

DEFENDING OUR FUTURE

OVERCOMING THE CHALLENGES OF RETURNING THE OGIEK HOME



A report on implementing the Ogiek judgment in Kenya



PREFACE

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The implementation of the Ogiek judgment is in the hearts and the spirits of the Ogiek people and the indigenous peoples globally. On 26 May 2017, we received the judgment at the African Court on Human and Peoples Rights (ACtHPR) in Arusha Tanzania, after a 12-year process that started in Kenyan courts and involved the African Commission on Human and Peoples Rights (ACHPR), The Gambia, besides the Court.

Our community consists of 52,000 members (2019 National Census) of which about 45,000 are from Mau and have the Mau Forest as their ancestral land. The Mau Forest Complex is approximately 400,000 Hectares and is administered under 22 blocks including the Maasai Mau.

Our community was in the corridors of justice for one reason: to regain full control of our ancestral land, for our sake, for the sake of the people of Kenya and to protect our biodiversity. The Ogiek means ‘caretakers of fauna and flora’, and as traditional conservationists, we suffer seeing the environmental destruction of our home. We do not view Mau Forest land as a factor of commercial production but as central to the cultural wellbeing, religious sites, traditions and customs of our community. The Ogiek are the owners of Mau, which has been our ancestral home from time immemorial.

The richness of our forest is measured in terms of its honey, shelter, and medicinal herbs, despite repeated attempts and eviction of our community depriving us of our livelihood and full participation as citizens of Kenya. While Kenyan history confirms the Ogiek as the first inhabitants of Kenya from 1000 AD, today we are forced to seek support and official recognition of our custodianship of the Mau, despite our uncontested and legally confirmed ancestral links.

The evictions and attempts to transfer Ogiek from our ancestral land forced us to seek justice in Kenyan courts after other methods proved futile. As the saying goes, ‘removing Ogiek from Mau Forest is like removing a fish from water – it will definitely die’. Political interference, which resulted in non-Ogiek being settled in the Mau Forest, didn’t sit well with our community. Many bodies attempted to resolve the Ogiek land rights issue, such as the Njonjo Commission and the Ndungu Commission, followed by the Mau taskforce formed by the then Prime Minister of Kenya during the Coalition Government in Kenya (2009). This last commission, while acknowledging many non-Ogiek had been wrongfully granted our lands, also resulted in a 14-day notice of our eviction in the name of environmental conservation. Besides reinforcing the environmental disaster befalling our forest, that decision failed to gain our Free, Prior and Informed Consent (FPIC). The subsequent and continued destruction of the Mau Forest has taken place under the watch of the government’s Kenya Forest Service (KFS), including the depletion of the forest canopy, which was intact during our tenure.

The most recent taskforce gazetted by the Cabinet Minister for Environment and Forestry was formed to advise government on how to implement the Ogiek judgment. This taskforce, like colonial rule in Kenya in times past, did not include representation of our community even though the deliberations directly concerned us. We understand its mandate ended on 24 January 2020 but its report has not been made public despite our attempts to seek disclosure. The Ogiek community made submissions to the taskforce seeking complete restitution of our ancestral land, with at least seven non-transferable community titles. We desperately wish for our land issue to be resolved so we can, like other Kenyans, live in dignity and with certainty about our future, and set about rehabilitating our ancestral forestland.

It is now three years since the landmark judgment in our favour. Despite past disappointments we hoped that this latest taskforce would find intelligent ways, as elsewhere in the world, to undo the harm of colonial policies that have been blindly adopted by post-colonial governments. The judgment called for the government to respect our rights, formally recognize our time-immemorial title, enhance our participation in the sustainable management of the forests and to

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take constructive and decisive steps towards righting the wrongs perpetrated against our community. This renewed hope lies shattered as this taskforce appears to have made no progress.

We call on the government to speed up implementation by remedying the violations meted to the Ogiek people as identified by the African Court decisions i.e. the violations of articles 1, 2, 4, 8, 14, 17, 21, and 22 of the African Charter, while honouring the decision of the African Court on Human and Peoples' Rights, one of the guiding principles in addressing the land claims of the Ogiek community. In this report, supported by Kenyan civil society, Kenyan and global legal experts shows why and how full implementation of this decision is vital: for the Ogiek community, for all Kenyans who deserve to have our rich biodiversity and natural resources protected, for indigenous communities in Africa and elsewhere who continue to struggle against colonial laws that do not recognize ancient land titles, and for the continued ability of all communities worldwide to live in harmony with nature.

We would not be the first to show how secure title enables a forest people to return their forests to good condition for all. This is common in other continents. Experts and communities around the world are showing how it is possible to achieve these aims with the support of their governments. We hope you will join us in ensuring that these positive developments can reach our beloved country.

THE SIGNIFICANCE OF IMPLEMENTING THE OGIEK JUDGMENT

Shatikha Suzanne Chivusia, Commissioner, Kenya National Commission on Human Rights (KNCHR), Nairobi, Kenya

On 26 May 2017, the African Court on Human and Peoples' Rights (African Court) delivered its judgment in what has come to be referred to as the Ogiek Case.¹ This ended an eight-year journey commencing in November 2009 when the African Commission on Human and Peoples' Rights (African Commission) received a communication from the Ogiek community through the Centre for Minority Rights Development (CEMIR-IDE) and Minority Rights Group International (MRG). The Ogiek (literally means 'caretaker of all plants and wild animals') are a hunter-gatherer community comprising between 35,000 and 45,000 people who inhabit the Mau Forest Complex in the Rift Valley of Kenya. They alleged violation of eight rights under the African Charter on Human and Peoples' Rights, to which Kenya is party. The Communication was prompted by service upon the Ogiek by the Kenya government

(through the Kenya Forest Service) of an eviction notice on the grounds that the forest constitutes a water catchment reservoir zone, and that it was also officially gazetted government land.² The African Court found in favour of the Ogiek community in this historic case and upheld seven of their claims.

Implementation of the Ogiek judgment will herald a new chapter in the protection of the rights of not only the Ogiek peoples but of all Kenyans too and other indigenous communities in the world. Significantly, this was the first case on indigenous peoples' rights to be handled by the African Court since its inception. It therefore set a precedent in the handling of similar cases and is of great jurisprudential value with regard to indigenous peoples' land rights.

In addition, being the first time that the African Commission referred a case to the African Court, its positive outcome demonstrates the two institutions' like-mindedness in upholding human rights on the continent. The collaboration between Africa's eminent human rights protection mechanisms brings hope to many on the continent who will now believe in its commitment to enforce the African Charter. Confidence in both institutions' competencies will encourage other victims of human rights violations on the continent to make use of them. African governments have also now been opened up to scrutiny with regard to how they comply with the rule of law and their international obligations.

Further, enforcement of the Ogiek judgment will give hope to other indigenous communities in Kenya such as the Sengwer, Endorois, Maasai, Yaaku and Samburu who have often faced arbitrary forced evictions from their ancestral lands. It is noteworthy that the Court found that the eviction of the Ogiek without due consultation and compensation resulted in denial of their rights to religion, culture and development and violated the procedural safeguards provided under the United Nations Declaration on the Rights of Indigenous People. It was also found to have negatively impacted their traditional lifestyle.

The Court's appreciation of the close attachment indigenous communities have with their ancestral land provides vital lessons for governments. This reinforced the understanding that the Ogiek, like most indigenous peoples, have spiritual, emotional and economic attachment to their ancestral lands and often rely on them for food, shelter and identity. Further, the central role of indigenous forest dwellers in the management of forests, recognized in various international and national laws as exemplified in the Convention on Biological Diversity, reflects the importance of traditional knowledge, innovations and practices of indigenous and local communities in the conservation and sustainable use of biodiversity, and that such traditional knowledge should be respected, preserved and promoted. Implementation of the Ogiek judgment will be an acknowledgment of the unique connection with their land and its sustainable use.

While Kenyan law obliges the state to comply with its international obligations and respect the rule of law,³ this has not always been the case. Prior to filing their request at the African Commission, the Ogiek consistently raised objections to these unlawful evictions with local and national administrations and commissions, and even instituted judicial proceedings to no avail. The African Court in recognition of the role of indigenous peoples in conserving their land and natural resources found that the ‘purported reason of preserving the natural environment cannot constitute a legitimate justification or the [Kenyan state’s] interference with the Ogiek’s exercise of their cultural rights.’

Of further significance was the Court’s recognition of the rights to communal property also recognized under Kenyan law.⁴ The Court declared ancestral land rights to the Ogiek over the Mau Forest Complex and that the right to property guaranteed by the Charter, as read in light of the UN Declaration on the Rights of Indigenous Peoples, may be exercised individually or collectively. This implies that the Ogiek have a right to retain occupation and use of their ancestral lands and the state should desist from evicting them from these lands. It explicitly confirmed that the Ogiek could not be held responsible for the depletion of the Mau Forest, nor could justification of their eviction or the denial of access to their land to exercise their right to culture be made out of it. The state is called upon to work collaboratively with the Ogiek in preservation of the Mau Forest Complex and other indigenous peoples in conserving the ecosystems within their ancestral lands,⁵ though control and or regulation of access to others may be necessary.

With regard to the claim of recognition of their distinct identity, the African Court found that failure by the Kenya government to recognize the Ogiek as a distinct tribe as afforded to other communities amounted to discrimination under the law. The Court analysed various criteria for identifying indigenous populations and stated that the Ogiek, deriving from their vulnerability, qualified and deserved protection by the Kenyan government.

In its endeavours to implement the judgment, the government set up a taskforce in November 2017 whose mandate included making recommendations on implementation and enhancing the participation of indigenous communities in sustainable forest management. Its term however lapsed before achieving its intended purposes. On 24 October 2018, the Cabinet Secretary for Environment and Forestry set up another taskforce.⁶ Its report, due in mid-January 2020, was pending at the time of writing this paper.

Whatever the findings of the taskforce, it is my conviction that implementation of the Ogiek judgment will forever change the plight of indigenous communities not only in Kenya, but the African continent as a whole. Implementation must by necessity entail their occupation of and access to the Mau Forest Complex. It is imperative therefore that the Kenya government establishes modalities of collaborating with the indigenous people for a win-win situation for all parties involved to prevail.



An Ogiek elder showing honey comb removed from beehive.

KEY FINDINGS OF THE OGIEK JUDGMENT

Lucy Claridge, Senior Counsel and Head of the Strategic Legal Response Centre at Forest Peoples Programme, formerly Legal Director at Minority Rights Group International, London, United Kingdom

The Ogiek case represents a major legal precedent for indigenous and forest community rights in Africa, being the first time that the African Court on Human Peoples Rights (‘the Court’) has considered the concept of indigenous peoples’ rights. Crucially, the Court found seven separate violations of the African Charter on Human and Peoples’ Rights (‘the African Charter’), including the Ogiek’s rights to non-discrimination, property, culture, religion, natural resources and development. This article provides a short summary of the salient features of the judgment, providing a background for implementation of the judgment in the Kenyan context.⁷

THE OGIEK AS AN INDIGENOUS COMMUNITY

The first issue the Court considered was ‘whether or not the Ogieks [sic] constitute an indigenous population’, since ‘most of the allegations made ... hinge on th[is] question’ and therefore it ‘is central to the determination of the merits.’⁸ The Court specifically drew inspiration⁹ from the African Commission on Human and Peoples’ Rights 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 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,¹⁰ 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.¹¹ This accords with the Kenyan government’s own admission during the litigation that the Ogiek are an indigenous people.¹²

THE OGIEK’S PROPERTY RIGHTS OVER THEIR ANCESTRAL LANDS

In relation to the right to property under Article 14 of the African Charter, the Court held that this can apply to groups or communities: that it can be individual or collective.¹³ It interpreted the right in light of Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples, which recognizes indigenous peoples’ ‘right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use’.¹⁴ Importantly, the Court recognized that such rights ‘do not necessarily entail the right of ownership in its classical meaning, including the

right to dispose thereof⁷, recognizing that, unlike other property rights, indigenous rights over their ancestral lands are inalienable: they cannot be transferred or taken away. 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.¹⁵ Further, although the Court accepted that the right to property under Article 14 can be restricted in the public interest where necessary and proportionate, it found that the degradation of the Mau Forest could neither be attributable to the Ogiek nor did the preservation of the ecosystem justify their eviction.¹⁶ Accordingly, the expulsion of the Ogiek from their ancestral lands against their will, without prior consultation, constitutes a violation of Article 14.¹⁷

ROLE OF OGIEK AND INDIGENOUS FOREST COMMUNITIES IN CONSERVATION

The Court made some crucial rulings in relation to the role of indigenous peoples, and specifically hunter-gatherers, in conservation. It explicitly stated that the preservation 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,¹⁸ and 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 are of huge relevance to Ogiek and other forest communities given the role that they can and should be playing as traditional custodians of their lands. They also clearly evidence that it is the Government of Kenya's custodianship – not the Ogiek's – that has resulted in the Mau Forest being degraded.



An Ogiek young woman in Ogiek cultural attire.

KENYAN INSTITUTIONS HAVE SO FAR FAILED TO REMEDY OGIEK RIGHTS

Finally, the Court specifically recognized that the persisting eviction of the Ogiek, and the failure to comply with decisions of the national courts which protected them, demonstrate that Kenya's 2010 Constitution and the institutions which the government has set up to remedy past or ongoing injustices are not fully effective.¹⁹ The Court also found that other rights belonging to indigenous peoples (such as the right to freedom of religion and culture)²⁰ are not protected by Kenya's current legislative arrangements. These firm findings point to the clear need for legislative, policy and practical reforms to respect the Ogiek's and other indigenous communities' rights.

Unfortunately, three years after the judgment was delivered, and despite the Court's precise yet wide-reaching findings, Kenyan institutions have still failed to remedy Ogiek rights. The Ogiek are entitled to restitution of their ancestral land, compensation for the damage suffered, full recognition as an indigenous people of Kenya, the enacting of legislative and other measures to ensure the Ogiek's right to be effectively consulted on issues which concern them, and – at the very least – an apology. Yet the Kenyan government's failure to take any of these steps, together with recent ongoing Ogiek evictions and repeated incidents of harassment, would so far indicate that the government is less than willing to respect the judgment in its entirety and remedy the rights violations meted out to the Ogiek over the years.



Members of the Ogiek community during the Ogiek Annual Cultural Festival in 2018.

WHAT DOES THE KENYAN CONSTITUTION SAY ABOUT THE RIGHTS OF INDIGENOUS AND MARGINALIZED PEOPLE?

Jill Cottrell Ghai, Retired Law Lecturer, Chair of Board of Katiba Institute, Nairobi, Kenya

The Constitution has a clear vision of a Kenya that is at one level united by common values including a sense of patriotism, while respecting, indeed celebrating, the cultures and languages of all the various communities that make up the country. It also recognizes the fact of past disadvantage, and the need for positive measures to bring true equality.

Every community within the country is entitled first of all to equality – and to freedom from discrimination whether intended or not. It is entitled to respect – dignity is at the core of the human rights provisions. It is also entitled to make choices: everyone has the right – with others – to enjoy their culture and use their language. There are provisions designed to ensure that communities that have developed cultural and artistic contributions are not deprived of commercial benefit from these. And the state must ‘protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities’ (Article 69(1)). This is to prevent the commercial use of knowledge developed by local communities, without any benefit accruing to those who developed it.

Affirmative action – a rather imprecise concept, which may involve making extra efforts to benefit those who have been left behind, policies of ‘other things being equal we’ll favour a disadvantaged group or person’, to positively preferring a person or group in order to achieve true equality, or what is sometimes called ‘positive discrimination’ – is required, not just allowed. And minorities and marginalized groups must benefit from government measures to ensure that they participate and are represented in various spheres of life, have special opportunities in education and economic fields and for access to employment, ‘develop their cultural values, languages and practices’, and have reasonable access to water, health services and infrastructure (Article 56).

There is a directive that all public officers must address the needs of ‘vulnerable groups’ including ‘members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities’ (Article 23 (3)).

SPECIAL TREATMENT FOR INDIGENOUS?

There is no special treatment simply for being indigenous – except for the provision about protection of indigenous knowledge. In fact, it is an important principle of the Constitution that affirmative action is to be based on genuine need (Article 27(7)). The concern was that privileged individuals within a generally marginalized group should not benefit from affirmative action.

We see the same idea at work in the definition of ‘marginalized community’. The Constitution is clear that an indigenous people may indeed be marginalized. It defines ‘marginalized community’ in terms of being excluded from the general national life (social and economic). It envisages the possibility that ‘an indigenous community has ... maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy’. But other examples of marginalized communities need not be indigenous: a traditional society that has remained apart because it wants to preserve its unique culture and identity; a pastoralist community that has remained apart because it is nomadic or geographically isolated. Indeed a community that has remained apart because it is small or ‘for any other reason’ can still claim to be marginalized.

In other words, simply being ‘indigenous’ does not bring any benefits. But it may make it easier to argue that a community is marginalized.

BENEFITS FOR BEING MARGINALIZED?

There are few obvious benefits for marginalized communities. Article 100 does require law to be passed to benefit marginalized communities in terms of elected representation in Parliament. That representation must be ‘promoted’. Common sense suggests that this does not mean ‘guaranteed’, but more like providing education and incentives for greater representation.

The importance of such communities is recognized in Article 174 on the objects of devolution – they include ‘to protect and promote the interests and rights of minorities and marginalized communities’.

The spirit of the Constitution especially the definition of ‘marginalized communities’ is not that integration is expected. A choice to be apart would be respected. And the only specific, targeted provisions about marginalized communities is Article 100 on political representation.

But if you want them, benefits ought to flow from the very fact of being a marginalized community (or group), because marginalization implies need. Being indigenous does not.

OTHER PROVISIONS

Apart from the wide range of human rights – to which everyone is entitled – certain other realities are recognized, and some may be particularly relevant to indigenous communities. Historic land injustices are a particular example. A process for dealing with these is supposed to be created.

The provisions on land are also relevant. Community land is defined as including community forests, grazing areas or shrines, ancestral lands, lands traditionally occupied by hunter-gatherer communities or otherwise held under customary law. Indigenous communities might most easily fit into these situations. Indeed, hunter-gatherer communities are specifically recognized as indigenous, as we have just seen.

NO BLANKET ENDORSEMENT OF CULTURES

However much a community may rightly claim to be indigenous or marginalized, they cannot claim that this enables them to practise their culture regardless of other constitutional values. No tradition or custom that goes against the human rights in the constitution more generally is supposed to survive (Article 2(4) on customary law; 53(1)(d) on the child’s right to be free from ‘harmful cultural practices’).

The Kenyan constitution was hailed globally when it was unveiled. Its provisions were carefully designed to overcome the grave historic disadvantage and structural discrimination that attached to marginalized communities. The Ogiek fit squarely within the imagination of the drafters, and the various constitutional provisions made ample provision for the community to access rights in line with all Kenyans. Its full realization is the only guarantee that all Kenyans will be able to enjoy rights and maintain their dignity, and in this sense the recognition of Ogiek rights forms a crucial test case of the Constitution’s efficacy in contemporary Kenya.



The Ogiek elders showcasing the herbs which they have been using.



A group photo of members of the Ogiek and community forest scouts in uniform.

THE AFRICAN COURT'S OGIEK JUDGMENT AND COMMUNITY LAND PROTECTION IN KENYA

Christine Nkonge, Executive Director, Katiba Institute, Nairobi, Kenya

Kenya has had a long and complicated history with land administration that ensures equal access, protection and benefit from land for its citizens. In its final report, the Constitution of Kenya Review Commission (CKRC) noted, 'ample evidence of the importance of land reform and the land question has been provided to the Commission in its hearings throughout the country. Indeed, there is hardly a part of the country that does not suffer land conflicts. The underlying causes of land-related conflicts include: colonial and post-colonial legacy; use of powers over land allocation to further political and ethnic interests; widespread manipulation and deeply rooted corruption in the alienation of government land; and degazettement and alienation of forest reserves, in some cases long used and occupied by indigenous people.' The 2003 Ndungu Commission of Inquiry into the Illegal/Irregular Allocation of Public Land provides some stark truths on land injustices in Kenya. It is for this reason the CKRC proposed formulation of a new land policy that would among other things, 'recognize, respect and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions on land' [*italics added for emphasis*].

As noted by the CKRC, while the root of Kenya's land problems can be traced back to colonialism, successive governments after independence compounded the issue through mismanagement and corruption, fuelling discontent among the people that finally contributed to the violence after the 2007 general elections. This moment provided impetus for real change through legal and political reform that led to the 2010 Constitution. The 2010 Constitution provides an expanded bill of rights and provides stronger protection for land and the environment unlike the 1969 Constitution. For the first time in our history, Kenya's constitution provided for principles and values in governance, land administration, environmental protection and recognition of rights of marginalized communities such as hunter-gatherers. The constitution required greater participation of the people in governance, policy formulation and law-making. These progressive provisions are not surprising due to the people-centred approach adopted in the formulation of the 2010 Constitution and heavy involvement of civil society in the process. It was the hope of Kenyans that the 2010 Constitution would transform Kenya's society, socially, politically and economically for the better. It was certainly the hope of civil society organizations, long involved in the movement for constitutional and land reform, that the 2010 Constitution would lead to coherent and evidence-based policies and laws to deal with past decades of mismanagement of land and to address historical land injustices.

The content for land recognition and protection are provided under Chapters 4 (rights to land, non-discrimination, dignity, clean environment, religion, culture, socio-economic rights, protection of minorities and marginalized communities) and 5 (definition of land – public, private and community land) of the Constitution. Of special importance is recognition of community land as land held by communities identified on 'the basis of ethnicity, culture or similar community of interest' (Art. 63). Such land could include land used as community forests, grazing areas, shrines, or lands traditionally occupied by hunter-gatherer communities (Art. 63). Our constitution also repeatedly provides for protection of marginalized persons, including 'members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities' (Art. 260). On that basis the state is required to take steps, including affirmative action to promote the rights of these persons. The tools for interpretation and demarcation of scope of the above rights has been provided to civil society and human rights activists through expanded standing before Kenyan Courts for protection of human rights and vindication of constitutional provisions through Articles 22 and 258; and requirements of public participation in all sectors of governance. These provisions allow people, including civil society organizations to engage with the legislature, executive and judiciary to promote the right of indigenous communities to own community land. Although the Constitution, the Land Act

2012 and the Community Land Act 2016 provide for community land rights, this has yet to be realized in Kenya.

Although some communities such as the Ogiek of Mau Forest and Sengwer have filed suits claiming entitlement to community ownership of land, this has yet to be actualized. Therefore the 2017 judgment by the African Court on Human and Peoples' Rights in African Commission on Human and Peoples' Rights v. Republic of Kenya (the Ogiek Case) provided a watershed moment in developing the scope and content of the rights of indigenous communities to community land and rectification of historical land injustices. The decision recognizes the Ogiek as an indigenous people, that may fall within the definition of a marginalized community under the Kenyan Constitution; it recognizes that the Ogiek community has priority in time occupation of

the Mau Forest and hence is entitled to identification and protection of their communal claim over the Mau Forest; it also recognizes that due to a series of evictions and threatened evictions, the Ogiek community's right to culture has been violated. The findings of this Court, which are binding on Kenya, are of significant jurisprudential value to the Ogiek Community and other similar minority and marginalized communities in Kenya. It is also important for civil society organizations with mandates on land and social justice. This is a judgment that communities and civil society organizations can use when advocating for implementation and recognition of community land rights in policy formulation, law creation and in public interest litigation. It is therefore important for such civil society organizations to support the implementation of this progressive judgment and similar local decisions on community land rights, to actualize the hope behind the 2010 Constitution.



OPDP Executive Director Mr. Daniel Kabei joins Ogiek members in celebration of the outcome of the Ogiek case.

Above: Traditional dancers entertain the audience during the celebrations.

CAN OGIEK REHABILITATE AND SAVE THE MAU FOREST FOR THE LONG TERM?

Dr. Liz Alden Wily, Fellow, Van Vollenhoven Institute for Law, Society and Governance, Leiden Law School, the Netherlands

For several decades the Kenyan state's response to Ogiek claims as owners of Mau Forests was to point to the law establishing the 22 forest blocks as government land. State justification was forced to alter once Article 63 of the new Constitution (2010) established otherwise, also providing routes for the legal transfer of such community lands presently designated as public lands.

To counter this, the government now argues that, while Ogiek may have been the historical owners of the Mau Forests, the importance of these forests for water catchment requires they be resettled. While for political correctness the government no longer urges hunter-gatherers to abandon their 'backward' way of life, it also claims this is what modern Ogiek want. It concedes they may visit shrines in government forests and contribute indigenous knowledge to management. Ogiek may also sign agreements to use certain resources legally in return for reporting unlawful activities to the Kenya Forestry Service (KFS). They could also benefit from commercial and other projects developed by the KFS in their ancestral forests.

The government asserts these kindnesses are in line with the *modus operandi* implied in the Constitution that citizens assist government to produce a healthy environment, not government to help citizens to achieve this (Article 69). While that article could be so interpreted, it runs counter to the more powerful principles of devolutionary empowerment of citizens as decision-makers and actors, along with an unusually strong bill of rights including to property in land for which Kenya's Constitution is now famed.

The shrinkage and degradation of the Mau Forest Complex since the 2000s is the result of outdated policies, incompetence and corruption.²¹ More importantly, it is the underlying fallacy which must be challenged: the conviction that the government is the only safe pair of hands for owning, protecting and managing valuable forests. Modern conservation practice and scientific assessments as outlined below suggest otherwise.

CAN COMMUNITIES MANAGE NATURAL FORESTS?

In truth, this is a strange question to ask in 2020. Consciously supported community-based conservation has been practiced for several decades around the world though of course community forest conservation has been at the root of indigenous practices for millennia. Legal recognition of a community's forest ownership gains pace annually as the most cost-effective and incentivized foundation for this. This has arisen out of failed attempts to suppress community forest interests through, first, a wave of on-farm tree planting and village woodlots in the 1970s, creation of user buffer zones around Protected Areas in the 1980s, formation of contracted user groups or associations through the 1990s, and somewhat stronger but expensive and contested joint or co-management arrangements between forest agencies and communities. Nor has the wave of turning forest departments into parastatals noticeably limited malfeasance or rent-seeking of nationally important forests, any more than fielding more armed guards has achieved. On the contrary, state-owned forests continued to face alarming rates of degradation, especially in parts of Africa.²²

UNDERPINNING COMMUNITY INITIATIVE WITH THE INCENTIVE OF OWNERSHIP

Contrarily, successes through granting communities ownership began to quietly mount during the 1990s. This commenced through the granting of native title to indigenous forest peoples in some twelve Latin America states, along with Canada, Australia, New Zealand and the Philippines, parts of whose territories include Protected Areas. By 2000, over half of all natural forests in China, Laos and Vietnam were also owner-managed by villages. Community tenure was restored in Spain and Portugal in the 1990s, as in some Eastern European states liberated from Soviet-led nationalization. These joined Sweden, Austria, Switzerland and Germany which had either never deprived traditional communities of forest ownership and/or had restored this much earlier as a more practical means of sustaining conservation.

In Africa, the Gambia and Tanzania led the way in piloting community forest ownership in the 1990s, expansion taking off in the early 2000s. By 2010, some 500 forests had been formally transferred to communities in the Gambia, while 580 forests covering 2.3 million hectares had been declared as village owned forest reserves in Tanzania.²³ Following a critical inspection, the Director of Forestry concluded that community-owned forests were better protected, and more cheaply and amicably managed, due to local secure ownership.²⁴ Nearly 400,000 hectares of community owned forests were gazetted in Namibia by 2010. South Africa, Liberia, Malawi and most recently Ethiopia are among African governments seeing the conservation value of legally acknowledging community ownership.

Forest tenure tracking began after the 12th World Forestry Congress (2003), where community owner conservation was first placed high on the global agenda. By 2017, communities were acknowledged as legal owners of 448 million hectares of forests in 58 those countries which cumulatively account for 92 per cent of global forests (3.99 billion ha).²⁵ More and more countries – including Kenya – now provide legally for communities to designate forests on their lands as protected.

And – unlike Kenya – more and more governments include nationally important forests under local ownership and control on a case by case basis. For example, all protected forests are owned by communities in Papua New Guinea and eight other Pacific states, 44 per cent of Australia's protected forests are owned by indigenous peoples, 190,000 hectares of reserved forests are owned by communities in Cambodia, and 84 of 221

Ancestral Domain Titles issued to indigenous peoples in the Philippines overlap Protected Areas.²⁶ At least 46 major national forest parks or reserves fall within 37 indigenous territories in South America.²⁷ In Mexico, 36 indigenous peoples' lawfully inhabit and manage 57 protected areas.²⁸ Nineteen Colombian communities agreed last year to bring their titled territories under classification as a National Natural Park to help exclude encroachers.²⁹ In India, the Scheduled Tribes and Other Traditional Forest Dwellers Act, 2006 enables millions of forest people to secure rights as individuals or communities to live within and around some 500 wildlife sanctuaries and 90 national parks. Nor is a hard and fast line drawn in Europe between protected forests and its owners: for example, in Romania, 225 of 1,500 community owned forests and pastures have been declared national parks, nature reserves and scientific reserves.³⁰

WHAT ARE THE EFFECTS OF COMMUNITY OWNERSHIP ON FOREST CONDITION?

Scientific reviews endorse the efficacy of devolved tenure approaches. Following review of community participation in forestry in 63 countries in 2016, FAO concluded that secure tenure was a vital 'key' to 'unlock' forest protection.³¹ This is echoed by forest research agencies such as IUFRO and CIFOR, donors,³² and country studies.³³

'The Science is in', as one analysis describes it: with secure ownership, communities have the ultimate incentive to limit encroachment, fires and unlawful logging, in addition to sustaining forest-related livelihoods.³⁴ Deforestation levels in Bolivia, Brazil, Colombia and Guatemala have recently been shown to be two to three times lower in community-owned compared to state-owned forests.³⁵ Reviewing carbon storage data in 64 states, researchers conclude that 'the struggle to secure land rights will play a crucial role in global efforts to reduce greenhouse gas emissions and mitigate the global threat of climate change'.³⁶ Biodiversity is also shown to be more intact where community tenure is guaranteed, often at higher levels than found in equivalent state protected areas.³⁷ NASA satellite imagery tracking the burning of the Brazilian Amazon in July-August 2019 showed the only major unburnt areas to be those owned by indigenous forest peoples. Using its own data, the 50+ scientists on the International Panel on Climate Change (IPCC) also concluded in 2019 that secure community forest ownership should be pursued as mitigation.³⁸

WHERE TO FOR THE MAU FOREST COMPLEX?

In short, while there are always exceptions, it is difficult to comprehend why the Kenyan Government would not eagerly explore and test community-based ownership of the long-troubled Mau Forest Complex, battered for decades by wrongful excisions granting lands to non-local interests, unsustainable logging and the like. It could do so by incrementally granting ownership to the appropriate clan clusters of Ogiek in accordance with the location of their ancestral territories, through a learning by doing mode, incorporating conservation conditions from the outset. Ogiek have already indicated to the African Court that the complex will be most practically allocated to Ogiek under seven or so discrete community land titles, each community land governing its own historical territory. The Ogiek also agreed that ownership should not be alienable, each territory held for future generations. Ideally this will be mirrored in

legally established protection against compulsory acquisition by government for non-forest protection purposes, an established element of agreements between forest peoples and their governments in especially Latin America and Oceania.

The KFS could easily partner with each community to earmark intact forests and degraded areas needing rehabilitation as Protected Community Forests as is each community's intention. They could assist them to similarly zone and earmark areas for settlement and farming, limiting these to naturally un-forested moorlands, glades or uneasily recoverable degraded lands such as have been wrongly allocated to outsiders for farming. KFS could similarly advise on Forest Rules and practices, including protection regimes, familiarizing itself with the innovative approaches of so many other operating community forest owners around the world. As ultimate monitor and regulator, KFS will enjoy maximum opportunity to raise its skills and expertise as a professional service agency for its citizens, unhampered by the burdens of misplaced claims of state ownership.



Members of the Ogiek community during the Ogiek submission to the Task force on implementation of the Arusha Ruling in Feb 2019 in Nakuru.

STEP ONE TOWARDS IMPLEMENTATION: DELIMITING, DEMARCATING AND TITLING OGIEK ANCESTRAL LANDS IN THE MAU FOREST

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The African Court's judgment could not have been clearer. It held that by virtue of being an indigenous people who have occupied their ancestral lands in the Mau Forest since time immemorial, the Ogiek have 'the right to occupy their ancestral lands, as well as use and enjoy the said lands'.³⁹ Although the Court reserved its decision on reparations, it ordered Kenya to remedy the violations established in the judgment, including the right to property.

Accordingly, the first step the Government of Kenya must undertake to implement the judgment is to identify the Ogiek's ancestral lands in the Mau Forest as those are the lands the Court held the Ogiek have a right to occupy, use and enjoy. Identifying and titling those lands is necessary to make Ogiek customary title effective under Kenyan law. It is the only way to redress the Charter violations that the Court established given that the Ogiek's underlying rights are inextricably linked to their ancestral lands. It is also in line with international and domestic jurisprudence, which requires states to take positive steps to make customary indigenous title effective in practice. This is generally accomplished through a delimitating, demarcation and titling procedure.

Common law jurisdictions have long recognized indigenous peoples have a customary right to their ancestral lands notwithstanding colonial annexation. Under the aboriginal/native title doctrine, courts in Australia, Belize, Canada, Malaysia, New Zealand, Papua New Guinea and South Africa have all affirmed that while radical title vests in the sovereign it may be burdened by the pre-existing legal rights of indigenous peoples. Importantly, such customary tenure is entitled to legal protection and remains enforceable unless the government can prove it has been validly extinguished. The precise nature and incidents of customary title is a question of fact that is ascertained by examining the customs of the specific indigenous community.⁴⁰ It follows that, in determining the precise boundaries of an indigenous community's ancestral lands, states must refer to the customs and traditional use patterns of the indigenous community in question.

These principles are mirrored in relevant international standards and jurisprudence, which confirm states must ensure indigenous peoples are in a position to effectively use and enjoy their ancestral lands. Article 26 of the UN Declaration on the Rights of Indigenous Peoples provides: 'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use ...'. The Inter-American Court of Human Rights (IACtHR) has clarified that 'the right to property of the indigenous and tribal peoples includes full guarantees over the territories they have traditionally owned, occupied and used in order to ensure their particular way of life, and their subsistence, traditions, culture, and development as peoples'.⁴¹ A state's duties in this regard extend against third parties, as a recent IACtHR case confirmed when it held non-indigenous settlers must be removed from indigenous lands as part of the restitution process.⁴²

States' chronic failures to adequately recognize and enforce indigenous customary title is the reason courts order states to delimit, demarcate and title indigenous lands as part of the reparations process.⁴³ The affected community's participation in that process is critical, not only to ensure indigenous peoples' right to self-determination, but also to identify the territories that need to be returned to the community on the basis of their traditional use and occupation.

In this context, the case of the Maya communities in Belize is particularly instructive. After winning a case before the Inter-American Commission on Human Rights,⁴⁴ the Maya sued the government to enforce the Commission's recommendations. Although the Supreme Court recognized that customary Maya land tenure systems constituted property worthy of legal protection,⁴⁵ ordering an injunction to protect their lands from interference by third parties,⁴⁶ an appellate

court subsequently revoked the injunction, questioning whether Belize had positive obligations under the constitution to protect indigenous customary title.⁴⁷ Eventually, when the case was heard at the Caribbean Court of Justice it held that Belize had failed to adequately protect the Maya's rights, reasoning:

We place particular emphasis on the Findings and Recommendations of the IACHR in the Maya Communities case which created legal obligations for Belize at the international level and legitimate expectations for the Maya people in the domestic sphere. These features all support the inescapable conclusion that the Government of Belize was under a duty to take positive steps to recognize Maya customary land tenure and the land rights flowing therefrom and, without detriment to other indigenous communities, to delimit, demarcate and title or otherwise establish the legal mechanisms necessary to clarify and protect these rights in the general law of the country.⁴⁸



Thus far, the most recent taskforce gazetted to implement the 2017 judgment has failed to adopt an approach that involves the Ogiek community in identifying and mapping their ancestral lands in the Mau Forest. For this reason, although the report has yet to be made public, it is unlikely to chart a viable way forward. Regardless of what it ultimately recommends, it will not temper Kenya's obligations to make the Ogiek's land rights effective. In the absence of a delimiting, demarcation and titling procedure driven by the Ogiek community, any scheme to implement the judgment will fail to redress the Charter violations the Court established.



The audience following proceedings during the celebration of Ogiek case held at Nessuit, Njoro sub-county, Nakuru County in 2018.

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ENDNOTES

- 1 *African Commission on Human and Peoples' Rights v Republic of Kenya*, African Ct. H.P.R., App No. 006/2012,
Judgment of 26 May 2017.
- 2 Under Section 4 of the *Government Land Act* (now repealed).
- 3 Articles 2(6), 10, 21 of the Constitution.
- 4 Article 61 of the Constitution, *Community Land Act*, 2016.
- 5 Kenya National Commission on Human Rights Presentation to the Taskforce on the Implementation of the Decision of the African
Court on Human and Peoples' Rights against the Government of Kenya in respect of the rights of Kenya in the Ogiek of Mau
and enhancing the participation of the indigenous communities in the sustainable management of forests.
- 6 The term of the taskforce was extended for six, then a further three months in April then November 2019. Its mandate: review the
Ogiek judgment and any other judgment issued by domestic court in relation to the Ogiek community's occupation of the Mau Forest;
review existing relationships between indigenous communities and public institutions involved in the management of forests and
identify all community forests within the meaning of Article 63 of the Constitution and develop a policy framework for the better
management, conservation and protection of community forests.
- 7 For a further analysis of the judgment, please see Lucy Claridge (2019): *The approach to UNDRIP within the African Regional
Human Rights System*, *The International Journal of Human Rights*, available at
<https://www.tandfonline.com/doi/full/10.1080/13642987.2019.1609761>; and Lucy Claridge (2017): *Victory for Kenya's Ogiek as
African Court sets major precedent for indigenous peoples' land rights*, *Minority Rights Group International*; available at
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Judgment of 26 May 2017, para 102.
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- 11 *Ibid.*, para. 112.
- 12 *Ibid.*, para 104.
- 13 *Ibid.*, para 123.
- 14 *Ibid.*, para 126.
- 15 *Ibid.*, para 128.
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- 40 *See generally Amodu Tijani v The Secretary*, Southern Nigeria [1921] UKPC 80, 2 AC 399; *Mabo and Others v Queensland (No 2)* [1992] High Court of Australia 23; (1992) 175 CLR 1 F.C. 92/014 (3 June 1992); *Aurelio Cal and Others v Attorney General of Belize* (18 October 2007) Claim Nos 171/2007, 172/2007; *The Maya Land Alliance and Others v Attorney General of Belize* (28 June 2010) Claim No 366/2008; *The Maya Leaders Alliance and Others v Attorney General of Belize* (25 July 2013) Civil Appeal No. 27 of 2010; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257; *Kerajaan Negeri Selangor and others v Sagong Bin Tasi and others* (2005) MLJ; *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA); *Paki v Attorney General* [2014] NZSC 118, [2015] 1 NZLR 67; *Richtersveld Community and Others v Alexkor Ltd and Another* [2001] (4) All SA 563 (LCC); *Alexkor Ltd v Richtersveld Community* [2003] 12 BCLR 13; *Madaha Resena and Others v The Independent State of Papua New Guinea* [1991] PNGLR 174.
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DEFENDING OUR FUTURE

OVERCOMING THE CHALLENGES OF RETURNING THE OGIEK HOME

A report on implementing the Ogiek judgment in Kenya

