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Repatriating the Violation of Human Rights of Indigenous Communities in Africa: A Review of the African Commission on Human and Peoples' Rights *v.* Republic of Kenya Application No. 006/2012 (Reparations)

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1. Introduction

Sometime in October 2009, the Ogiek, an indigenous minority ethnic group in the Republic of Kenya, received a thirty (30) days eviction notice issued by the Kenya Forestry Service, to leave the Mau Forest. This was despite the fact that the Ogiek have lived in the Mau Forest for centuries.[1] On 14th November 2009, Ogiek Peoples' Development Program (OPDP) joined by Centre for Minority Rights Development (CEMIRIDE) and later by Minority Rights Group International (MRGI), sent a communication to the African Commission on Human and Peoples' Rights (ACHPR) highlighting the dilemma of the Ogiek People.

The Commission issued an Order for Provisional Measures requesting Kenya to suspend implementation of the eviction notice. Kenya did not comply with the same. This necessitated the ACHPR to on, 12 July 2012 file an application before the African Court on Human and Peoples Rights arguing that the evictions violated several provisions of the African Charter

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[1] Micheli I., The Ogiek of the Mau Forest: reasoning between identity and survival, 2014 Available at *https://www.researchgate.net/publication/283213921_The_Ogiek_of_the_Mau_Forest_reasoning_between_identity_and_survival* Accessed on 22/08/2022

on Human and Peoples' rights.[2] This application was heard and judgment entered on 26th May 2017.[3] The court held that Kenya had violated several Articles of the Charter and proceeded to order the state to take all appropriate measures within a reasonable time frame to remedy the violations. However, it reserved its judgment on reparations. The court issued the judgment on reparations on 23/06/2022.[4]

2. Prayers of the Parties

In their reparation's prayers, the applicant sought orders to compel the respondent to delimit and demarcate the ancestral lands of the Ogiek as well as open dialogue mechanisms on the commercial activities on Ogiek land. Further, that the Respondents would be obliged to pay the sum of US$297 104 578 in pecuniary and non-pecuniary damage into a Community Development Fund and adopt legislative, administrative and other measures to recognize and ensure the right of the Ogiek to be effectively consulted with regards to development, conservation or investment projects on Ogiek ancestral land. They also asked the court to issue orders compelling Kenya to fully recognize the Ogiek as an indigenous people of Kenya as well as provision of provision of amenities while enacting positive steps to ensure national and local political representation of the Ogiek.

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[2] The Provisions claimed to have been violated were: Article 1 (which obliges all member states of the Organization of African to uphold the rights guaranteed by the Charter), Article 2 (freedom from discrimination), Article 4 (right to life), Article 8 (freedom of religion), right to property (Article 14), Article 17 (the right to culture (Article 17) , Article 21 (the right to freely dispose of wealth and natural resources) , Article 22 (the right to development).

[3] African Commission on Human and Peoples' Rights *v.* Republic of Kenya Application No. 006/2012 (Merits) Available at *https://africanlii.org/afu/judgment/african-court/2017/28 Accessed* on 24/08?2022

[4] African Commission on Human and Peoples' Rights (ACHPR) V. Republic of Kenya Application No. 006/2012 Judgment on Reparations Available at *https://www.africancourt.org/cpmt/storage/app/uploads/public/62b/44e/f59/62b44ef59e0bc692084052.pdf* Accessed on 22/08/2022

Kenya prayed for the court to find that its establishment of a multi-agency Task Force to oversee the implementation of the Court's judgment showed its commitment to the implementation of the court's judgment and that guarantees of non-repetition are the most far-reaching forms of reparations that could be awarded to redress the root and structural causes of identified human rights violations. They also prayed for orders to the effect that the court ought to use its offices to facilitate amicable with the Ogiek Community on the issue of reparations.

The Respondents also urged the court to hold that reparations could be achieved by reverse action of guaranteeing and granting access to the Mau Forest in accordance with the law and the public interest. They also invited the court to find that demarcation and titling was totally unnecessary for purposes of access, occupation and use of the Mau Forest by the Ogiek since it would hamper communal access to the i.e., nomadic groups that have seasonal access to the Mau Forest. The Respondent also urged the court to find that its 2010 Constitution created a legal super structure that was meant to address the structural and root causes of violations of Article 2 and that by virtue of the existing laws, the same had been substantially remedied and find that the court in the Merits Case, did not determine that the Ogiek were the owners of the Mau Forest.

Kenya also invited the court to reject the community survey report submitted by the Applicant and the claim for US$ 297,104,578 as not credible. The court was also urged to find that any compensation due as co as well as find that any compensation due to the Applicants could be computed in United States Dollars for a claim involving a country whose currency is not the United States Dollar. They also sought orders to Order that the Respondent State's general liability for violations of the Charter can only be computed from 1992, the year when the Respondent became a party to the Charter. Specifically, in relation to the eviction of the Ogiek from Mau Forest, they prayed that the court would hold that its liability could only be computed from 26 October 2009, when the notice of eviction from South Western Mau Forest was issued.

3. Court's Determination

Before considering the claims, the court commenced by looking into the three objections lodged by Kenya. On the first front, it objected to the court computing damages for the years prior to its ascension to the charter in 1992. The court reiterated its decision in the *Merits case* that it would only exercise temporal jurisdiction while determine the reparations just as it did in the merits case. Secondly, Kenya was of the view that amicable settlement was the most appropriate approach for the case in line with Article 9 of the Protocol. The court observed that it had initiated the process for the possible settlement of the matter during the merits stage of the proceedings but the same had collapsed. Given that failure and given that that the same was not mandatory under the Protocol, the court was convinced that foundations of the amicable settlement had not been laid.

Lastly, the state objected to the participation of Centre for Minority Rights Development Minority Rights Group International and the Ogiek People's Development Programme since they were not the representatives of the Ogiek. The applicants contended that the Ogiek had been clear on who should represent during the case, namely OPDP. The court observed that it had handled the same in the merits case and that since the organizations being complained against were not appearing as "parties", it had the proper parties to render a judgment.[5]

Before considering the claims of the applicants and the respondents, the court outlined the principles it applied before arriving at its reparation's decision.[6] It commenced by reiterating its jurisdiction to issue a judgment on reparations in cases where human rights have been violated. It relied on the position of the Permanent Court of International Justice in the *Charzow Factory case* that was also applied in *Reverend Christopher Mtikila v United*

[5] African Commission on Human and Peoples' Rights *v.* Republic of Kenya Application No. 006/2012 (Merits) Para 88

[6] African Commission on Human and Peoples' Rights (ACHPR) V. Republic of Kenya Application No. 006/2012 Judgment on Reparations Para 36-45

Republic of Tanzania that the right to reparations for the breach of human rights,obligations is a fundamental principle of international law which has been recognized by amongst others the courts own Protocol in Article 27 (1).[7]

The court proceeded to lay down which of the parties would bear the burden of proof and was of the view that in this case, it was the applicant, and that such a proof alone would not qualify one for reparations, rather the same should be supported by a link that exists between the acts complained of and the prejudice suffered whilst citing the *Mtikila* case.[8] Such reparations, as stated in the *Zongo case*, ought to cover moral and material damages. The court was also guided that the damages complained of had to be casually linked with the wrongful acts of the respondent.[9]

On quantifying the reparations, the court reminded itself that the reparations it would award had to be of a sum that would be commensurate to the prejudice suffered. It placed its reliance on this principle in the *Charzow case*. On the intended beneficiaries of the reparations, the court observed that it would be the victims who it determined to include groups and communities as well as close relatives of persons who suffered harm as a result of the violations.

With these principles in mind, the court proceeded to examine the claims on their merits. The court considered the pecuniary claims of the applicant under two limbs, the material prejudice and the moral prejudice suffered by the Ogiek.

[7] The Factory at Chorzow (Jurisdiction) Judgment of 26 July 1927 p.21, Reverend Christopher Mtikila v United Republic of Tanzania (14 June 2013*)* 1 AfCLR 72 Para 27-29

[8]Reverend Christopher Mtikila v United Republic of Tanzania (14 June 2013*)* 1 AfCLR 72 Para 27-29

[9] Zongo and others v Burkina Faso (Reparations) Para 24

On material prejudice, the court held that since the Respondent State was found responsible for the violation of the rights of the Ogiek, it follows that it bears responsibility for rectifying the consequences of its wrongful acts.[10] On the currency question the court was guided by the decision in *Ingabire Victoire Umuhoza v Republic of Rwanda* where it held that where an applicant was a resident of the respondent state, the amount of reparation ought to be calculated in the currency of the respondent state.[11]The court was guided by the decisions in *Case of the Saramaka People v Suriname* where the indigenous community was awarded the sum of US$75, 000 (Seventy five thousand United States Dollars) as compensation for the illegal exploitation of their land and resources and in *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* in the InterAmerican Court was awarded US$90 000 (Ninety thousand United States Dollars) for the pecuniary prejudice suffered by the Sarayaku in light of the expenses they incurred in domestic proceeding while enforcing their rights.[12] The court exercised its equitable discretion and awarded the sum of KES 57 850 000. (Fifty-seven million, eight hundred and fifty thousand Kenya Shillings) for the material prejudice suffered by the Ogiek.

Under the moral prejudice claim, the court relied on the *Zongo* case and reiterated that between the wrongful act and the moral prejudice suffered, may result from the violation of a human right, as an automatic consequence, without any need to prove otherwise and that the quantification ought to be done equitably.[13] The court awarded the sum of KES 100 000 000 (One hundred million Kenyan Shillings) for moral prejudice suffered while exercising its discretion in equity. Committed in the non-pecuniary compensation limb, the court observed that granting the Ogiek access to land alone would not be an adequate remedy and it was necessary to grant them communal titles in order to grant the tenure security. It therefore ordered the

[10] Para 66
[11] Ingabire Victoire Umuhoza v Republic of Rwanda (Reparations)Para 45
[12] IACtHR *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* Judgment of June 27, 2012 (Merits and reparations)
[13] Zongo and others v Burkina Faso (Reparations)

demarcation of the land for use by the Ogiek through a collective title. The court further ordered the state to take the legislative, administrative or other measures to recognize, respect and protect the right of the Ogiek to be effectively consulted. The applicant's prayers for guarantees of non-repetition were not opposed by Kenya and the court ordered the laying don of measure that would ensure the avoidance of recurrence of the violations established by the Court.

4. Implications and Significance of the Judgment

Through its judgment, the Court demonstrated how the law could respond to the real challenges that indigenous communities face over their land and its exploitation. This is especially important to the many indigenous communities across the continent who, from time immemorial, have faced serious abuse to their rights. The positive outcome has brought hope to many on the continents who now believe in the Court's commitment to enforce the African Charter and in particular, rights of indigenous peoples'.[14]

For instance, Commentators have noted that now many other indigenous communities in Kenya such as the Sengwer, Endorois, Maasai, Yaaku and Samburu are empowered to utilize legal avenues to register communal land claims, to protect their culture and indigenous knowledge.[15] The courts innovative approach of grating the prayer of the creation of a community development fund where the reparations the court had ordered would be deposited and thereafter drawn for the benefit of the whole community is also a game changer in the management of reparations communities may be granted in the process of pursuing these legal avenues.

Additionally, the judgment affirmed the role of indigenous communities in the protection and conservation of land and natural resources as the Court

[14] Shatikha Suzanne Chivusia, *The Significance of Implementing the Ogiek Judgment Commissioner*, Kenya National Commission on Human Rights (KNCHR), Nairobi, Kenya

[15] ILC's Database of Good Practices, *Litigation for the Restoration of Ogiek Land Rights in Kenya.*

recognized that the Ogiek - and therefore many other indigenous peoples in Africa - have a leading role to play as guardians of local ecosystems, and in conserving and protecting land and natural resources.[16] The Continent is now faced with an unprecedented opportunity to secure the customary land and resource rights of millions of its most marginalized peoples, and research shows that securing these rights yields multiple globally relevant benefits as these communities possess vital environmental knowledge that will serve the world in its efforts to protect and conserve the environment.[17]

The judgment also has a considerable bearing on how Kenya and other African Governments treat indigenous communities. It has demonstrated that African Governments must comply with the rule of law and their international obligations towards indigenous communities in their territories. That African governments are not above the law but are open to scrutiny and any violation of international obligations will result in repercussions on their part.

Lastly, the judgment, being the first of its kind, has brought clarity and added onto the jurisprudence of indigenous rights litigation in Africa. The Court was able to provide clarity on Commission to Court transfers, representation of parties in a case, the identification and understanding of the concept of indigenous populations and the type of reparations to be awarded in cases involving the violation of indigenous rights. This will provide guidance for future cases.

Further, the application and reliance of other human rights instruments in the judgments has demonstrated that the Court does not limit itself to

[16] African Commission on Human and Peoples' Rights v. Republic of Kenya, ACtHPR, Application No. 006/2012 (2017) African Commission on Human and Peoples' Rights v. Republic of Kenya, ACtHPR, Application No. 006/2012 (2017) | ESCR-Net accessed 22nd August 2022.

[17] Rights and Resources Initiative, *Recognizing Indigenous and Community Rights, Priority Steps to Advance Development and Mitigate Climate Change*, September 2014

instruments that are ratified by member states that are parties to an application. This is important because it means that applicants do not need limit the law relied upon to that ratified by the member state in their petition but look to all international law and procedure in building their case.[18]

5. Conclusion

All human rights instruments across the globe recognize that all peoples, including indigenous peoples, are entitled to the enjoyment of the rights and freedoms, including the rights to land and natural resources, without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status. Apart from international recognition, many countries have recognized these rights through constitutional or legal protections or adjudication, constructive agreements and administrative programs. [19] Despite this recognition, a huge gap still remains in ensuring and realizing the same for indigenous peoples and consequently their rights to land and natural resources continue to face serious abuses. Take the example of the Ogiek in Kenya. Though Kenya recognized the aforementioned rights through its laws, the Ogiek's rights to their land and natural resources were violated. This continued, despite demands from the Ogiek for the formal recognition of their rights to their lands, and natural resources. By finding Kenya responsible for the violations of the Ogiek's rights and awarding the Ogiek both pecuniary and non-pecuniary compensation, the Court demonstrated how the law could respond to the real challenges that indigenous communities face over their lands. The judgement set new precedents and made many implications in the protection of indigenous rights not just in Kenya but across the Continent. Conclusively, with this

[18] Oliver Windridge, *Five Points on African Commission v Kenya*, June 15 2017 *http://www.acthprmonitor.org/five-points-on-african-commission-v-kenya/* accessed August 20th 2022

19 UN DESA, *Protecting the rights and well-being of indigenous peoples*, Vol 23 No. 4 - April 2018 Protecting the rights and well-being of indigenous peoples | UN DESA VOICE accessed 22nd August 2022

ruling, we hope to see countries across the continent effectively securing and ensuring the rights of indigenous peoples to their lands and natural resources.

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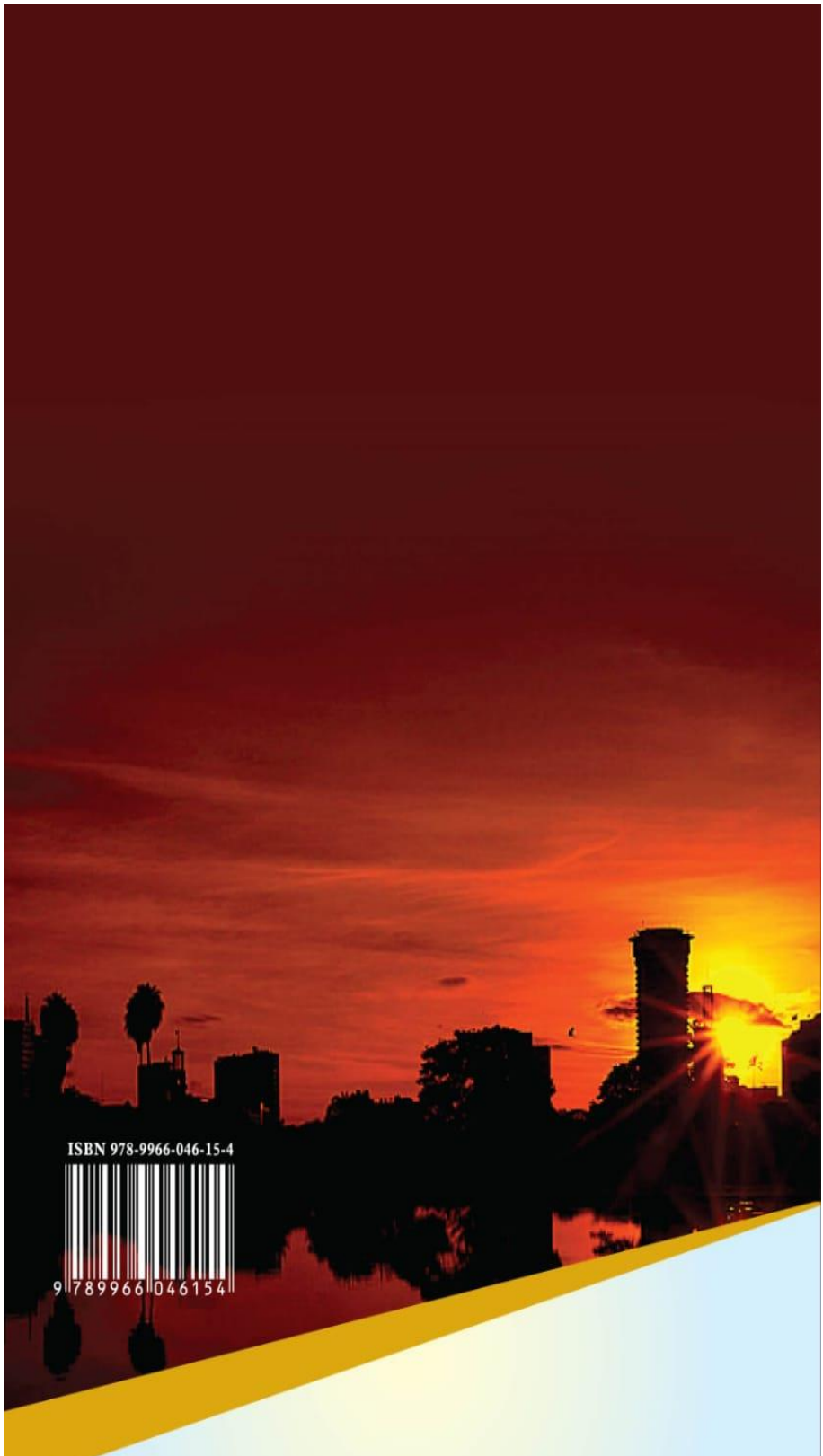

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