Protected areas, Indigenous rights and land restitution: the Ogiek judgment of the African Court of Human and Peoples' Rights and community land protection in Kenya

Lucy Claridge and Daniel Kobei

Abstract In May 2017, the relationship between conservation and human and Indigenous peoples' rights was considered for the first time by the African Court of Human and Peoples' Rights. In a case brought by the Indigenous Ogiek of Kenya, the Court stated that the preservation of the Mau Forest could not justify the lack of recognition of the Indigenous status of the Ogiek, nor the denial of the rights associated with that status. It also confirmed that the Ogiek could not be held responsible for the depletion of the Mau Forest, and that preservation of the ecosystem could not justify their eviction from or the denial of access to their land. Although Kenyan institutions have still failed to remedy Ogiek rights, the Ogiek have identified a pathway for the Kenyan Government to follow to restitute Ogiek land, following principles of conservation and symbolizing the central role that Indigenous forest dwellers can and should play in forest management. They sought a further ruling from the Court to clarify the steps the Government should take. In June 2022, the Court issued a judgment ordering the Government to grant the Ogiek collective title of their lands through a process of delimitation and demarcation. In the meantime, the Ogiek have established community forest scouts in East Mau to replant native trees and protect the forest from illegal logging. In addition, they have developed an Ogiek community Bio-Cultural Protocol. Here we examine the feasibility of restituting Ogiek land both legally and practically. We conclude with some general comments related to global conservation policy and practice on the restitution of lands and support for Indigenous conservation practices, where protected areas have caused displacement and rights abuses of Indigenous peoples.

Keywords African Court of Human and Peoples' Rights, conservation, Indigenous rights, land restitution, litigation, Mau Forest, Ogiek people

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Introduction

In May 2017, the relationship between conservation and human and Indigenous peoples' rights in Africa was determined for the first time by the highest human rights body in the continent, the African Court of Human and Peoples' Rights (hereafter referred to as the Court). The case was brought by the Indigenous Ogiek of Kenya, who successfully challenged their eviction from their ancestral land and territories in the Mau Forest and systematic denial of associated rights, which the Government sought to justify by reason of conservation, as the Mau Forest is a major water catchment area (ACtHPR, 2017). In its landmark judgment, the Court made clear rulings regarding the role of Indigenous peoples and hunter–gatherers specifically in conservation, stating that the preservation of the Mau Forest could not justify the lack of recognition of the Indigenous status of the Ogiek, nor the denial of the rights associated with that status. It also confirmed explicitly that the Ogiek could not be held responsible for the depletion of the Mau Forest.

Five years after this judgment, and despite the precise and wide-reaching findings of the Court, Kenyan institutions have still failed to remedy Ogiek rights (for a more detailed analysis of the implementation of the Ogiek judgment, see Katiba Institute, 2020). The case remained pending before the Court under its reparations process, before the Court finally issued a ground-breaking judgment in June 2022, specifying the remedies that the Government of Kenya must grant the Ogiek (ACtHPR, 2022). The ruling was unequivocal that the Government must restitute Ogiek land under collective title and through a process of physical delineation and demarcation, premised on the framework set out in Kenyan legislation and in line with international law (ACtHPR, 2022, paras 114–116), following clear principles of conservation and symbolizing the central role that Indigenous forest dwellers can and should play in the management of forests. The ruling therefore sets a precedent for the restitution of ancestrally owned land on a conservation basis to Indigenous and forest communities in Africa and beyond.

In the meantime, the Ogiek have taken steps to continue conserving the Mau Forest, including establishing community forest scouts in East Mau to replant native trees and protect the forest from illegal logging. They have also developed an Ogiek community Bio-Cultural Protocol, under the Nagoya

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Protocol on Access and Benefit Sharing, which aims to ensure that owners or guardians of genetic resources receive a fair and equitable share of any benefits that arise from research conducted with those resources, and from traditional knowledge associated with those genetic resources (CBD, 2011).

Here we examine the feasibility of restituting Ogiek land on a conservation basis, both legally and practically, looking at the international legal protections concerning the role of Indigenous peoples in conservation, and then setting out how the Ogiek's legal case was built and argued. We also examine the role that the Court reparations process has played both in providing remedy for the Ogiek and in setting a precedent for effective conservation. We consider conservation efforts that the Ogiek have already instituted and examine the Kenyan legal framework for restitution of land pursuant to conservation principles. Finally, we draw conclusions related to global conservation policy and practice on the restitution of lands and support for Indigenous conservation practices, where protected areas have caused displacement and rights abuses of Indigenous peoples.

International law recognizing the role of Indigenous peoples in conservation

The Ogiek's claim to be recognized by the Court as conservators of the Mau Forest was supported by developments at the international level, where there has been an increasing recognition of the role of Indigenous peoples in the conservation of land and natural resources. Many studies have demonstrated that the territories of Indigenous peoples whose customary land rights have been recognized and/or formalized in law have been significantly better conserved than adjacent lands (Sobrevila, 2008; Stevens, 2014), illustrating how Indigenous peoples can contribute and provide solutions to avoiding and reducing land degradation, recovering degraded ecosystems and providing multiple societal benefits through their valuable local knowledge, traditional systems of land use and resource management (UNEP, 2019). Evidence shows that many Indigenous peoples, who generally have strong ties to the lands and forests they depend on, have developed locally adapted institutions that are associated positively with high biodiversity in the lands and freshwater systems managed by them (Pretty et al., 2009; Nelson & Chomitz, 2011). In addition to the increased recognition of collective and community land rights, there have been new commitments by governments (e.g. in Canada, Australia and New Zealand) and the conservation community to recognize and respect the rights of Indigenous peoples, together with the adoption of some supportive international laws, policies and standards (for further analysis, see Tauli-Corpuz et al., 2020).

The UN Committee on the Elimination of Racial Discrimination, for example, has articulated two main interrelated rules that apply to the establishment of 'protected areas' (defined as 'a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'; IUCN, 2008) in the territories of Indigenous peoples: 'No decisions directly relating to the rights and interests of indigenous peoples [can] be taken without their informed consent' (UN CERD, 2002, para 304) in relation to both the 'establishment of national parks, and as to how the effective management of those parks is carried out' (UN CERD, 2007, para 22).

Furthermore, recognizing that hunter–gatherer livelihoods have been practised with low impacts, and given the increasing evidence that communities with secure rights over their land and resources are effective guardians of local ecosystems (Stevens et al., 2014; Schuster et al., 2019; Fa et al., 2020; IPBES, 2020; FAO & FILAC, 2021), a new conservation paradigm is developing based on the land and resource rights of Indigenous peoples. This is increasingly being recognized via international conservation policy initiatives (IUCN, 2003; CBD, 2004) and by conservation organizations themselves, such as the IUCN (IUCN, 2016).

The Convention on Biological Diversity (CBD), which has gained the global support of 196 states parties, refers to the knowledge, innovations and practices of Indigenous peoples for the conservation and customary use of biological diversity (Articles 8(j), 10(c), 17.2 and 18.4). Article 10(c) provides that states parties shall 'protect and encourage [Indigenous peoples'] customary use of biological resources in accordance with traditional cultural practices. . .'. The CBD's Programme of Work on Protected Areas, adopted in 2004, has set various targets for states parties, including Kenya, which reflect the conservationist role played by Indigenous peoples such as the Ogiek. Goal 2.1.3 of the Programme of Work on Protected Areas recognizes the consistency between 'the goals of conserving both biodiversity and the knowledge, innovations and practices of indigenous and local communities'.

Furthermore, the CBD governing body, the Conference of Parties (COP), has made a number of legally binding decisions that recognize the role of Indigenous and community-conserved areas and have contributed to the development of the Nagoya Protocol on Access and Benefit Sharing. For instance, COP11 Decision XI/24 on Protected Areas invites parties to '[s]trengthen recognition of and support for community-based approaches to conservation and sustainable use of biodiversity in situ, including indigenous and local community conserved areas, other areas within IUCN governance types and initiatives led by indigenous and local communities . . .' (CBD, 2012, para 1).

Similarly, COP10 Decision X/31 on Protected Areas 'recognises the role of indigenous and local community conserved areas . . . in biodiversity conservation [and] collaborative management' (CBD, 2010, para 31), whereas COP12 Decision XII/

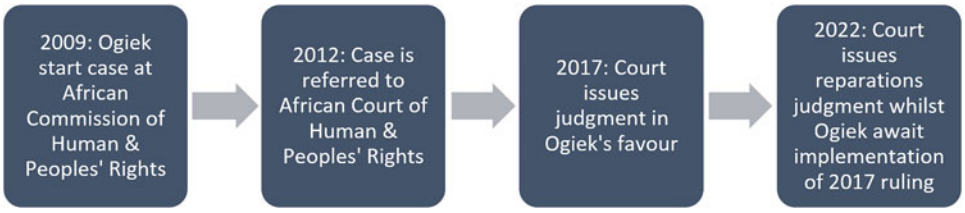

FIG. 1 A timeline of the Ogiek's case at the African Court of Human and Peoples' Rights.

12 emphasizes the need for a collaborative approach or recognition of the conservation initiatives of Indigenous peoples within their territories (CBD, 2014, para. 9) and highlights the requirement that protected areas and their management regimes must be consensual, participatory and respectful of the rights of Indigenous peoples (CBD, 2014, paras 3–5). In addition, COP12 Decision XII/12, Plan of Action on Customary Sustainable Use of Biological Diversity, states: 'Customary sustainable use of biological diversity and traditional knowledge can contribute to the effective conservation of important biodiversity sites, either through shared governance or joint management of official protected areas or through indigenous and community conserved territories and areas. Community protocols and other community procedures can be used by indigenous and local communities to articulate their values, procedures and priorities and engage in dialogue and collaboration with external actors (such as government agencies and conservation organizations) towards shared aims, for example, appropriate ways to respect, recognize and support customary sustainable use of biological diversity and traditional cultural practices in protected areas' (CBD, 2014, para. 9).

A meeting of the Intersessional Working Group on Article 8(j) (traditional knowledge) and Related Provisions of the CBD recognized that '[p]rotected areas established without the prior informed consent or approval and involvement of indigenous and local communities can restrict access and use of traditional areas and therefore undermine customary practices and knowledge associated with certain areas or biological resources. At the same time, conservation of biodiversity is vital for the protection and maintenance of customary sustainable use of biological diversity and associated traditional knowledge' (CBD, 2013, para. 9 of Annex).

In addition, over the past 40 years, the IUCN has issued a number of resolutions and recommendations that establish the key role that Indigenous peoples play in the conservation of natural resources (IUCN, 1981).

The UN Special Rapporteur on the rights of Indigenous peoples has recognized specifically that the loss of the guardianship of Indigenous peoples, and the placing of their lands under the control of government authorities that have often lacked the capacity and political will to protect the land effectively, have left such areas exposed to destructive settlement, extractive industries, illegal logging, agribusiness expansion, tourism and large-scale infrastructure development (UN, 2016, para. 17; UN, 2020b). In addition, the UN Special Rapporteur on human rights and the environment has stated that 'Indigenous peoples and local communities and peasants can make enormous contributions to the conservation, protection, restoration and sustainable use of ecosystems and biodiversity, when empowered to do so, through recognition of their rights. Thanks to their traditional knowledge, customary legal systems and cultures, they have proved effective at conserving nature' (UN, 2020a).

In terms of international standards and jurisprudence, the UN Declaration on the Rights of Indigenous Peoples makes specific reference to conservation in Article 29, which states that Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources and that states shall establish and implement assistance programmes for Indigenous peoples for such conservation and protection without discrimination. In *Centre for Minority Rights Development v Kenya*, the Commission found that, although the Endorois' land had become a game reserve, the Endorois as its ancestral guardians were best equipped to maintain its delicate ecosystem and that their alienation from their land threatened their cultural survival and thus the encroachment was not proportionate to the public need (ACHPR, 2010, para. 235). In *Xákmok Kásek Indigenous Community v Paraguay*, the Inter-American Court of Human Rights determined that 'the State must adopt the necessary measures to ensure that [its domestic laws concerning the protected area] do not represent an obstacle to the return of traditional lands to the members of the Community' (IACtHR, 2010, p. 78), whereas in *Kaliña and Lokono Peoples v Suriname*, the same court concluded that respect for the rights of Indigenous peoples could have a positive impact on environmental conservation and therefore the rights of Indigenous peoples and international environmental laws should be seen as complementary rather than exclusionary rights (IACtHR, 2013, para. 173).

Building the Ogiek's legal case

This case study is based on the long-term experiences of and research by the authors litigating the Ogiek case before the African Court of Human and Peoples' Rights and seeking its implementation, a process that has now taken more than 13 years, as well as work seeking to empower the Ogiek

through the Ogiek Peoples Development Program (OPDP; a Kenyan-based NGO working to promote Ogiek culture, participation and inclusion). The authors are the lead lawyer who has represented and advised the Ogiek throughout the litigation process and an Ogiek leader who has been actively engaged in the litigation since its inception, as Executive Director of the OPDP.

First, to build a strong legal case, there was a need to establish the historical relationship that the Ogiek have had with their ancestral land in the Mau Forest since time immemorial. The complicated factual matrix of evictions and treatment of the Ogiek over the years also needed to be detailed and evidenced clearly. Both of these processes required vast documentation and anthropological research within social science libraries, in the national archives of Kenya and through online research. A detailed evidence-gathering process was also conducted by the OPDP to unearth relevant documents proving ownership, such as maps, correspondence with local and national authorities dating back many years, pleadings and related evidence in the numerous land disputes brought by the Ogiek before the national courts. Similarly, 46 extensive witness statements were collected from Ogiek community members, including elders, women and youth from different Ogiek clans, providing details on dates and locations of evictions since the 1920s, and explaining the Ogiek way of life, including cultural and religious practices and traditional knowledge. This evidence not only substantiated the evictions that were suffered, but also provided comprehensive detail on the relationship of the Ogiek with the Mau Forest, its central function in customary religious and cultural practices, the crucial part it plays as a source of food and traditional medicine and, above all, its vital role in defining Ogiek identity (ACtHPR, 2017, para. 110). Detailed witness evidence was also collected on Ogiek identity and traditional lifestyle, including hunting, honey production, traditional medicines and other traditional uses for plants (including photographs of relevant plants), cultural rituals and ceremonies, crafts, use of territory, social organization, language, religion, tribal interactions and the extent to which that lifestyle has been forced to change over the years (ACtHPR, 2017, para. 165). Several Ogiek community members also gave oral evidence directly to the Court during the November 2014 hearing, providing powerful testimony that played a pivotal role in assisting the judges to deliver their ruling.

The Court was thus able to reach its first ruling on the rights of Indigenous peoples in Africa and also recognized the Ogiek as an Indigenous population deserving special protection, declaring that the Ogiek, as a hunter–gatherer community, have for centuries depended on the Mau Forest for their residence and as a source of their livelihood (ACtHPR, 2017, para. 109), that they exhibit a voluntary perpetuation of cultural distinctiveness, which includes aspects of language, social organization and religious, cultural and spiritual values through self-identification and recognition by other groups (ACtHPR, 2017, para. 110), and that they have suffered from continued subjugation and marginalization (ACtHPR, 2017, para. 112). (For further discussion of how the litigation process included and empowered the Ogiek, see Claridge, 2018.)

In addition to considerable research on matters of international comparative law, it was also necessary to establish the role of the Ogiek as conservationists of the Mau Forest. Photographs of native plants well known to the Ogiek and the role that these play in Ogiek customs were collected and submitted to the Court, demonstrating Ogiek traditional knowledge and their keen awareness of how to conserve their ancestral surroundings. The OPDP assisted with the production of a film of Ogiek land and cultural practices, which was submitted as video evidence to the Court, giving the judges the opportunity to witness first-hand the traditional Ogiek way of life. An expert on customary land tenure also presented critical written and oral evidence to the Court on the way that the practice of Indigenous communities can and does save threatened natural forests.

The Ogiek: a long wait for justice

Numbering c. 52,000 (Kenya Population and Housing Census, 2019), the Ogiek are some of the last remaining forest dwellers in Africa. Traditionally honey-gatherers, the Ogiek assert that they survive mainly on wild fruits and roots, game hunting and traditional beekeeping (Blackburn, 1986). The Ogiek have lived since time immemorial (ACtHPR, 2017, para. 128) in the Mau Forest in Kenya (which measures c. 400,000 ha; Government of Kenya, 2009) and they proclaim themselves friendly to the environment on which they depend. They have a unique way of life that is well adapted to the forest. To them, the Mau Forest is a home, school, cultural identity and way of life that gives them pride and destiny. The term 'Ogiek' literally means 'caretaker of all plants and wild animals'. The survival of the Indigenous Mau Forest is therefore linked inextricably with the survival of the Ogiek.

Since Kenya's independence from Britain and prior to it, the Ogiek have been routinely subjected to forced evictions from their ancestral land by the Kenyan Government, without consultation or compensation. The rights of the Ogiek 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. These evictions have been justified by the Kenyan Government over the last c. 20 years on the basis of environmental protection, as the Mau Forest is the largest water drainage basin in Kenya, and the country's largest 'water tower' (forested mountains that contain springs and streams that run into major rivers;

ACtHPR, 2017, paras 8 and 20). The stated rationale of the Government for evicting everyone that lives in the Mau Forest is to stop its further degradation and to protect the vital water supplies in the country (Kenya Water Towers Agency, 2021).

A detailed history of Ogiek evictions over the past 100 years and the accompanying discrimination and marginalization are set out in the merits submissions of the Ogiek to the Court (ACHPR, 2013, pp. 61–117). The Ogiek were first removed from their ancestral land under the British colonial administration through a series of evictions. Initially these evictions were part of the more general plan of the colonialists to confine different African tribes in designated native reserves. However, in the case of the Ogiek, given their scattered nature and the fact that they lived in small groups, a decision was taken not to establish a designated reserve for them but instead to move them into the native reserves of tribes with which the British considered them closely affiliated, such as the Nandi and Maasai, with the view that they were 'more likely to progress and become useful citizens if they lived side by side with communities who have already advanced some way along the road of orderly progress' (extract from House of Commons Parliamentary Paper, *Report of the Kenya Land Commission*, September 1933, as detailed in ACHPR, 2013, para. 136). Many Ogiek experienced not a single eviction but a series of evictions, as their strong association and identification with their traditional forests meant that following their eviction they would seek to return to their original lands.

Following the departure of the British and Kenya gaining independence in 1963, the situation did not improve for the Ogiek. The Mau Forest continued to be subjected to logging and clearance operations as the post-colonial Kenyan administration parcelled and distributed land to leading members of the Government, political supporters and allies. In contrast to the approach of the colonial Government, which had been to move the Ogiek away from the forested areas, successive Kenyan governments have excised areas of the forest (i.e. removed them from the category of forest land such that individuals can settle there), purportedly for the purposes of settling the Ogiek. Although potentially beneficial to the Ogiek in guaranteeing them land within the forest, the fact that many such settlement schemes have proven to be irregular, with the land being allocated to wealthy and influential members of the ruling party or to non-Ogiek communities, has meant that the Ogiek often have not benefitted from them. At the same time, the large influx of commercial farmers, loggers and companies who do not share the same respect for the forest has affected the Mau Forest ecosystem deleteriously (ACHPR, 2013, para. 174).

The eviction of the Ogiek from their ancestral land and the refusal to allow them access to their spiritual home have prevented the Ogiek from practising their traditional cultural and religious activities including their hunter–gatherer way of life, thus threatening their existence as a people. 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 an 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 they had already suffered, and having failed to resolve these injustices through repeated national litigation and advocacy efforts, the Ogiek lodged a case against their Government before the African Commission of Human and Peoples' Rights (the 'Commission'), via the OPDP and with legal assistance and representation from CEMIRIDE, an NGO registered in Kenya, and Minority Rights Group International. In November 2009, the Commission, citing the far-reaching implications for the political, social and economic survival of the Ogiek community and the potentially irreparable harm that would be caused if the eviction notice was actioned, issued an Order for Provisional Measures (ACtHPR, 2013, para. 8) requesting the Kenyan Government to suspend the implementation of the eviction notice. The Ogiek were not evicted on that occasion but their precarious situation continued. In July 2012, following the lack of response on the issue from the Kenyan Government, the Commission referred the case to the Court pursuant to Article 5(1)(a) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court of Human and Peoples' Rights (African Union, 1998) on the grounds that the case evinced serious and mass human rights violations (ACtHPR, 2013, paras 2 and 4).

The Ogiek as conservationists

In their legal submissions before the Court (ACHPR, 2013, paras 83–94), the Ogiek sought to explain the nature of their intimate relationship with the Mau Forest and how their dependence on it for food, shelter, identity and survival has ensured that this relationship has been rooted in respect for the forest and the need to conserve it. The role of the Ogiek as guardians rather than over-exploiters of the forest is supported by the findings of a number of researchers. For example, Thomas Ronoh observed: 'The exploitation of the natural resources had clear checks and balances thus allowing indigenous environmental sustainability. Certain trees, for instance, "Simotwet" were conserved mainly to be used during initiation ceremonies. Likewise, it was the sole responsibility of the lineage council of elders to teach the community members and instruct [. . .] them on the issues of environmental management for sustainable development, thus, there were trees that they were prohibited from cutting [. . .] down' (Ronoh, 2002, p. 41).

In addition: 'Herbal medicine to a greater extent aided the conservation of the environment because only the specialists were allowed to extract the herbs from the forests and they were entirely guided within the framework of their code of ethics governing their profession. . . they took into cognizance [. . .] their indigenous sustainability, thus justifying the sustainable development framework. Trees associated with provision of herbs and related medicinal value were conserved and it was the responsibility of the individual member and the lineages in general to monitor their growth and development. Likewise, during the various rites of passage, the young were taught the importance and ultimately the fundamental rights attached to these specified trees and hence the society treating them as sacred. They universally guarded them from being destroyed by the hungry-loggers, other members of ethnic groups as well as other interested parties' (Ronoh, 2002, pp. 59–60).

In common with other forest and Indigenous peoples, over generations the Ogiek have developed a set of conservation measures that are passed down from one generation to the next, leading to them being described as 'the best imaginable conservators of land' (Dowie, 2009, p. 184). Such measures include: ensuring that there are no forest fires; allowing only the experienced elders to make beehives from the trees in a way that conserves the tree; creating awareness of important tree species and prohibiting the cutting of these trees; allocating blocks of forest for clan use in accordance with the Ogiek land tenure system that ensures a community stake in the allocated forest and its resources; and protecting streams by ensuring that no cultivation is done within 50 m on both sides (Obare & Wangwe, 1999; Ronoh, 2002, pp. 35–36). The Ogiek exercise great caution with fire, for example, which they use to release smoke and stun bees when collecting honey. The Ogiek store embers in a ball of *kurongurik* (lichen mixed with Spanish moss), transfer this ball in a honey bag and extinguish embers by burying them in wet soil.

It is against this background that in 2016 the Ogiek community volunteered to establish forest scouts in both Kiptunga and Logoman forests (both forests in the eastern Mau Forest, Nakuru County, Njoro sub-county) in partnership with the Kenya Forest Service (KFS). The scouts used both traditional Ogiek knowledge to protect the forest as well as skills learnt during trainings conducted jointly with the KFS, such as the management of forest fires and the participatory management of natural resources, mobilizing community support to rehabilitate the forest, including the planting of over 10,000 indigenous trees (OPDP, 2020). The County Government has also provided some funding for beehives within a 200-acre area, which helps to increase biodiversity. The majority of these scouts are Ogiek but a few are from communities who live adjacent to the forest and who are willing to learn traditional conservation practices. The scouts work alongside the KFS, patrolling the forest and stopping encroachers and those who might destroy the forest. They wear a uniform so that they are recognizable, and they work peacefully with the KFS. The scouts have the mandate to arrest illegal loggers, but they can request the assistance of the KFS in this respect when necessary. In just a few years, these forest scouts have had a considerable impact, reducing corruption amongst the forest rangers and in turn reducing the rate of forest destruction (D. Kobei, pers. obs., 2021).

In addition to conducting forest patrols and deterring illegal loggers, the scouts have worked closely with the OPDP to rehabilitate over 200 acres of land by planting native trees to replace degraded forest that did not support the Ogiek way of life of beekeeping, herbal collection and other cultural practices integral to the Ogiek community. The scouts do not agree that the *shamba* system propagated by the KFS under the Forest Management and Conservation Act 2016, whereby communities are permitted to participate in the management of forest lands by farming and growing trees within the farms for a period of 3 years rather than through ownership, is an effective method of conservation. The forest scouts have also established ecotourism activities at Kiptunga, showcasing the importance of forest conservation and arranging visits to the Ogiek cultural site at the Kiptunga caves, whilst also supporting nurseries for native trees and growing such trees for local people to plant in their own homes. These activities in turn provide a livelihood for the scouts, who are often volunteers or are paid little. The ecotourism centre has attracted the interest of the Nakuru County Government, who are now considering supporting it financially.

In addition to taking this direct action, the Ogiek have developed their own community Bio-Cultural Protocol to protect their customarily owned land under the Nagoya Protocol on Access and Benefit Sharing. The third (and most recent) edition of the Mau Forest Ogiek's Bio-Cultural Protocol was published in 2021 (OPDP, 2021). Developed by the community in an inclusive process involving elders, youths and women, its objective is to safeguard the rights, traditional knowledge and resources of the community by both detailing these clearly and by providing terms and conditions to regulate access to those resources and to ensure the fair and equitable sharing of the benefits arising from their development (OPDP, 2021, pp. 1–2). This traditional knowledge is a result of Ogiek experience, skills, innovations and practices embodied in the traditional lifestyle of the community, ranging from the conservation and sustainable use of forests to genetic resources (plant and animal species), animal tracking and hunting, ecological knowledge and traditional medicine. For example, the Ogiek never cut trees for firewood but collect dead or fallen trees, and their utilization, conservation and protection of the Mau Forest are based on a seasonal calendar, following the forest ecology that controls the climatic patterns and natural resource dynamics of the region (OPDP, 2021,

pp. 7–8 and Appendix 3). In this way, the Bio-Cultural Protocol contributes to the conservation and sustainable use of the Mau Forest and to global ideas about conservation. It also sets out the rights and responsibilities of the community under customary, state and international law. In particular, the Bio-Cultural Protocol states that the Mau Forest Ogiek have a collective responsibility to protect and conserve the forest as dictated by their traditions and culture. It provides for the communal holding of land, with communal land management taking place through the establishment of conservation, rehabilitation and habitation zones. It calls for recognition of the Ogiek traditional governance system, including via the Ogiek Council of Elders, who are traditional leaders, in particular during negotiations with Government agencies, companies and other related organizations, with such negotiations to occur in accordance with the principle of free, prior and informed consent (OPDP, 2021, pp. 15–26).

The Bio-Cultural Protocol provides a means by which the Ogiek can call on their Government, the private sector and other stakeholders to recognize and appreciate their vital role as guardians and conservators of biological diversity in the Mau Forest and for them to recognize their customary and legal rights over their land, territories and natural resources. In this way it provides a clear and important set of standards on how Indigenous traditional knowledge can and should be recognized in both national and international conservation spheres.

The Court recognizes the role of the Ogiek as conservationists

The Court was persuaded by the arguments of the Ogiek that they can and should play a role in preserving the Mau Forest (for a more detailed analysis of the ruling, see Claridge, 2019). The Court considered that it had received significant evidence to affirm the assertion of the Ogiek that the Mau Forest is their ancestral home (ACtHPR, 2017, para. 109), recognizing the link between Indigenous communities, land and the natural environment, and that for centuries they had depended on the Mau Forest as a source of their livelihood. The Court also recognized the Ogiek as an Indigenous population that is part of the Kenyan population and that deserves special protection because of its vulnerability (ACtHPR, 2017, para. 112).

Although the Court declared that the Ogiek deserved special protection deriving from their indigeneity, it is important to consider the context in which the Ogiek sought to establish their Indigenous identity. Section 260 of the 2010 Constitution of Kenya recognizes specifically hunter–gatherers such as the Ogiek as 'an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy', whereas the Final Report of the Truth, Justice and Reconciliation Commission of Kenya of May 2013 described the Ogiek as one of several Indigenous peoples in Kenya (ACHPR, 2013, paras 335–336). In addition, during the public hearing of the case in 2014, the Government admitted that the Ogiek constitute an Indigenous population in Kenya, albeit claiming that their way of life had been transformed in recent years (ACtHPR, 2017, para. 104), an argument that did not hold weight with the Court. Although it would therefore seem difficult to dispute the indigeneity of the Ogiek, the Ogiek sought to establish this to benefit from the provisions of the African Charter of Human and Peoples' Rights (the African Charter) that protect collective rights, and from internationally recognized standards that have been developed regarding the rights of Indigenous peoples in relation to their lands, properties and natural resources (ACHPR, 2013, para. 310). They also sought full recognition as an Indigenous people of Kenya by way of specific remedy (ACHPR, 2013, para. 700(vi)), including but not limited to the recognition of their language, cultural and religious practices, the provision of health, social and education services and the enacting of positive steps to ensure their national and local political representation. In this way, although deserving of special protection as an Indigenous people, they sought equal protection and status as one of the recognized 'tribes' of Kenya who should in turn benefit from access to basic state services and political representation, having suffered years of marginalization and discrimination, as opposed to seeking special protection by virtue of their Indigenous identity.

In examining the arguments of the Ogiek under the right to property, protected by Article 14 of the African Charter, the Court interpreted specifically and directly the right in light of Article 26 of the UN Declaration on the Rights of Indigenous Peoples, which recognizes the right of Indigenous peoples 'to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership' (ACtHPR, 2017, para. 126). As 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 (ACtHPR, 2017, para. 128), and the Court then considered whether the restriction on the Ogiek occupying and using their lands could be considered to be in the public interest (as required by Article 14 of the African Charter) and whether it could be deemed as necessary and proportionate to its aim as required under international law: 'In the circumstances, since the Court has already held that the Ogieks [*sic*; note that Ogiek is already plural, whereas Ogiot is the singular term] constitute an indigenous community (supra para. 112), it holds, on the basis of Article 14 of the Charter read in light of the above-mentioned United Nations Declaration, that they have the right to occupy their ancestral lands, as well as use and enjoy the said lands' (ACtHPR, 2017,

para. 128). '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*' (ACtHPR, 2017, paras 129–130, emphasis added).

Accordingly, the Court held 'that by expelling the Ogieks [*sic*] from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land as defined above and as guaranteed by Article 14 of the Charter read in light of the United Nations Declaration on the Rights of Indigenous Peoples of 2007' (ACtHPR, 2017, para. 131).

The Court considered that it had sufficient evidence demonstrating that the Ogiek have their own distinct culture and that the restrictions on access to and evictions from the Mau Forest have affected their ability to preserve their traditions, resulting in a violation of the right to culture of the Ogiek (ACtHPR, 2017, para. 183). The Court did not consider that the way of life of the Ogiek has changed over time to the extent that it has eliminated their cultural distinctiveness, and it could see that some of these changes were caused by the Government by restricting the right of the Ogiek to access their land and natural environment (ACtHPR, 2017, paras 184–186). Finally, given that the Court had already found that the Government had not adequately proved its claim that the eviction of the Ogiek was for the preservation of the natural ecosystem of the Mau Forest, 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 (ACtHPR, 2017, paras 187–190).

Legal aspects of restituting the land pursuant to conservation principles: the Constitution and Community Land Act of Kenya

Knowing that the process of remedying the many rights violations, including the restitution of Ogiek land, would be complicated, the Ogiek requested (and were granted) a separate Court ruling on reparations (ACtHPR, 2017, para. 223). Within this process, both the Ogiek and the Kenyan Government made a series of written reparation submissions; a hearing on reparations was scheduled but delayed repeatedly largely because of the Covid-19 pandemic, and in June 2021 the Court issued an order deciding that all of the claims on reparations should be resolved on the basis of the written pleadings and submissions filed by the Parties (ACtHPR, 2021). The Court issued its reparations judgment in June 2022 (ACtHPR, 2022). In the meantime, the Kenyan Government was required by the 2017 judgment of the Court to take all appropriate measures within a reasonable time frame to remedy all of the violations established; in other words, implementation of the judgment did not need to await the separate reparations judgment of the Court (Katiba, 2020).

One of the contested issues regarding the implementation of the Ogiek judgment and the reparations process has been the feasibility of restituting ancestral Ogiek land in the Mau Forest both legally and practically. Following the 2017 judgment, the Ogiek have established a roadmap to implementation that includes steps to clarify the parameters, establish the priorities and outline a process towards restitution of their land, amongst other things. This will involve the land being returned under a number of communal land titles, vested in common amongst the members of each community. This roadmap was submitted to the Court as part of the reparations process and formed part of the deliberations of the Court. It provides a systematic process through which title could be granted pursuant to Kenyan law and procedure, including under the Community Land Act, and it is also consistent with international standards as set out in both international law and jurisprudence. (A detailed analysis of the Viability of Creating Community Land Title over Ogiek Ancestral Land as a Framework for Achieving Rights and Forest Conservation was submitted to the Court within the reparation process in the form of an expert opinion from Liz Alden Wily. This expert opinion is not yet publicly available.)

In terms of the legal framework, the 2010 Constitution of Kenya (which came into force as the Ogiek case was being litigated) defines community lands under Article 63(2) as: (a) land lawfully registered in the name of a group of representatives under the provisions of any law; (b) land lawfully transferred to a specific community by any process of law; (c) any other land declared to be community land by an Act of Parliament; and (d) land that is (i) lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; (ii) ancestral land and lands traditionally occupied by hunter–gatherer communities; or (iii) lawfully held as trust land by the county governments, but not including any public land held in trust by the country government under Article 62(2). Legally, therefore, lands held, managed or used lawfully by specific communities as community forests, grazing areas or shrines and ancestral lands, and lands traditionally occupied by hunter–gatherer communities, are community lands. Most hunter–gatherer communities in Kenya are forest peoples and, in the case of the Ogiek of Kenya, the Court recognized them specifically in its May 2017 judgment as an Indigenous population of Kenya whose ancestral land is the Mau Forest.

Arguably, therefore, Mau Forest Ogiek lands are community lands under Article 63(2). Article 2(4) of the Constitution admits customary law provided that it is consistent with the Constitution; therefore, the Mau Forest Ogiek territory could be classified as community land 'lawfully held, managed or used by specific communities as community forests, grazing

areas or shrines' under Article 63(2)(d)(i) above. In addition, given the recognition by the Court that the Mau Forest Ogiek are a hunter–gatherer community and that the Mau Forest Complex is their ancestral homeland, the Mau Forest Ogiek lands are also classifiable as 'ancestral lands and lands traditionally occupied by hunter–gatherer communities' under Article 63(2)(d)(ii) above.

In 2016 the Community Land Act was enacted to give effect to Article 63 on community lands. The Act provides for: (a) the recognition, protection and registration of community land rights; (b) the management and administration of community land; and (c) the role of county governments in relation to unregistered community land and for connected purposes.

The Community Land Act also allows for communities to secure their customarily owned (community) lands as registered properties. It specifies that communal rights to some or all of the property are held by all members of the community over and above their shared co-ownership of the land itself; it allows for zoning or reserving special-purpose areas for farming, settlement areas, community conservation areas, access and rights of way, cultural and religious sites, urban development or any other purpose (sections 5(3), 12, 13(3), 29 and 30). It also provides for individual, family or subgroup interests over plots to be registered as customary rights of exclusive occupancy with usage capable of being of indefinite duration, inheritable and governed by customary law through rules agreed by the community (sections 14(1) and 27(3)), whereas such rights cannot be assigned or leased to a non-member of the community and must be surrendered back to the community on their abandonment or cessation. The Community Land Act also reinforces the right of communities to retain and regulate natural resources on their lands through requirements that they institute conservation measures to 'sustainably and productively' manage these with transparency and accountability 'for the benefit of the whole community including future generations' and 'on the basis of equitable sharing of accruing benefits' (section 20(3)). In addition, it requires communities sharing resources to take collaborative 'measures to protect critical ecosystems and habitats', to provide 'incentives to invest in income-generating natural resource conservation programmes', to 'facilitate the access, use and co-management of forests, water and other resources by communities who have customary rights to these resources' and to follow 'procedures for registration of natural resources in an appropriate register' (section 20(2)).

The Community Land Act provides a straightforward procedure for a community to secure collective title to its land or part of its land (including a two-stage process requiring a community to first define, describe and register itself and then apply for adjudication, survey and registration of its property); establishes a common-sense governance framework that ensures the co-owners have ultimate say over decisions through a convened Community Assembly; empowers community land owners to the same degree as private owners to be able to enter into agreements, mortgage, lease or rent out lands (section 17) on the basis of majority decisions approved in the Community Assembly; and reminds officials that all such actions must be undertaken through participatory and consultative means (e.g. section 8).

In summary, as explained in detail in submissions to the Court during the reparations process (summarized in ACtHPR, 2022, paras 95–96), the Community Land Act provides an ideal mechanism through which the Ogiek (and in turn other forest communities in Kenya) can identify intact, degraded and recoverable lands in the Mau Forest and work to protect, rehabilitate and use them on a sustainable basis. It offers the Kenyan State a path through which to achieve two of its essential objectives: to protect the property interests of its citizens (in this instance the Mau Forest Ogiek) and to halt the disastrous loss of natural forest, and to nurture and sustain these forests over the long term. This is relevant given that individual privatization of land does not work where Indigenous and forest communities customarily hold their primary resources in common. The requirements of the Community Land Act for inclusive and equitable governance of property are well attuned to hunter–gatherer socio-cultural and organizational norms. Provision for title to be vested directly in the community in common is appropriate to customary norms and to Indigenous and forest communities, whose traditional properties are almost entirely rangelands and forest landscapes. Technical advisory services, resource support and partnerships for specific initiatives from and with the KFS can be sought, and the KFS can also provide oversight on behalf of the Government.

A precedent for global conservation?

Implementation of the Ogiek case, including restitution of Ogiek land, has the capacity to become a precedent for global conservation policy and practice. As the Court and other international and regional human rights bodies have found, where the rights of Indigenous and forest peoples over their lands are not respected and are threatened or violated in the name of conservation, the situation must be remedied, and restitution of land is one of the primary means of providing that redress (e.g. as provided for in the UN Declaration on the Rights of Indigenous Peoples, Articles 11 and 28). Historically, the demarcation and management of protected areas are the conservation context with which human rights concerns have been in conflict most prominently. As the Ogiek case illustrates, lack of recognition of customary tenure is a primary issue underlying many conflicts between the management of protected areas and the rights of Indigenous peoples and local communities. In contrast, new protected area paradigms that recognize community rights to own and manage protected areas provide a

foundation for positive synergies (Springer & Campese, 2011). Equitable conservation, which empowers and supports the environmental stewardship of Indigenous peoples, represents the primary pathway to effective long-term conservation of biodiversity, particularly when upheld in law and policy (Dawson et al., 2021). A recent global study of deforestation showed that in Africa, protected areas did not reduce deforestation substantially, and that Indigenous lands outperformed protected areas in retaining tropical forests (Sze et al., 2021). However, the African Commission on Human and Peoples' Rights has recently called upon African States to recognize the rights of Indigenous populations and communities regarding the conservation, control, management and sustainable use of their natural resources, and to strengthen community governance and institutions (ACHPR, 2021).

In issuing its 2022 reparations judgment, the Court has both cemented the rights of the Ogiek over their ancestral land and established the first precedent for the restitution of land on conservation principles to Indigenous and forest communities in Africa. The Court recognized that ownership of land, even for Indigenous peoples, entails the right to control access to Indigenous lands, and it therefore behoves duty-bearers such as the Government of Kenya to attune their legal systems to accommodate the rights of Indigenous peoples to property such as land. The close ties that Indigenous peoples have with the land must be recognized and understood as the fundamental basis of their cultures, spiritual lives, integrity and economic survival (ACtHPR, 2022, paras 111–112). Accordingly, securing the right of the Ogiek to property, especially land, creates a conducive context for guaranteeing their continued existence (ACtHPR, 2022, para. 115). In addition, the Court ordered that the free, prior and informed consent of the Ogiek must be sought regarding the development and the conservation of investment projects on Ogiek land, meaning that any plans regarding restitution must be agreed to by the Ogiek and cannot be decided solely by the Government (ACtHPR, 2022, para. 144). Given that the legal framework for the restitution of Ogiek land exists in Kenya, it can and should take place as part of the implementation of the ruling of the Court in their favour. Restitution is a right, even where the concerned land is a protected area (e.g. a gazetted forest). Restitution could also have positive outcomes, especially if it is accompanied by measures to support collective conservation actions as described above, setting an example for broader conservation policy and practice. In this way, restitution of land can represent a new, people-driven and human rights-based approach in Africa, with protected areas being owned by Indigenous peoples and forest communities working in conjunction with the state authorities responsible for forest protection, who can assist the community owners to meet the relevant needs.

Conclusion

The Ogiek have been legally recognized by the Court as an Indigenous people who can and should play a role in the conservation of their ancestrally owned forest. They have also established a set of rules, the Bio-Cultural Protocol, by which they agree to conserve the forest and share in its benefits. In addition, Kenyan law provides under its Constitution and the Community Land Act for the land to be returned to the Ogiek under a number of communal land titles vested in common amongst the members of each community. Indigenous peoples can play a crucial role in conservation, and the ruling of the Court ordered the Government of Kenya to restitute Ogiek land by way of collective title and in accordance with the right of the Ogiek to free, prior and informed consent. Therefore, the Government of Kenya should now take all steps to implement the May 2017 judgment of the Court by way of restitution, including a process of delimitation and demarcation of Ogiek ancestral land, thereby setting a global precedent for conservation. Going forward, the Ogiek must now confirm which land they wish to seek restitution of, prepare for collective title to be transferred to them on an inalienable basis and work with the KFS to protect their forest lands. Court reparations rulings can and should play a clear role in securing this.

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