Charter, as a result of the treatment by the Kenyan Government. In November 2009, the Commission, citing the far-reaching implications on the political, social and economic survival of the Ogiek community and the potential irreparable harm if the eviction notice was actioned, issued an Order for Provisional Measures requesting the Kenyan Government to suspend implementation of the eviction notice. The Ogiek were not evicted on that occasion, but their precarious situation continued. In early 2012, following the Kenyan Government's lack of response on the issue, the Commission referred the case to the Court, and in July 2012, the Court declared itself seized of the matter, pursuant to Article 5(1)(a) of the Protocol.

On 15 March 2013, the Court issued an Order for Provisional Measures, mirroring the order already issued by the Commission, requiring the Kenyan Government to (i) immediately reinstate the restrictions it had imposed on land transactions in the Mau Forest Complex, and (ii) refrain from any act/thing that would/might irreparably prejudice the main application, until the Court gives its final decision in the case. The Order was issued as the Court considered that 'there is a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the [rights of the] Ogiek of the Mau Forest'.⁶ This Order was, unfortunately, not complied with, and evictions, harassment and intimidation of the Ogiek have continued, including a violent eviction of approximately 1,000 Ogiek and police intimidation in March 2016.

On 27 and 28 November 2014, the Court heard arguments from the parties as well as two Ogiek witnesses, an expert witness and an intervention by MRG on behalf of the Original Complainants.⁷ In March 2015,

4. CEMIRIDE, *Minority Rights Group International & Ogiek Peoples Development Programme (On Behalf Of The Ogiek Community) v. Republic Of Kenya*, Communication 381/09.

5. CEMIRIDE and OPDP are both NGOs registered in Kenya; OPDP works specifically to promote and protect Ogiek culture, land, language, environment and human rights.

6. See <http://en.african-court.org/images/Cases/Orders/006-2012-ORDER_of_Provisional_Measures-African_Union_v_Kenya.pdf>.

7. See paras. 14, 27 and 29 of *Ogiek* judgment.

the Court proposed that amicable settlement be investigated, although this was ultimately unsuccessful.⁸ In March 2016, the Court decided to proceed to judgment, issuing its landmark ruling on 26 May 2017.

2 The Ogiek's Key Arguments

In order to benefit from the substantial body of international human rights law recognising indigenous peoples' rights, the Ogiek argued first that they are an 'indigenous people', a status that would also entitle them to benefit from provisions of the African Charter that protect collective rights. They substantiated this argument by stating that the Ogiek have been living in the Mau Forest since time immemorial and that their way of life and survival is inextricably linked to the forest as their ancestral land.⁹

The Ogiek argued that the failure of the Kenyan Government to recognise them as an indigenous community denies them their right to communal ownership of their traditionally owned lands. They claimed that the encroachment by the Kenyan Government on Ogiek property, without their consent and without adequate compensation, as well as the inability of Kenyan law and the refusal of the Kenyan courts to respect collective ownership rights, does not comply with the appropriate international laws on indigenous peoples' rights, resulting in a violation of Article 14.¹⁰

The Ogiek alleged that they have suffered routine discrimination at the hands of the Respondent State, and the reasons for such difference in treatment cannot be considered strictly proportionate to, or absolute necessary for, the aims being pursued. As a result, the laws that permit this discrimination are in violation of Article 2 of the African Charter.¹¹

By evicting the Ogiek from their land, refusing the Ogiek access to the Mau Forest and the religious sites within it, and failing to demarcate or protect those sites, the Ogiek argued, the Kenyan Government has interfered with their ability to practise and worship as their faith dictates in violation of Article 8.¹²

The Ogiek further alleged that the eviction of the Ogiek from their ancestral land and the refusal to allow them access to their cultural home resulted in a disproportionate interference by the Respondent State and a denial of the Ogiek's right to culture under Articles 17(2) and (3) of the African Charter.¹³

The Ogiek argued that they have been denied use of the natural resources on their ancestral land while the Kenyan Government has plundered them, without seeking the consent or effective participation of the Ogiek, or sharing the benefits. They claim a violation of Article

8. *Ibid.*, paras. 31-39.

9. *Ibid.*, para. 103.

10. *Ibid.*, paras. 114-119.

11. *Ibid.*, paras. 132 & 133.

12. *Ibid.*, paras. 157-160.

13. *Ibid.*, paras. 170-172.

21(1) and, accordingly, pursuant to the provisions of Article 21(2), the Ogiek are entitled to the lawful recovery of their property as well as to adequate compensation for the losses they have suffered.¹⁴

The Ogiek further maintained that the critical failure of the Respondent State to consult with or seek consent from the Ogiek community about their shared cultural, economic and social life within the Mau Forest resulted in a violation of the Ogiek's right to development under Article 22.¹⁵

The Ogiek claimed that the Government of Kenya is obliged under Article 1 to adopt legislative or other measures to ensure the Ogiek's rights are protected under the African Charter. The Government's failure in this respect results in a violation of Article 1.¹⁶

Finally, the Ogiek alleged that the continued prohibition of access to the Mau Forest's resources by the Ogiek prevents the sustainability of the Ogiek's traditional hunter-gatherer way of life, and, as such, violates the Ogiek's right to life under Article 4 of the African Charter.¹⁷

3 The Kenyan Government's Response

In relation to the Ogiek's claim that they are an indigenous people, the Government argued that the Ogiek are not a distinct ethnic group but rather a mix of different ethnic communities. During the public hearing, however, the Government admitted that the Ogiek constitute an indigenous people of Kenya but claimed that the Ogiek of today are different from those of the 1930s, having transformed their way of life through time and adapted themselves to modern life, and that they are currently like all other Kenyans.¹⁸

Responding to the arguments on Article 14, the Government contended that the Ogiek are not the only tribe indigenous to the Mau Forest and therefore cannot claim exclusive ownership of it. It stated that title for all forest in Kenya is vested in the State. It further argued that the Mau Forest is a protected conservation area upon which the Ogiek were encroaching and that the Ogiek had been consulted and notified before every eviction, which was carried out in accordance with the law. Finally, it claimed that Kenya's land laws recognise community ownership of land and provide for mechanisms by which communities can participate in forest conservation and management.¹⁹

In relation to the Ogiek's claims of discrimination under Article 2, the Government submitted that this was baseless and lacked evidence. It further claimed that, in any

event, the alleged discrimination would be contrary to a number of provisions of its Constitution.²⁰

The Government contended in relation to Article 8 that the Ogiek had failed to adduce evidence to show the exact places where their religious sites are located. They argued that the Ogiek had abandoned their religion as they have converted to Christianity and that the religious practices of the Ogiek are a threat to law and order, necessitating Government interference. They further alleged that they are free to access the Mau Forest, except at night, and are prohibited from carrying out certain activities in the forest without a licence.²¹

The Government argued under Article 17(2) and (3) that it has taken reasonable steps at the national and international levels to ensure that the cultural rights of indigenous peoples in Kenya are promoted, protected and fulfilled, referring specifically to its ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as Constitutional provisions. It stated that it has the responsibility to ensure a balance between cultural rights and environmental conservation, and that Ogiek and other indigenous peoples' cultural rights may include activities such as hunting or fishing, which could have a negative impact on the environment. The Government further added that the Ogiek's lifestyle has metamorphosed and the cultural and traditional practices that made them distinct no longer exist, and that, therefore, the group no longer exists and cannot claim any cultural rights, nor can they be said to conserve the environment.²²

The Government denied a violation of the Ogiek's rights to freely dispose of their wealth and natural resources, claiming that Article 21 of the African Charter calls for reconciliation between the State, on the one hand, and individuals or groups /communities, on the other, when it comes to the ownership and control of natural resources. They also argued that states ultimately exercise the enjoyment of this right in the interest of the people and that efforts are being made to maintain a balance between conservation, a people-centred approach to the control of natural resources and their ultimate control, with an emphasis on access to, rather than ownership over, natural resources.²³

In relation to the right to development under Article 22, the Government argued that the Ogiek had not shown how it had failed to undertake development initiatives for their benefit, or how they had been discriminated against within development processes. It further stated that consultation had taken place with the Ogiek's democratically elected representatives in relation to development of the Mau Forest.²⁴

The Government did not address the Ogiek's arguments under Article 1 of the African Charter.²⁵

14. *Ibid.*, paras. 191-193.

15. *Ibid.*, paras. 202-204.

16. *Ibid.*, para. 212.

17. *Ibid.*, para. 147-149.

18. *Ibid.*, para. 104.

19. *Ibid.*, paras. 120-121.

20. *Ibid.*, paras. 134-135.

21. *Ibid.*, para. 161.

22. *Ibid.*, paras. 173-175.

23. *Ibid.*, para. 194.

24. *Ibid.*, paras. 205-206.

25. *Ibid.*, para. 213.

With regard to the arguments under Article 4 of the African Charter, the Government claimed that the Mau Forest Complex is important for all Kenyans and that it is entitled to develop it for the benefit of all its citizens. It further argued that the effects of any economic activity on Kenya's indigenous people should be seen in the light of the principle of proportionality.²⁶

4 Analysis of the Court's Judgment

Before addressing the merits of the Ogiek's substantive claims, the Court addressed various procedural aspects of the case, responding to some preliminary objections raised by the Government of Kenya. First, the Court ruled that it has jurisdiction to hear the case following the Commission's referral, confirming and clarifying the procedure under which cases can be referred to the Court by the Commission.²⁷ This included clarifying that there was no need for the Commission to have first brought the case to the attention of the Assembly of Heads of State and Government of the African Union before referring the case to the Court²⁸ and that the status of the Original Complainants before the Commission was irrelevant because the Commission – the Applicant in the instant case – is entitled to submit cases to the Court, pursuant to Article 5(1) of the Protocol Establishing the Court.²⁹ This is particularly important for future Commission-referred cases, given this is the first judgment to be delivered following a referral and a substantive hearing on merits and admissibility.³⁰ Second, the Court held that even though the Government only became a Party to the African Charter on 10 February 1992 and a Party to the Protocol Establishing the Court on 4 February 2004, the alleged violations related to events that occurred before those dates but that were continuing to take place and therefore the Court had the power to consider the totality of the Ogiek's claims.³¹ Finally, the Court considered various points regarding whether or not the Court had the power to hear the case, confirming that the Commission did not need to have itself considered this issue before the case was referred to the Court since the Court will make its own separate determination once referred; that the case before the Commission is no longer pending; and that even though the Commission (the party before the

Court) had not taken steps to exhaust domestic remedies, the Ogiek had taken steps to do so, which the Court was satisfied were unduly prolonged and therefore were not available to the Ogiek to exhaust. Again, as the first Court judgment to be delivered following a referral by the Commission and a substantive hearing on merits and admissibility, this has provided important procedural precedent for future Commission-referred cases, as well as building on the Court's jurisprudence regarding its admissibility criteria.

Turning then to the alleged violations of the African Charter, first, the Court dealt with the claim that the Ogiek are an indigenous people. It specifically drew inspiration³² from the Commission's Working Group on Indigenous Populations/Communities and the UN Special Rapporteur on minority issues, concluding that the relevant factors to consider when determining whether a community is indigenous or not include the priority in time with respect to the occupation and use of a specific territory; a voluntary perception of cultural distinctiveness, which may include aspects of language, social organisation, and religion and spiritual values; 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. It further stated that these criteria generally reflect the current normative standards to identify indigenous populations in international law, and deemed it appropriate, by virtue of Articles 60 and 61 of the Charter, to draw inspiration from other human rights instruments to apply these criteria to the case before it.³³ The Court considered that it had received significant evidence to affirm the Ogiek's assertion that the Mau Forest is their ancestral home,³⁴ recognising the link between indigenous populations and nature, land and the natural environment, and that for centuries they had depended on the Mau Forest as a source of livelihood. The Court also found that the Ogiek exhibit all aspects of the second factor, which include aspects of language, social organisation, religious, cultural and spiritual values, modes of production, laws and institutions though self-identification and recognition by other groups and by State authorities, as a distinct group. Despite the fact that the Ogiek are divided into clans made up of patrilineal languages each with its own name and are of habitation, they have their own language, social norms and forms of subsistence, which make them distinct from other neighbouring tribes. They are also identified as distinct by those tribes, with whom they have regular interaction.³⁵ Finally, the Court ruled that the Ogiek have suffered continued subjugation and marginalisation, as evidenced by the evictions from their ancestral lands, their forced assimilation and lack of recognition of their status as a tribe. Accordingly, the

26. *Ibid.*, para. 150.

27. Cases can be referred pursuant to Art. 5(1) of the Protocol Establishing the Court.

28. *Ogiek* judgment, paras. 48-55

29. *Ibid.*, paras. 56-61

30. The first Commission-referred Court case in which a judgment was issued by the Court was *African Commission on Human and Peoples' Rights v. Libya*, App. no. 002/2013, 3 June 2016, in which judgment was issued in default and not after hearing both parties, available at: <www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl%20%20002-2013%20African%20Commission%20v%20Libya-%20Engl%20.pdf>.

31. *Ogiek* judgment, paras. 62-66.

32. Pursuant to Arts. 60 and 61 of the Charter, para. 108.

33. *Ogiek* judgment, para. 108.

34. *Ibid.*, para. 109.

35. *Ibid.*, para. 110.

Court recognised the Ogiek as an indigenous population that is part of the Kenyan population and deserves special protection deriving from their vulnerability.³⁶

In relation to the right to property under Article 14, the Court held that this can apply to groups or communities: that it can be individual or collective.³⁷ Rather than view the right to property in its classical conception, the Court held that in order to determine the extent of the rights recognised for indigenous communities in their ancestral lands, Article 14 must be interpreted in the light of Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognises indigenous peoples' 'right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership.'³⁸ This provision places greater emphasis on the rights of possession, occupation and use/utilisation of land. Since the Government had not disputed that the Ogiek have occupied lands in the Mau Forest since time immemorial, and since the Court had also held that the Ogiek constitute an indigenous community, the Court ruled that they have the right to occupy their ancestral lands, as well as use and enjoy them.³⁹ Further, the Court accepted that the right to property under Article 14 can be restricted in the public interest and where such restriction is necessary and proportionate. However, it rejected the Government's public interest justification for evicting the Ogiek from the Mau Forest – the preservation of the natural ecosystem – since it had not provided any evidence to the effect that the Ogiek's continued presence in the area is the main cause of the depletion of the natural environment. Varying reports revealed that the main causes were government excisions for settlements and ill-advised logging concessions, and indeed the Government had conceded in its pleadings that the degradation of the Mau Forest could not be associated entirely with the Ogiek.⁴⁰ Therefore, the continued denial of access to and eviction from the Mau Forest of the Ogiek population cannot be necessary or proportionate to achieve the Government's purported justification. Accordingly, the Court held that the expulsion of the Ogiek from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, constitutes a violation of Article 14.⁴¹

The Court next considered the Ogiek's claims under Article 2 of the African Charter. It first emphasised that Article 2 is imperative for the respect and enjoyment of all other rights and freedoms protected in the Charter, and explained the relation between the right to non-discrimination and the right to equality under Article 3. The Court stated that 'The scope of the right to non-discrimination extends beyond the right to equal treatment by the law and also has a practical dimension in

that individuals should in fact be able to enjoy the rights enshrined in the Charter without distinction of any kind relating to their race, colour, sex, religion, political opinion, national extraction or social origin, or any other status.'⁴² In determining whether a ground falls under this last category, the Court held that it shall take into account the general spirit of the Charter. Further, the Court drew attention to the difference between a distinction or differential treatment and discrimination, explaining that '[a] distinction or differential treatment becomes discrimination, and hence, contrary to Article 2, when it does not have objective or reasonable justification and... where it is not necessary and proportional'.⁴³ Although not specifically referenced in the judgment, the Court clearly drew upon regional standards in reaching this conclusion, including the approach taken by the European Court of Human Rights.⁴⁴ In this sense, the Court went much further in articulating the right to non-discrimination under Article 2, and the ruling therefore sets out a clear standard for the future.⁴⁵ The Court moved on to consider the position of the Ogiek in Kenya. It found that the Ogiek's request for recognition as a tribe goes back to the colonial period, where their request was rejected by the then Kenya Land Commission in 1933, and has been continuously denied. In contrast, other groups in Kenya, such as the Maasai, have been recognised as tribes and consequently have been able to enjoy related rights derived from that recognition – while the denial of the Ogiek's request for recognition has resulted in them being denied access to their own land. The Court considered this treatment to amount to a 'distinction' based on ethnicity and/or 'other status' and held that it therefore falls within the prohibition on non-discrimination as specified in Article 2.⁴⁶ Further, while the Court noted that Kenya's 2010 Constitution recognises and accords special protection to indigenous populations that could theoretically benefit the Ogiek, these provisions can be effective only when actually respected and have been available only since the new Constitution was enacted in 2010. It therefore found that the persisting eviction of the Ogiek, and the failure to comply with decisions of the national courts that protected them, demonstrates that the new Constitution and the institutions that the Government has set up to remedy past or ongoing justices are not fully effective.⁴⁷ Finally, again, the Court concluded that Government's purported justification that the evic-

36. *Ibid.*, para. 112.

37. *Ibid.*, para. 123.

38. *Ibid.*, para. 126.

39. *Ibid.*, para. 128.

40. *Ibid.*, paras. 129-130.

41. *Ibid.*, para. 131.

42. *Ibid.*, para. 138.

43. *Ibid.*, para. 139.

44. See, e.g., case *Relating to certain aspects of the laws on the use of languages in education in Belgium*, ECtHR judgment of 23 July 1968, App. nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, para 10; as referenced in para. 366 of the Applicant's Submissions on the Merits, available at: <<http://minorityrights.org/wp-content/uploads/2015/03/Final-MRG-merits-submissions-pdf.pdf>>.

45. The Court has only found a violation of Art. 2 in one other case, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*, Appl. Nos. 009&011/2011, judgment dated 14 June 2013.

46. *Ogiek* judgment, paras. 141-142.

47. *Ibid.*, paras. 143-144.

tion of the Ogiek were prompted by the need to preserve the natural ecosystem of the Mau Forest could not reasonably or objectively justify the lack of recognition of the Ogiek's indigenous or tribal status or the denial of the rights associated with that status. This was particularly true given the earlier finding in relation to Article 14 that the Mau Forest has been allocated to other people in a manner that cannot be considered compatible with the preservation of the natural environment.⁴⁸ Accordingly, the Court found a violation of Article 2.

Considering the allegations under Article 8 of the African Charter, the Court specified that the right to freedom of worship offers protection to all forms of beliefs regardless of denominations, while the right to manifest and practise religion includes the right to worship, engage in rituals, observe days of rest, wear religious garb, allow individuals or groups to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes as well as to celebrate ceremonies in accordance with the precepts of one's own religion or belief. It drew inspiration, in particular, on international standards on the right to free practice of religion, including Article 18 ICCPR, CCPR General Comment no 22 on Article 18 ICCPR and Article 6 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The Court went on to note that, in the context of traditional societies, where formal religious institutions often do not exist, the practice and profession of religion are usually inextricably linked with land and the environment, and any impediment to accessing that environment severely constrains their ability to conduct or engage in religious rituals.⁴⁹ The Court considered that the evictions of the Ogiek from the Mau Forest were interfering with their freedom of worship. While Article 8 allows restrictions on the exercise of the freedom of religion and in the interest of maintaining law and order, these restrictions must be necessary and reasonable. The Court viewed that there were other less onerous measures that the Government could have put in place, such as collaborating to maintain the religious sites.⁵⁰ Further, the Court noted that not all Ogiek have converted to Christianity and that there was significant evidence to show that they still practise their traditional religious rites.⁵¹ It could not therefore be said that the Ogiek's traditional spiritual values and rituals have been entirely eliminated. As a result, given the link between indigenous populations and their land for the purposes of practising their religion, the evictions of the Ogiek from the Mau Forest rendered it impossible for the community to continue their religious practices, resulting in an unjustifiable interference with the Ogiek's freedom of religion and a violation of Article 8.⁵²

48. *Ibid.*, para. 145.

49. *Ibid.*, para. 164.

50. *Ibid.*, para. 167.

51. *Ibid.*, para. 168.

52. *Ibid.*, para. 169.

Addressing the Ogiek's arguments under Article 17(2) and (3) of the African Charter, the Court considered it to have a dual dimension: ensuring the protection of individuals' participation in the cultural life of their community while also obliging the State to promote and protect traditional values of the community. It considered that the right goes beyond the duty not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, cultural heritage essential to the group's identity, and should be construed in its widest sense, encompassing the group's total way of life: languages, symbols, manner of constructing shelters, economic activities, rituals (such as the group's particular way of dealing with problems) and shared values that reflect its distinctive character and personality.⁵³ The Court noted that preservation of culture is of particular importance for indigenous populations, who have often been affected by economic activities of other dominant groups and large-scale developmental programmes and drew on the work of the Commission's Working Group on Indigenous Populations/Communities, which recognises that such communities have been the target of deliberate policies of exclusion and forced assimilation, threatening and extinguishing their cultural distinctiveness. It also referred to Article 8 of the UNDRIP, which provides the right not to be subjected to forced assimilation or destruction of their culture, and requires States to provide effective mechanisms to prevent any action that deprives them of their integrity as distinct peoples or of their cultural values or ethnic identities. Similarly, it relied on General Comment No 21 of the UN Committee on Economic, Social and Cultural Rights, which has observed that indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired.⁵⁴ This approach of recognising the duality of indigenous peoples' rights to participating in the cultural, social and political life of society while also maintaining their own separate cultural systems is very much in line with the spirit of UNDRIP, particularly Articles 11, 12 and 13. The Court considered that it had sufficient evidence demonstrating the Ogiek have their own distinct culture distinguishing them from other communities living around and outside the Mau Forest Complex, and considered that the restrictions on access to and evictions from the Mau Forest have greatly affected their ability to preserve their traditions, resulting in a violation of the Ogiek's right to culture.⁵⁵

Having found this, the Court then needed to determine whether such interference could be justified by the need to attain a legitimate aim under the African Charter. The Court did not consider that the Ogiek's way of life has changed over time to the extent that it has eliminated their cultural distinctiveness, and viewed that the

53. *Ibid.*, paras. 177-179.

54. *Ibid.*, paras. 180-181.

55. *Ibid.*, para. 183.

invisible traditional values embedded in their self-identification and shared mentality often remain unchanged. Indeed, the Court could see that some of these changes were caused by the Government as a result of restrictions on their right to access their land and natural environment.⁵⁶ This approach should be widely welcomed, since it avoids the debate around whether indigenous peoples still practise their traditional culture and completely dismisses any requirement to prove ‘cultural authenticity’ in order for any indigenous people to be able to claim their cultural rights. Finally, given that the Court had already found that the Government had not adequately proved its claim that the eviction of the Ogiek was for the preservation of the natural ecosystem of the Mau Forest, it held that this could not constitute a legitimate justification for the interference in the Ogiek’s exercise of their cultural rights under Article 17(2) and (3) of the African Charter.⁵⁷

In relation to the Ogiek’s right to freely dispose of their wealth and natural resources under Article 21, the Court first considered whether these rights could be extended from constituent peoples to sub-state ethnic groups and communities that are a part of the State’s population. It concluded that they could, provided such groups or communities do not call into question the sovereignty or territorial integrity of the State without consent.⁵⁸ It reached this decision by finding that it would be difficult for the Charter to automatically recognise the ethnic groups’ and communities’ right to self-determination and independence guaranteed under Article 20(1) of the Charter, which would amount to a veritable right to secession, but nothing prevents other peoples’ rights from being recognised, where necessary, specifically for the ethnic groups and communities that constitute the population of a state. The Court’s reasoning clearly recognises that self-determination goes beyond secession, which is important in the African context, given claims often voiced by African states – and particularly during the UNDRIP draft process – that to grant indigenous peoples their self-determination threatens territorial integrity. The Court then referred back to its earlier findings in relation to the Ogiek’s right to property, including their right to use and enjoy the produce of the land, which presupposes the right to access and occupation of the land, and declared a violation of Article 21 since the Ogiek have been deprived of the right to enjoy their ancestral lands.⁵⁹

Regarding the claimed violation of the Ogiek’s right to development, the Court reiterated its view on the definition of ‘peoples’ as already developed under Article 21 of the African Charter, stating that all populations that comprise a constitutive element of a State are entitled to social, economic and cultural development under Article 22 of the African Charter. Accordingly, the Ogiek population is entitled, under Article 22, to enjoy their right to

development.⁶⁰ The Court again relied on UNDRIP, citing Article 23, which states, ‘indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and...to administer such programmes through their own institutions.’ Since the Ogiek have been continuously evicted from the Mau, without being effectively consulted, adversely impacting on their economic, social and cultural development; and since they have not been actively involved in developing and determining programmes affecting them, the Court held that the Government had violated Article 22 of the African Charter.⁶¹

With regard to Article 1, the Court observed that this imposes a duty on states to take all legislative and other measures necessary to give effect to the rights and freedoms guaranteed in the African Charter. It also observed that Kenya’s 2010 Constitution and other 2016 legislation regarding community and forest lands had made some progress in this respect – but noted that these laws had been enacted relatively recently. The Court stated that it had already found the Government had failed to recognise the Ogiek as a distinct tribe, leading to denial of access to their land and the consequential violations of their rights under Articles 2, 8, 14, 17(2) and (3), 21 and 22 of the African Charter. The Government had not demonstrated that it had taken measures to give effect to these rights. Therefore, the Court found a violation of Article 1.⁶²

Finally, in relation to the alleged violation of the right to life under Article 4 of the African Charter, the Court noted that this is a right to be enjoyed irrespective of the group to which he or she belongs. The Court also understood that the violation of economic, social and cultural rights, including through forced evictions, may generally engender conditions unfavourable to a decent life. However, the Court viewed that a deprivation of economic, social and cultural rights may not necessarily result in a violation of the right to life under Article 4 of the African Charter, finding it necessary to make a distinction between the classical meaning of the right to life and the right to decent existence of a group. Concluding that Article 4 relates to the physical right to life, rather than to existence, and that no causal link had been established between the evictions of the Ogiek and the deaths that had occurred subsequent to their evictions, it found there had been no violation of Article 4. The Court’s approach in this respect differs markedly from the stance adopted in Inter-American jurisprudence, which has incorporating aspects of indigenous community’s livelihood – including the possibility of access to traditional means of subsistence, to use and enjoyment of the natural resources necessary to obtain clean water and to practise traditional medicine to prevent and cure illnesses – within the right to life and human dignity.⁶³

56. *Ibid.*, paras. 184-186.

57. *Ibid.*, paras. 187-190.

58. *Ibid.*, paras. 196-199.

59. *Ibid.*, para. 201.

60. *Ibid.*, para. 208.

61. *Ibid.*, paras. 209-211.

62. *Ibid.*, paras. 214-217.

63. See, e.g., I/A Court H.R., *Yakye Axa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of 17 June 2005. Series

5 Remedies and Reparations

In their legal submissions to the Court, the Ogiek sought a declaration that the Mau Forest is the ancestral home of the Ogiek in which they have a communal property right and that they are entitled to full reparations for the violations suffered. They requested a separate judgment of the Court,⁶⁴ including the following orders: restitution of Ogiek ancestral land; compensation for all the damage suffered; the adoption of legislative and other measures ensuring the Ogiek's right to be effectively consulted; the issuance of a full apology to the Ogiek; the erection of a public monument acknowledging the violation of Ogiek rights; and full recognition of the Ogiek as an indigenous people of Kenya. The Court decided that it would rule on reparations in a separate decision, taking into consideration additional submissions from the Ogiek and the Government of Kenya, and granting each party a period of 90 days in which to provide its submissions.⁶⁵ At the time of writing, this period is ongoing and the Court's reparations order is hoped for 2018.

The Government was also ordered to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within 6 months of the date of the judgment.⁶⁶

64 6 A Model for Community Engagement?

Litigating the *Ogiek* case on behalf of such a large community, who had been systematically discriminated, marginalised and disenfranchised by successive governments since the 1900s, who had lost faith in the ability of any justice system to offer them redress, and who live in scattered geographical locations, represented numerous challenges for the Original Complainants. Yet, as will be explained, these challenges also offered significant opportunities to provide the Ogiek with legal empowerment.

First, there was a need to establish the historical relationship that the Ogiek have had with their ancestral land in the Mau Forest since time immemorial. The complicated factual matrix of evictions and treatment of the Ogiek over the years also needed to be clearly detailed and evidenced. Both of these processes required

vast documentation and anthropological research, with-in social science libraries, in Kenya's national archives as well as online research. There was also a detailed evidence gathering process conducted by MRG and OPDP, in order to unearth relevant documents proving ownership, such as maps, correspondence with local and national authorities dating back many years, pleadings and related evidence in the numerous land disputes brought by the Ogiek before the national courts. Similarly, extensive witness statements were collected from Ogiek community members, including elders, women and youth, in order to substantiate not just the evictions that were suffered, but also to fully explain the Ogiek's relationship with the Mau Forest, its central function in the conduct of customary religious and cultural practices, the crucial part it plays as a source of food and traditional medicine, and, above all, its vital role in defining Ogiek identity. Detailed witness evidence was also collected on Ogiek identity and traditional lifestyle, including hunting, honey production, traditional medicines and other traditional uses for plants, cultural rituals and ceremonies, crafts, use of territory, social organisation, language, religion, tribal interactions, as well as the extent to which that lifestyle has been forced to change over the years.

In addition to considerable research on matters of international comparative law, MRG's legal team also needed to establish the role of Ogiek as conservationists of the Mau Forest. Photos of indigenous plants well known to the Ogiek and the role that these play in Ogiek customs were collected and submitted to the Court, demonstrating Ogiek traditional knowledge and their keen awareness of how to conserve their ancestral surroundings. OPDP and MRG also produced a film of Ogiek land and cultural practices, which was submitted as video evidence to the Court, giving the judges the opportunity to witness firsthand the traditional Ogiek way of life. An expert on customary land tenure also presented critical written and oral evidence to the Court on the way that the practice of indigenous communities can and does save threatened natural forests.

As a result of this detailed and lengthy process of evidence gathering to support the litigation process, the Ogiek have been considerably legally empowered. Legal empowerment involves strengthening the capacity of all people to exercise their rights, either as individuals or as members of a community. It aims to deliver grassroots justice, ensuring that law is not confined to books or courtrooms, but rather is available and meaningful to everyone.⁶⁷ Through significant engagement with the community – which was not only necessary to ensure

C No. 125; I/A Court H.R., *Sawhoyamaxa Indigenous Community v. Paraguay*. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146; I/A Court H.R., *Xákmok Kásek Indigenous Community v. Paraguay* Merits, Reparations and Costs. Judgment Merits and reparations. Judgment of 24 August 2010. Series C No. 214.

64. Pursuant to Rule 63 of the Court rules.

65. *Ibid.*, paras. 222-223 and 227 Merits (iv) and (v); note that para. 227 (v) provides a period of 60 days, but at the hearing during which the judgment was delivered, a period of 90 days was requested by both parties and granted by the Court.

66. *Ogiek* judgment, para. 227, Merits (iii).

67. See, e.g., <<https://www.opensocietyfoundations.org/projects/legal-empowerment>> and <<https://namati.org/>>; see also UN Commission on the Legal Empowerment of the Poor, 2008, 'The Four Pillars of Legal Empowerment', in *Making the Law Work for Everyone* Volume I, Commission on Legal Empowerment of the Poor and United Nations Development Programme, New York, pp. 25-42, which identifies ways of empowering those in poverty, focusing around access to justice and the rule of law, property rights, labour rights and business rights (the latter two were less explored in the case of the Ogiek).

the success of the litigation efforts, but also part of a conscious effort by the Original Complainants – the Ogiek have become familiarised with their human rights under both national and international law, have been enabled to advocate for full protection of those rights, and better understand the judicial process. These approaches also had the effect of uniting the Ogiek behind – and in spite of – a long, protracted, uncertain legal struggle. This was particularly important for a community as vulnerable as the Ogiek, some of whom were also being intimidated and harassed: it would have been relatively easy for the Government to have sought support for their own position had the Ogiek not been firmly committed to the case.

Working closely with MRG, OPDP went to great lengths to ensure that Ogiek community members were closely consulted as the litigation developed and were kept fully informed of procedural and other developments, via community forums, through consultative meetings with Ogiek elders and community representatives, and through regular informal outreach and liaison. This was particularly important during amicable settlement discussions, as Ogiek views on both the course of action and the settlement terms were necessarily central to the process. Several Ogiek community members also gave oral evidence direct to the Court during the November 2014 hearing, providing powerful testimony that played a pivotal role in assisting the judges to deliver their ruling. In addition, MRG and OPDP facilitated over 50 Ogiek to attend the hearing and over 80 to attend the judgment delivery, giving the Ogiek a clear sense of ownership over their case, which was being decided by a Court sitting in a different country and by judges from many different states. Many Ogiek community members also attended meetings with Commissioners and representatives of the Commission team representing them before the Court, in order to ensure that their voices were heard.

In addition, MRG and OPDP also trained 25 Ogiek community members as paralegals, through a series of in-depth and follow-up refresher sessions. This enabled the Ogiek not only to have a better understanding of their rights under national, regional and international law, and the national judicial system, but also to challenge instances of intimidation, violence and harassment that resulted following efforts to defend themselves from ongoing evictions, by bringing cases before domestic courts and recording and collecting evidence that could be used within the regional case. The training also equipped them with skills to monitor the Court's 2013 Provisional Measures Order, submitting vital evidence of violations of the Order to OPDP and MRG that could then be forwarded to the Court. These will be essential competencies necessary as the implementation process commences in order that the Ogiek monitor the extent to which the Kenyan Government complies with the judgment; but, as explained further below, resources will still be needed to continue the outreach as implementation begins and to enable them to conduct nation-

al and local advocacy, giving the Ogiek a sense of ownership over their own destiny.

7 Evaluating the Role of Litigation in Community Empowerment

The *Ogiek* judgment was delivered while MRG was conducting a detailed external evaluation of its litigation and legal empowerment programmes implemented with minorities and indigenous peoples in East Africa over the last 15 years, including the *Ogiek* case. The evaluation found that litigation and legal empowerment are powerful tools that create spaces and opportunities for communities to unite around shared struggles and make decisions that can impact positively on their collective rights,⁶⁸ while also recommending further strategies to be employed at the national and domestic levels.

First, the Ogiek sought via litigation to find solutions to deeply historically embedded land disputes. In doing so, they were able to draw on the experiences of other communities in Kenya and East Africa, as well as internationally, that have also resorted to litigation. The social and political climate in these states has been extremely resistant to recognising indigenous peoples' land rights in accordance with international law. These common contexts allowed for cross-fertilisation of human rights standards and provided a strong platform for community-led litigation strategies.

In the course of the litigation processes, the evaluators observed significant and positive social changes, including the enhancement of communities' sense of justice, legal empowerment and unity around long-term struggles.⁶⁹ A certain degree of positive change in attitudes and behaviours of other parts of society, such as neighbouring communities, local authorities and the media, was also reported as a consequence of the legal and human rights activities and litigation, although this state of affairs remains fragile, given they are not supported by material and legal changes. However, some concerns were expressed by communities that litigation can contribute to the inflammation of existing tensions and surges of violence where the socio-political climate is unstable. For example, Ogiek claiming their rights over their ancestral land caused tension with other non-Ogiek communities, who used intimidation and, in some cases, violence, to prevent them from doing so. Responsible action is necessary and a litigation programme operating in such circumstances must be supplemented with security screening measures and risk assessments

68. See <<http://minorityrights.org/programmes-evaluations/indigenous-peoples-land-rights-tanzania-kenya-impact-strategic-litigation-legal-empowerment/foracopyofthereportinfull>>.

69. The Ogiek's immediate sense of justice upon receiving a positive ruling in their favour can clearly be witnessed in a short film, available at: <<http://minorityrights.org/law-and-legal-cases/the-ogiek-case/>>.

for the prevention of violence, as well as access to funding and remedies in case of violence.

Further, now that the regional human rights system has ruled in favour of the Ogiek and ordered land restitution, demarcation and titling, a strong plan to support implementation and actual material gain for the communities is necessary. In terms of redress and material consequences, winning these regional legal cases is the start of a process. For the Ogiek, the material consequences of litigation so far have been minimal, and implementation will be a great challenge. The prospects of effective implementation can be stalled by a lack of access to long-term financial support and human resources for national and international NGOs, as well as for human rights mechanisms and governmental bodies responsible for implementation, so adequate support on that front is essential. However, a strong and well-resourced implementation programme, incorporating international regional, national and advocacy, mapping of community land, regular community outreach meetings and trainings, appropriate use of the media and focusing on the needs of women, youth and elders, can be effective at uniting a community behind a common cause.

However, the impact of strategic litigation on the national legal framework of Kenya is not straightforward. While legal empowerment of communities is undeniable, the judiciary in Kenya and Tanzania have not yet taken on board international law on indigenous peoples' rights. For example, training of judges, registrars and lawyers in Tanzania shows the importance of such activities in raising the awareness of decision-makers about indigenous peoples' rights in Africa and internationally. Litigation is part of a larger advocacy strategy aiming at making national laws and the legal profession more conversant with indigenous peoples' rights as per international law. From this perspective, litigation is a powerful tool for change, but the impact of the Ogiek litigation seems to have been felt mainly at the community, regional and international levels, where the contribution of indigenous peoples' organisations in Kenya and of MRG to the regional jurisprudence on land rights in Africa has been found to be considerable. Further legal empowerment work clearly needs to be done at the national level in order to achieve change on the ground and secure implementation of the *Ogiek* judgment.

8 A Wider Impact beyond Kenya?

The Court's landmark judgment is a momentous achievement that offers hope to other indigenous and rural communities across Africa, and beyond. The Court has firmly embraced and adopted the concept of indigenous peoples' rights, in relation to not only communal property rights over ancestral land, but also rights to culture

and religion, and also their right to freely enjoy their natural resources. By specifically drawing inspiration from the concept of indigenous peoples as set out in UNDRIP, as well as stating that such people deserve special protection deriving from their vulnerability, it sends a clear message to governments across the continent that indigenous peoples must be recognised and can no longer be routinely discriminated and marginalised. The Court also made some very clear rulings in relation to the role of indigenous peoples, and specifically hunter-gatherers, in conservation. It stated in no uncertain terms that the preservation of the forest could not justify the lack of recognition of the Ogiek's indigenous or tribal status or the denial of the rights associated with that status, and explicitly confirmed that the Ogiek could not be held responsible for the depletion of the Mau Forest, nor could it justify their eviction or the denial of access to their land to exercise their right to culture.

The *Ogiek* case has also demonstrated that litigation and related legal empowerment efforts can significantly build and increase community cohesion. Not only can they provide the driving force behind community unity, but when organised, communities like the Ogiek are in a strong position to strengthen and support that litigation, seek their rights as both individuals and as a collective, and advocate for implementation of judgments when successful. As the Ogiek await a further Court ruling on reparations, which is hoped for 2018, many will be monitoring whether the Kenyan Government respects the judgment. Needless to say, the Ogiek will be at the forefront.