

# briefing

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## **Victory for Kenya's Ogiek as African Court sets major precedent for indigenous peoples' land rights**

*African Commission on Human and Peoples' Rights v the Republic of Kenya*

By Lucy Claridge





**Ogiek women in Kenya.**

Lucy Claridge/MRG.

### **Acknowledgements**

MRG gratefully acknowledges the support of Irish Aid. Author: Lucy Claridge, Legal Director, MRG. Commissioning Editor: Peter Grant. Production coordinator: Jasmin Qureshi.



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**ISBN 978-1-907919-91-6. Published August 2017.**

**Victory for Kenya's Ogiek as African Court sets major precedent for indigenous peoples' land rights** is published by MRG as a contribution to public understanding of the issue which forms its subject. The text and views of the author do not necessarily represent in every detail and all its aspects, the collective view of MRG.

# Victory for Kenya's Ogiek as African Court sets major precedent for indigenous peoples' land rights

The Ogiek indigenous community of Kenya have successfully challenged the denial of their land rights before the African Court of Human and Peoples Rights ('the Court'). In the first indigenous peoples' rights case before the Court, and by far the largest ever case it has had to consider, the Court found violations of Articles 1, 2, 8, 14, 17 (2) and (3), 21 and 22 of the African Charter on Human and Peoples' Rights ('the African Charter').<sup>1</sup> It therefore created a major legal precedent. The case has also set significant procedural precedent, since it was the first ever case to have been referred to the Court by the African Commission of Human and Peoples' Rights ('the Commission') in which judgment has been delivered following a substantive hearing of the arguments of both parties.

## The Ogiek: a history of dispossession and marginalization

The Ogiek, who number some 30,000,<sup>2</sup> are some of Africa's last remaining forest dwellers. Traditionally honey-gatherers, they survive mainly on wild fruits and roots, game hunting and traditional bee-keeping. 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 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,<sup>3</sup> with the assistance of Minority Rights Group International, Ogiek Peoples' Development Programme and CEMIRIDE.<sup>4</sup> 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 July 2012, following the Kenyan Government's lack of response on the issue, the Commission referred the matter to the Court pursuant to Article 5(1)(a) of the Protocol on the establishment of the court.

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'.<sup>5</sup> This Order was unfortunately not complied with and evictions, harassment and intimidation of 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.<sup>6</sup> In March 2015, the Court proposed that amicable settlement be investigated, although this was ultimately unsuccessful.<sup>7</sup> In March 2016, the Court decided to proceed to judgment, issuing its landmark ruling on 26 May 2017.

## The Ogiek's key arguments

In order to benefit from the substantial body of international human rights law recognizing 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.<sup>8</sup>

The Ogiek argued that the failure of the Kenyan Government to recognize 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.<sup>9</sup>

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 which permit this discrimination are in violation of Article 2 of the African Charter.<sup>10</sup>

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 that the Kenyan Government has interfered with their ability to practise and worship as their faith dictates in violation of Article 8.<sup>11</sup>

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.<sup>12</sup>

The Ogiek argued that they have been denied use of the natural resources on their ancestral land whilst 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 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.<sup>13</sup>

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.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup>

## 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 therefore stated they are currently like all other Kenyans.<sup>17</sup>

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 were carried out in accordance with the law. Finally, it claimed that Kenya's land laws recognize community ownership of land and provide for mechanisms by which communities can participate in forest conservation and management.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup>

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 which made them distinct no longer exist, and therefore the group no longer exists and cannot claim any cultural rights, nor can they be said to conserve the environment.<sup>21</sup>

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 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 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.<sup>22</sup>

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.<sup>23</sup>

The Government did not address the Ogiek's arguments under Article 1 of the African Charter.<sup>24</sup>

With regards to the arguments under Article 4 of the African Charter, the Government claimed that the Mau Forest Complex is important for all Kenyans and 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.<sup>25</sup>

## 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. Firstly, 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.<sup>26</sup> 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.<sup>27</sup> Secondly, 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 which occurred before those dates but which were continuing to take place, and therefore the Court has the power to consider the totality of the Ogiek's claims. 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.

Turning then to the alleged violations of the African Charter, firstly, the Court dealt with the claim that the Ogiek are an indigenous people. It specifically drew inspiration<sup>28</sup> 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 if 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 organization, 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, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist. The Court considered that it had received significant evidence to affirm the Ogiek's assertion that the Mau Forest is their ancestral home,<sup>29</sup> recognizing 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, are distinct from other neighbouring tribes, and are identified as distinct by those tribes. Finally, the Court ruled that the Ogiek have suffered continued subjugation and marginalization, as evidenced by the evictions from their ancestral lands, their forced assimilation and lack of recognition of their status as a

tribe. Accordingly, the Court recognized the Ogiek as an indigenous population that is part of the Kenyan population and deserved special protection deriving from their vulnerability.<sup>30</sup>

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.<sup>31</sup> It interpreted the right in light of Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognizes indigenous peoples' 'right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership'.<sup>32</sup> Since the Government had not disputed that the Ogiek have occupied lands in the Mau Forest since time immemorial, the Court ruled that they have the right to occupy, use and enjoy their ancestral lands.<sup>33</sup> Further, although the Court accepted that the right to property under Article 14 can be restricted in the public interest where necessary and proportionate, the degradation of the Mau Forest could neither be attributable to the Ogiek nor did the preservation of the ecosystem justify their eviction.<sup>34</sup> Accordingly, the expulsion of the Ogiek from their ancestral lands against their will, without prior consultation constitutes a violation of Article 14.<sup>35</sup>

The Court next considered the Ogiek's claims under Article 2 of the African Charter. It found that other groups in Kenya, such as the Maasai, have been recognized as tribes and consequently have been able to enjoy related rights derived from that recognition - whilst 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 fall within the prohibition on non-discrimination as specified in Article 2.<sup>36</sup> Further, whilst the Court noted that Kenya's 2010 Constitution recognizes and accords special protection to indigenous populations which could theoretically benefit the Ogiek, these provisions can only be effective when actually respected and have only been available 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 which protected them, demonstrate that the new Constitution and the institutions which the Government has set up to remedy past or ongoing injustices are not fully effective.<sup>37</sup> Finally, the Court concluded that the need to preserve the natural ecosystem of the Mau Forest could not justify the lack of recognition of the Ogiek's indigenous or tribal status nor 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 which cannot be considered compatible with the preservation of the natural environment.<sup>38</sup> Accordingly, the Court found a violation of Article 2.

Considering the allegations under Article 8 of the African Charter, the Court noted 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.<sup>39</sup> The Court considered that the evictions of the Ogiek from the Mau Forest were interfering with their freedom of worship. Whilst 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 which the Government could have put in place, such as collaborating to maintain the religious sites.<sup>40</sup> Further, the Court noted that not all Ogiek have converted to Christianity and there was significant evidence to show that they still practice their traditional religious rites.<sup>41</sup> Therefore, 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.<sup>42</sup>

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 protection of individuals' participation in the cultural life of their community whilst also obliging the State to promote and protect traditional values of the community. It considered that the right requires respect for and protection of cultural heritage essential to the group's identity, encompassing the group's total way of life: languages, symbols, economic activities, rituals and shared values.<sup>43</sup> The Court noted that preservation of culture is of particular importance for indigenous populations and drew on the work of the Commission's Working Group on Indigenous Populations/Communities which recognizes 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 UNDRIP, which provides the right not to be subjected to forced assimilation or destruction of their culture, whilst General Comment No 21 of the UN Committee on Economic, Social and Cultural Rights has observed that indigenous peoples' cultural life includes the right to lands, territories and resources which they have traditionally owned, occupied and used.<sup>44</sup> The Court considered that it had sufficient evidence demonstrating the Ogiek have their own distinct culture, and 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.<sup>45</sup> 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 indeed 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.<sup>46</sup> Finally, given 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, 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.<sup>47</sup>

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 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.<sup>48</sup> 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; it declared a violation of Article 21 since the Ogiek have been deprived of the right to enjoy their ancestral lands.<sup>49</sup>

The Court reiterated its view on the definition of 'peoples' as already developed under Article 21 of the African Charter, stating that all populations which 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 has the right under Article 22 to enjoy their right to development.<sup>50</sup> 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.<sup>51</sup>

With regards 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.<sup>52</sup>

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.

## 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<sup>53</sup> 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.<sup>54</sup>

The Government was also ordered to take all appropriate measures within a reasonable timeframe to remedy all the violations established and to inform the Court of the measures taken within 6 months of the date of the judgment.<sup>55</sup>

## Placing the ruling in context: the wider impact beyond Kenya

Following on from the Commission's decision adopted by the African Union in 2010 regarding the Endorois,<sup>56</sup> the Court's landmark judgment is a momentous achievement that offers hope to other indigenous and rural communities across Africa, and beyond.

Firstly, the Court has firmly embraced and adopted the concept of indigenous peoples' rights, not only in relation to communal property rights over ancestral land, but also in relation to 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 recognized and can no longer be routinely discriminated and marginalized.

Secondly, the Court 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 nor 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. These edicts will be of huge relevance to other forest communities who have been evicted from their traditional lands in the name of conservation, including for example the Sengwer in

Western Kenya and the Batwa of Kahuzi-Biega National Park in DRC.<sup>57</sup>

Further, in recognizing the Ogiek's communal property rights over their ancestral land, the judgment arguably protects not only Africans who define themselves as indigenous people but all rural dwellers who own land on the basis of customary law.<sup>58</sup>

Finally, in the Kenyan context, the Court specifically recognized that the new Constitution, recent land legislation and the institutions which the Government has set up to remedy past or ongoing injustices are not fully effective, and further that other rights belonging to indigenous peoples (such as the right to freedom of religion and culture) are not protected by Kenya's current legislative arrangements. These firm findings should assist other indigenous communities in Kenya who are seeking legislative, policy and practical reforms on these issues.

The Ogiek now await a further Court ruling on reparations, which is hoped for 2018. In the meantime, many eyes will be watching to verify that the Kenyan Government immediately implements the judgment by allowing the Ogiek communal ownership of their land and stopping the routine discrimination the community has long been subjected to.



# Notes

- 1 *ACHPR v Kenya*, Application 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%20Rights%20v.%20the%20Republic%20of%20Kenya.pdf>
- 2 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 here: <http://minorityrights.org/wp-content/uploads/2015/03/Final-MRG-merits-submissions-pdf.pdf>
- 3 *CEMIRIDE, Minority Rights Group International & Ogiek Peoples Development Programme (On Behalf Of The Ogiek Community) v Republic Of Kenya*, Communication 381/09.
- 4 CEMIRIDE and OPDP are both NGOs registered in Kenya; OPDP works specifically to promote and protect Ogiek culture, land, language, environment, and human rights.
- 5 Available here: [http://en.african-court.org/images/Cases/Orders/006-2012-ORDER\\_of\\_Provisional\\_Measures-\\_African\\_Union\\_v.\\_Kenya.pdf](http://en.african-court.org/images/Cases/Orders/006-2012-ORDER_of_Provisional_Measures-_African_Union_v._Kenya.pdf)
- 6 See paras. 14, 27 and 29 of Ogiek Judgment.
- 7 *Ibid.*, paras. 31 - 39.
- 8 *Ibid.*, para. 103.
- 9 *Ibid.*, paras. 114 - 119.
- 10 *Ibid.*, paras. 132 & 133.
- 11 *Ibid.*, paras. 157 - 160.
- 12 *Ibid.*, paras. 170 - 172.
- 13 *Ibid.*, paras. 191 - 193.
- 14 *Ibid.*, paras. 202 - 204.
- 15 *Ibid.*, para. 212.
- 16 *Ibid.*, para. 147 - 149.
- 17 *Ibid.*, para. 104.
- 18 *Ibid.*, paras. 120 -121.
- 19 *Ibid.*, paras. 134 - 135.
- 20 *Ibid.*, para. 161.
- 21 *Ibid.*, para. 173 - 175.
- 22 *Ibid.*, para. 194.
- 23 *Ibid.*, paras. 205 - 206.
- 24 *Ibid.*, para. 213.
- 25 *Ibid.*, para. 150.
- 26 Cases can be referred pursuant to Article 5(1) of the Protocol Establishing the Court.
- 27 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*, Application 002/2013, 3June 2016, in which judgment was issued in default and not after hearing both parties: available here: <http://www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl%20%20002-2013%20African%20Commission%20v%20Libya-%20Engl%20.pdf>
- 28 Pursuant to Articles 60 and 61 of the Charter, para. 108.
- 29 Ogiek Judgment, para. 109.
- 30 *Ibid.*, para. 112.
- 31 *Ibid.*, para. 123.
- 32 *Ibid.*, para. 126.
- 33 *Ibid.*, para. 128.
- 34 *Ibid.*, paras. 129 - 130.
- 35 *Ibid.*, para. 131.
- 36 *Ibid.*, paras. 141 - 142.
- 37 *Ibid.*, paras. 143 - 144.
- 38 *Ibid.*, para. 145.
- 39 *Ibid.*, para. 164.
- 40 *Ibid.*, para. 167.
- 41 *Ibid.*, para. 168.
- 42 *Ibid.*, para. 169.
- 43 *Ibid.*, paras. 177 - 179.
- 44 *Ibid.*, paras. 180 - 181.
- 45 *Ibid.*, para. 183.
- 46 *Ibid.*, paras. 184 - 186.
- 47 *Ibid.*, paras. 187 - 190.
- 48 *Ibid.*, paras. 196 - 199.
- 49 *Ibid.*, para. 201.
- 50 *Ibid.*, para. 208.
- 51 *Ibid.*, paras. 209 - 211.
- 52 *Ibid.*, paras. 214 - 217.
- 53 Pursuant to Rule 63 of the Court rules.
- 54 *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.
- 55 Ogiek Judgment, para. 227, Merits (iii).
- 56 *Centre for Minority Rights Development & Minority Rights Group International on behalf of the Endorois Community v The Republic of Kenya*, Communication 276/2003.
- 57 See <http://minorityrights.org/law-and-legal-cases/minority-rights-group-international-et-environnement-ressources-naturelles-et-developpement-au-nom-des-batwa-du-parc-national-de-kahuzi-biega-rdc-v-republique-democratique-du-congo-rdc>
- 58 See for example the opinion of Liz Alden Wily, who gave expert evidence in the case, here: <http://theconversation.com/african-courts-landmark-ruling-gives-hope-to-rural-people-across-the-continent-79303>

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## **Victory for Kenya's Ogiek as African Court sets major precedent for indigenous peoples' land rights** *African Commission on Human and Peoples' Rights v the Republic of Kenya*

In May 2017, the Ogiek indigenous community of Kenya successfully challenged the denial of their land rights before the African Court of Human and Peoples Rights ('the Court'). Following an eight-year legal battle, the Court found that the Kenyan government violated seven separate articles of the African Charter in a land rights case that dates back to colonial times.

This landmark ruling recognised 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. This briefing sets out a brief history of the case, the key arguments of the Ogiek and the Kenyan Government's response, and provides an analysis of the Court's judgement. The briefing also places the ruling in context and looks at the wider impact beyond Kenya.

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This briefing is published as a contribution to public understanding.

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ISBN 978-1-907919-91-6

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