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Abbreviations

African Charter	=	African Charter on Human and Peoples' Rights
African Court	=	African Court on Human and Peoples' Rights
African Commission	=	African Commission on Human and Peoples' Rights
AU	=	African Union
CEMIRIDE	=	Centre for Minority Rights Development
EACJ	=	East African Court of Justice
ECtHR	=	European Court of Human Rights
IACtHR	=	Inter-American Court of Human Rights
KADU	=	Kenya African Democratic Union
KANU	=	Kenya African National Union
KAU	=	Kenya African Union
KNHRC	=	Kenya National Human Rights Commission
MRG	=	Minority Rights Group International
OPDP	=	Ogiek Peoples' Development Program
UNDRIP	=	UN Declaration on the Rights of Indigenous Peoples

Introduction

“This case has been a long struggle for the Ogiek community. We have been in several courts in Kenya for the last 20 years, but we have never got justice.”

– Emmanuel Lemis (Ogiek community member)
(MRG 2017)

May 26th, 2017, Ogiek members from the Mau Forest in Kenya travelled by bus to the African Court on Human and Peoples’ Rights in Arusha, Tanzania, to personally receive the judgment on their case against the Kenyan government after an eight-year legal battle (MRG 2017). Ogiek women and men fill the court room, some of them dressed in their traditional attire of fur coats and beaded jewelry. At stake is their livelihood in the Mau Forest, where their homes and food resources in the form of beehives had been repeatedly destroyed by the government officials. Their right to land has been denied by every government on the grounds of conservation, so they live under the constant threat of being forcibly evicted and unable to practice their culture, traditions, and religions as a hunter-gatherer community in peace (Klopp & Sang 2011). When Justice Ramadhani declares the Kenyan government in violation of the African Charter on Human and Peoples’ Rights and decided in favor of the Ogiek people, asserting their right to land, the audience is full of joy and slowly leaves the court room singing and celebrating the judgment (MRG 2017). It is the first time the Ogiek people have ever gotten justice. But did they really?

The Ogiek people, a Kenyan ethnic group, have been denied their land rights since the colonial period under the British administration, when it declared the Mau Forest to be Crown Forest (Kameri-Mbote/ Kindiki 2008: 177). Laws were implemented to foster unequal property relations in favor of European settlers, so they could make the most economic profit of the fruitful lands. The Ogiek people were totally left out, since they were not even acknowledged as an ethnic group and therefore had no access to natural resources (Musembi/ Kameri-Mbote 2013: 14). Although they have always referred to themselves as an ethnic group, the Kenyan government categorized them as Maasai, Kalenjin, or "other" by being hunter-gatherers until 2009, when they were first counted as a separate ethnic group in the census (Balaton-Chrimes 2021: 51). To consider the local legal structures, representatives of the colonial administration created,

in consultations with local decision-makers, customary laws. This negotiation process established a situation of legal pluralism, that is to say one in which British laws coexisted with but had priority over the so-called African customary laws. After independence in 1963, the Kenyan government inherited the colonial legal system with its attendant injustice. As a result, the Mau Forest became state property and the Ogiek people were still denied their land rights.

Werner Zips, a professor on legal pluralism at the University of Vienna and researcher Markus Weilenmann explored the intersection between politics and laws, focusing more particularly on the way political leadership influences governance in a situation of conflicting legal ideas and legal systems, analyzing power struggles and inequalities between different actors (Zips/ Weilenmann 2011: 19). The thesis will explore the Ogiek case "African Commission on Human and Peoples' Rights v. Kenya", the landmark case of the African Court on Human and Peoples' Rights (African Court) as it was the first time it decided on indigenous peoples' rights. I will adopt the approach of Zips and Weilenmann and investigate the overlap between political leadership and law in a situation of conflicting legal systems. At the center is the power struggle between the actors involved the Ogiek people, the colonial administration, the Kenyan government, the African Commission, the African Court, all claiming to be in accordance with "the law".

The Ogiek case "African Commission on Human and Peoples' Rights v. Kenya" is complex, involving many actors, political and legal implications dating back to the colonial period, as well as conflicting legal understandings of land rights at the local, national, and international levels. This thesis is thereby interdisciplinary, building on the disciplines of law and African studies and combining a historical and legal analysis of the dispute. The legal proceedings of the Ogiek case have not been taken into consideration in the existing analysis of the case: a gap this thesis intends to explore in more details. The thesis will be based on primary sources comprising the legal documents issued by the African Court as well as submissions the parties made to the court, and secondary literature. I will interpret the sources along the research question on how the Ogiek people, as a marginalized community, accessed justice in a multi-layered legal setting to acquire their land rights and how judicial and political actors create competing entitlements for land allocation.

1. Literature review

The Ogiek case is the landmark decision of the African Court as it was the first time the African Court decided on indigenous peoples' rights. Most of the literature on the case questions the application of the concept of indigeneity in African countries, which refers to marginalized people with a distinct way of life from the dominant society and a close relationship with a territory in using natural resources and maintaining cultural practices (Claridge 2019; Majekolagbe/ Akinkugbe 2018; Rösch 2017). The key document at issue is the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007, which, among other rights, specifically protects indigenous peoples' land rights. The African Commission advocated for the UNDRIP by establishing the African Commission's Working Group on Indigenous Populations/Communities in 2001, which published their findings on adapting the concept of indigeneity to the African context to strengthen the protection of human rights in its report (Claridge 2019: 270). However, the concept remained contested by states, notably the Kenyan government has not signed the UNDRIP and therefore opposed its application. The African Commission was the AU's only human rights institution from 1987 until 2009, when the African Court decided its first case. In the meantime, it has developed a jurisprudence based on its mandate, which includes the promotion, protection of human rights and the interpretation of the African Charter (Article 45 African Charter).

Even though the Kenyan government rejected the application of the UNDRIP, the African Court applied the concept of indigeneity in the Ogiek judgment. Lucy Claridge, researcher and head lawyer in the Ogiek case but also in the Endorois case, was more specifically working on issues of human rights violations by the Kenyan government by addressing indigenous rights, land rights and arbitrary evictions. She analyzed the UNDRIP as a practical legal tool to protect the rights of indigenous peoples, the application of which was ultimately upheld by the African Court in the Ogiek case (Claridge 2019: 268). In contrast to the application of the UNDRIP to the Ogiek case, Majekolagbe and Akinkugbe question the application of the minority concept under the Declaration on Minority People, which is also politically supported by the Kenyan government. The difference is that the concept of indigeneity depends on the "priority in time", which is only relevant in the context of comparison, while the concept of minority relates to the deep connection to a territory, which has a narrow scope of application (Majekolagbe/ Akinkugbe 2018: 27).

The discussions around the Ogiek judgment and thus the applied concept of indigeneity revealed the conflicts between the member states of AU, its organs such as the African Commission and the African Court, and the influence of NGOs representing the affected indigenous groups before the proceedings (Rösch 2017: 243). The Ogiek judgment also addressed the right to land, the right to food, and the requirement of free, prior and informed consent before decisions affecting indigenous peoples' territories or natural resources. Highlighting the gender perspective on the Ogiek case critically reflected that women's voices have been neglected before the African Court, while women suffer from the intersectional discrimination of being members of a marginalized society and being women (Kameri-Mbote/ Oduor 2009: 169 f). Although there are international laws and state laws granting property rights to women, in practice they do not own land as this is preserved for Ogiek men.

The literature of the Ogiek case predominantly challenged the concept of indigeneity and its application in the African context. In this thesis, I would like to analyze the proceedings from the time of the eviction notice in 2009 to the delivery of the judgment and thereby critically explore the judicial material to question, from a legal perspective, the approaches of the political actors who want to maintain their power structure to the detriment of already marginalized communities. In order to contextualize the case, a historical discussion of the struggle for land rights of the Ogiek people will clarify the significance of the ruling, as well as the entanglements of injustice since colonial times through law and governments on land rights.

2. Overview of the chapters

The thesis will be divided into five chapters in which I not only interrogate the judicial proceedings starting form 2009 that led to the judgment eight years later, but also the historical injustices the Ogiek people had suffered during the colonial and post-colonial period. In the first chapter, I explore the emergence of legal pluralism as a discipline: its definition and challenges spread across different fields of research which all question what constitutes the law. This issue specifically arose during the colonial encounter when different understandings of law contrasted with each other. I further examine how the British colonial administration used the law to legitimize their ruling and at the same time created a subordinate set of rules, regardless of the ambiguities over the terminology and the adaptation of foreign legal concepts that did not fit local circumstances. At independence, entrenched legal disparities persisted and were complicated by an

additional, new legal framework as Kenya became a member of international organizations such as the African Union.

Chapter two contextualizes the land struggle of the Ogiek people. The chapter first gives an overview of the indigenous rights movement that presented an opportunity for the Ogiek people to claim their land rights before the African Court, an international human rights body. A historical analysis will show that their land rights were constantly violated during the colonial administration and post-colonial governments, and that Ogiek land was distributed to new actors to secure political power structures. Focusing on land rights, the politicization of ethnic belonging and politics will provide an understanding of the socio-economic challenges faced by the Ogiek people.

Chapter three and four present the proceedings before the African Court, beginning with the action of NGOs on behalf of the Ogiek people, through the communication with the African Commission, to the procedural requirements of the African Court and the content of the judgment. The Ogiek people, the Kenyan government, NGOs and the continental human rights institutions the African Commission and the African Court are the actors of the case. The process will show the dispute between the actors before the African Court, which provides the Ogiek people with the opportunity to acquire their land rights that have been denied to them at the national level since colonialism and during the post-independence period. Furthermore, the discussion on the judgment demonstrates the individual human rights violations committed by the Kenyan government under the African Charter.

Finally, chapter five discusses the aftermath of the judgment, as it has not been implemented at all by the Kenyan government over the past five years, from 2017 to 2022. Even though the African Court ruled in favor of the Ogiek people, the implementation of the judgment depends on the political will of the Kenyan government. The Kenyan government prolonged the proceeding on the compensation for the endured suffering under the excuse of the Covid pandemic, has continued to evict Ogiek members from the Mau Forest and distribute title deeds to non-Ogiek. Also, third parties have stepped in to oppose the ruling and to protect their own land rights, which they have acquired under Kenyan national law. The ruling has thus created another situation of competing land rights. In the conclusion, I will summarize the main arguments and research efforts of the thesis, and emphasize the connection between legal pluralism, the case study, land rights and the actors involved.

Chapter 1: Theoretical Framework on Legal Pluralism

As the emergence of legal pluralism as a discipline was situated in various fields of research that addressed law from different perspectives, the very definition of what law is in the first place poses a challenge. This issue already arose during the colonial encounter when two different understandings of law, on the one side the Europeans who viewed the law separated from morality and African communities who had a holistic approach defined by the balance between nature, human and spirits. In conquering African societies, the colonial administrations used the law to legitimize their ruling and at the same time created a subordinate set of rules, the so-called customary law, regardless of the ambiguities over terminology and the adaptation of foreign legal concepts that did not fit local circumstances. The British administration in Kenya affected the co-existence of African communities by creating social system based on the belief that ethnic groups were separated from one another and each was governed by their respective customary laws.

At independence, the Kenyan government did not tackle the disparity between state law, which was based on British law, and laws of African communities. During the transition period from colonialism to Kenya's independence, legal pluralism materialized through British state law, customary law, and local laws of African communities. Another layer was added during the post-independence era with the membership of international organizations such as the United Nations (UN) and the African Union (AU). However, legal pluralism is not discussed in the context of international organizations, only in the connection with the harmonization of the laws. Furthermore, legal pluralism opens up the possibility of claiming rights under international law and applying political pressure on national governments to comply with them. This offers minority groups in particular the opportunity to claim their rights, which are protected by international laws but have been violated by national governments.

1. Legal pluralism: definition and challenges

The concept of legal pluralism describes the coexistence of several legal orders within one nation-state. Until the 1970s, legal pluralism was subsumed in legal anthropology, a discipline which studied customary law through an extended case method, a research method that focuses on the study of disputes to determine general legal principles (von Benda-Beckmann/ Turner 2018: 258). The academic discipline of legal pluralism emerged in the 1970s and 1980s: the Journal of Legal Pluralism and Unofficial

Law, created in 1981, became an important source and medium of publication. Western scholars from Europe and the U.S. dominated and led the debates on legal pluralism in former African colonies and conceptualized the idea of parallel legal orders.

Classic legal pluralism developed as a discipline in the 1970s and was characterized by actor-oriented approaches involving the parties of conflict based on their goals, political power relations, social and economic interests (von Benda-Beckmann/ Turner 2018: 260). Researchers at that time analyzed the colonial and post-colonial situation by focusing on the intersection of customary African law and European law (Merry 1988: 872). The scholarship was based on the idea of two parallel existing legal systems, one imported by Europeans through colonialism, the other one rooted in pre-colonial times but remained relevant in colonial and post-colonial African countries.

New legal pluralism evolved in the 1980s and put the reconceptualization of the relationship between law and society in the foreground and thus the political dimensions of law (Merry 1988: 872). Instead of focusing on colonial contexts, researchers explored non-colonized societies, particularly industrial countries of Europe and the U.S with the perception that in those countries nonstate forms of ordering were more difficult to see. This approach challenged the dominant thought of Eurocentric legal centralism that grants solely the state the power to create and execute the law, which is "uniform for all persons, exclusive of all other laws, and administered by a single set of state institutions" (Griffiths 1986: 3). In contrast to the legal centralist approach and in line with the New legal pluralism, the French jurist Jean Carbonnier created the concept of Flexible Droit (Le Roy 2007: 345). It is based on three sources of law which are the law, jurisprudence, and custom to emphasize that there are other systems of social regulation when there is no law in place. While the law comprises a set of rules that are recognized as binding by the community and that can be enforced by a controlling authority, jurisprudence are theories and principles on which a legal system is founded. Customs on the other hand, are long-established and repeated practices that cannot be enforced but their non-compliance might have social consequences.

The fundamental issue of legal pluralism is the question of what constitutes law. Sally Falk Moore created the concept of the semi-autonomous field to show that the social space between legislator and subject is not empty (Griffiths 1986: 34). Instead, social structures are also a source of law that produce and enforce rules. Moore proposed a broad interpretation of the law which makes a distinction of the legal and social field

impossible. Referring to Moore's concept Griffiths established the descriptive conception of legal pluralism as "the presence in a social field of more than one legal order" (Griffiths 1986: 1). While declaring the Eurocentric interpretation of the law and therefore the theory of legal centralism an illusion, he pointed out that "legal pluralism is the fact" and "the name of a social state of affairs and it is a characteristic which can be predicated of a social group" (Griffiths 1986: 4, 12). Many scholars adopted Griffiths' leading definition of legal pluralism but also challenged it until he revised himself twenty years later (Gebeye 2017: 231). He admitted that his conception of legal pluralism was a mistake since it is impossible to adequately conceptualize law for social scientific purposes and confirmed that 'normative pluralism' would be the accurate term (Tamanaha 2008: 395).

Clearly, the concept of legal pluralism is contested. However, a multi-layered legal setting also provides loopholes that can be politically instrumentalized, as in the Ogiek case, when the land rights of the Ogiek people were not protected by national, but only by international laws. Therefore, political agents use the opportunity of legal plurality to advance their interests to their advantage. For the Ogiek people, claiming their land rights at the African Court was the only option left to them due to the current political environment in Kenya, whose notions of power structures and use of law date back to colonial times.

2. Ethnicity, Law and Order – European constructs for African societies

In pre-colonial times, African societies had their own ways of dealing with social conflicts. Societies like the Akan (located in today's Ghana) or the Yoruba (located in today's Nigeria) were governed by a central authority, that resolved disputes through a legal court system (Ayittey 2006: 81ff). Other societies did not have such structures but relied on respected elders of the community instead. Even though the modes of dispute resolution were different throughout the continent the common aim was the maintenance of order and harmony (Ayittey 2006: 72). Order and harmony are to be understood in a broader sense, that comprises the connection with the supernatural, the earth, the sky, and the social environment. The settlement of disputes took place through deliberation, discussion, and reconciliation, rather than the use of force. It was the responsibility of respected elders to assess issues since they were considered impartial and therefore able to ensure moral conduct (Ayittey 2006: 72). Those elders

were role models of the community and expected of good behavior and fair decision-making. They were usually elder men, who instructed younger people in native laws and customs as guiding principles to maintain peace within the community. Therefore, the knowledge of the laws was transmitted orally and unwritten but treated each case individually based on those moral principles.

In the early phase of colonization on the African continent, missionaries and anthropologists conducted extensive research on African communities, their social structures, and their languages, but their interpretations were infused by their own normative, European ideas of social and legal structures. Consequently, they concluded that African societies were governed by "primitive laws" (von Benda-Beckmann/Turner 2018: 256). European legal systems were characterized by individualism, which punished a person's wrongdoing. The development from natural law to constitutional law was recent at the end of the 19th century (Tamanaha 2008: 381). Natural law was a combination of laws and morals, which derived from religion and was applied by monarchs. The divine was on top of the hierarchy to which only the monarchs had access, who acted as intermediaries between the supranational and the population. The introduction of parliamentary systems or constitutional monarchies brought significant changes in the perception of the law which was to derive from a state (von Benda-Beckmann/ Turner 2018: 256). The law was to be understood separately from moral aspects, morality was no longer relevant in identifying the law. Moreover, the written Constitution of a country was to be the fundamental law, it was defined by the people and the basis for governmental authority. This principle that law must derive from the Constitution, is called legal positivism. Overall, the Constitution replaced the role of God and the monarchs.

Europeans understood the application of natural law as backward in the development of constitutionalism. In their view, it was a phase in evolution they had overcome and that justified their superiority over African societies (von Benda-Beckmann/ Turner 2018: 256). The two systems had different approaches, the African being community-based solution finding in the light of reconciliation to maintain peace based on orally transmitted guiding principles by elders or chiefs that are to be understood as leaders rather than rulers (Amao 2018: 10f). Europeans based their legal decision-making on written laws deriving from a constitution. The laws were executed by an authority to punish individuals for their misconduct. Therefore, it is not surprising that European

missionaries and anthropologists did not only assess the African legal systems outside of their respective context but also from a European perspective of superiority.

Problematic was the fact that the findings of anthropologists and missionaries were not only the sources of understanding African societies but the basis for political decisions of European governments in the colonies. General conclusions that depicted African societies as “backward”, “primitive”, and “savages” gained popularity and justified the so-called “civilizing mission” of African societies whilst the real imperial interest of economic exploitation was carried out on the ground (Comaroff 2001: 306). To facilitate their goal, European powers needed to gain influence in the hinterland to enforce a colonial administration. After they conquered local resistance due to their advanced military force and use of weapons they organized ethnic groups, that shared a common language, customs, and rituals based on those missionary and anthropological results (Ayittey 2006: 420).

The division of the population in such ethnic groups facilitated the exercise of power. The colonial administration created social structures based on the European ideas of territory and ethnicity (Magnant 2004: 175f). Therefore, a territory comprised of a political unit and ethnicity of a cultural unit such as in Europe where the territory of countries constitutes a political unit, and their people belong to the same national and cultural group to establish their ethnicity. They emphasized similarities and differences to stipulate connectedness and exclusion even in societies that did not identify themselves on those terms. Along the notions of territory and ethnicity, prevailed the perception that a respective ethnicity had a culture and a law (Magnant 2004: 168). Since the laws were unwritten and orally transmitted, colonial administrations demanded their statutory form. A process of negotiation between colonial powers and local elites started to formalize what was to be called customary law.

3. Creating customary law – The colonial encounter

Customary law became a product of the colonial encounter between the European administration and African elites. These African elites included chiefs, elders, and merchants which were people that hold a distinct position in societies. Colonial powers and African elites invented or opportunistically selected what customary law was according to their political interests (Tamanaha 2008: 384). This allowed the colonial administration to implement their rules without getting in touch with the population but through selected people within the communities, whereas African elites could secure their

influence in their respective communities through collaboration with the administration. Customary law usually controlled the areas of private law such as marriage, inheritance, property rights, customary and religious offenses but was written down in the colonizer's language (Tamanaha 2008: 385). This means that the laws, which by their very nature are flexible in that they evolve with and reflect society, were not only put into legal form, but were also written in a language that was foreign to the society they governed, as many local people did not even speak English.

Language barriers also limited the presentation of laws and had to be overcome through interpreters who were either native that had received crash courses in English or former slaves who were not familiar with the local dialects (Diala/Kangwa 2019: 195). Those interpreters learned English solely as a language of instruction which was kept communicating basic orders. However, the translation of laws also required the demonstration of their meaning for the society and could not be restricted to fact findings. Furthermore, the terminology used to express customary rules implied legal concepts that were alien to native African languages (Mancuso 2014: 4). The same term could imply different practices such as marriage for example: A European concept of marriage includes the union of one man and one woman only, whereas in polygamy societies marriage is not restricted to one man and one woman but can involve a union with several women. Therefore, applying legal concepts in different social contexts required a precise understanding of the terminologies and their meanings.

To demonstrate the lack of social context in the creation of customary law, the South Africa-based scholar Diala constructed a dialogue involving marital property rights between a district officer, a court interpreter, and a family head based on his research in southern Nigeria (Diala/Kangwa 2019: 196f). The dialogue is based on his interview with elders, traditional leaders, and customary court judges in southern Nigeria between 2014 and 2015 and a 1980s Nigerian television comedy. Presented in the article "Rethinking the Interface between Customary Law and Constitutionalism in Sub-Saharan Africa" in the De Jure Law Journal it emphasizes how indigenous laws changed through language barriers between members of the local communities, interpreters and colonial administrators:

> **District Officer**: Ask the chief to explain matrimonial property rights in his community.

Court interpreter: Master says you should tell him whether women inherit property when they separate from their husbands.

Family Head: Women do not separate from their husbands in our community, so how can they inherit property?

Court interpreter: No, that is not what I asked! When a man sends a woman back to her father forever, does she have claims to marital property?

Family Head: [Contemptuously] If you know our people (community) well, you wouldn't ask that question. But I don't blame you because you are not from here -

Court interpreter: [Cuts in sharply] Never mind me! Just answer the question

Family Head: Such a thing is rare, as our fathers did not divorce their wives. Our women used to be well behaved until the white man's education started filling their ears with nonsense ... Anyway, if a man sends a woman with nasty character back to her husband, she has no right to the man's property because everything she owns belongs to the family in which she married. In fact, since the man is the head of the family, it means the woman belongs to the man.

Court interpreter: Master, the witness says a divorcing woman has no matrimonial property rights because she belongs to her husband (Diala/Kangwa 2019: 196f)

The above dialogue not only shows the adaption of local customs to the British concept of marital property rights but also how the social context of customs was ignored by the district officer who acted on behalf of the colonial administration. Since the areas of private law, such as marital property rights, were unique to the communities and the colonial administrations did not have enough knowledge nor authority to make fundamental changes, they relied on collaboration with local actors. Customary law functioned as a tool that mixed indigenous laws with the respective European laws to control social structures.

Contrary to the perception that customary law would be an expression of customs, it was an artificial creation of the colonial encounter and can be referred to as ‘the invention of tradition’ (Comaroff 2001: 306). The image of customs and traditions was actually an adaption of pre-colonial norms to socio-economic changes that overlapped in

the areas of law, economics, and religion. In literature, the terms “customary law”, “traditional law”, or “indigenous law” are often used synonymously, although indigenous laws refer to a pre-colonial phase whereas customary law to the colonial (Tamanaha 2008: 397). There is no doubt that indigenous laws in their ancient form would have changed throughout time, but Diala further argues that the colonial encounter fastened those changes and had a significant impact on them by inventing customary law (2019: 200).

4. The Kenyan experience

For the European expansion, the British, the French, the Belgians, the Dutch, the Italians, the Germans, and the Portuguese also applied their laws and in doing so added another set of rules to the legal plurality. In Kenya, the British rule started in 1895 with its declaration of a protectorate. It was administered and controlled by the Imperial East African Company, a British commercial association to develop trade relations (Ghai/McAuslan 1970: 14). Until then, the company focused its commerce along the coastal area where it acted as a government by administering justice and concluding trade agreements. The local population was only dealt with by their local rulers, until the enactment of the East Africa Order in Council 1897 which allowed the application of British laws to the local population through native courts (Ghai/McAuslan 1970:19). From then on, the legal systems in the East Africa Protectorate comprised indigenous laws, customary laws, British law, and Islamic laws. The customary legal system was created along with differentiation of ethnic groups such as the Kikuyu, Kamba, Borana, Gabbra, Turkana, Pokot, Nandi, Ogiek, and Luo. Fluid ethnic identities were no longer possible, and customary law became the norm: if someone who rejected customs and became Christian instead was still tried under customary law (Kariuki 2015:4). In the case of conflicting laws, British law was applied to disputes involving a European to demonstrate European supremacy.

Commissioners (local administrators), who were appointed by the Queen, played an important role in the colonial administration by being the chief executive officer of the territory, later called Governor and then Commander-in-Chief (Ghai/McAuslan 1970: 37, 43). His duties included the maintenance of law and order including the supervision of local laws. The Commissioner also established courts for the African population known as the native tribunals. The administration of customary law was upheld by local chiefs and councils of elders when they decided issues among their communities

(Kariuki 2015: 2). The introduction of local chiefs created an unusual power relation. The council of elders was a traditional organ that was always granted decision-making power, whereas the local chiefs were appointed by the Commissioner to decide minor cases (Ghai/McAuslan 1970: 134). The position of the chief was not autonomous and instead required loyalty to the administration. Within the communities, certain men were given more authority than they would normally have been entitled to. At the same time, those men represented communities without their legitimacy and acted on behalf of the administration. This ambiguous role opened opportunities to abuse such as the enforcement of rules for personal purposes that resulted in money exploitation, attaining authority over land, and ignoring local customs (Ghai/McAuslan 1970: 148).

The court system in Kenya was segregated into Muslim courts in the coastal region, British courts, and native tribunals (Ghai/McAuslan 1970: 164). The inferior character of the tribunals is already highlighted by its designation as such. Tribunals can be described as minor courts, that only deal with specific issues whereas courts are part of a legal system dealing with a variety of cases and are established to give their decisions. Not only were customary laws subordinated to other laws but also the procedural framework. Native tribunals lasted until 1951 and were a mixture of chiefs and council of elders as decision-making organs (Ghai/McAuslan 1970: 135). In the beginning, the tribunals only decided issues of respective social groups and applied their customary laws but in 1930 its jurisdiction was extended to all Africans living in the area regardless of their customs. Throughout colonization, lawyers were not permitted to represent the parties (Ghai/McAuslan 1970: 383). The parties had to defend themselves or could have relatives on their side for support. Professional European lawyers only became involved to exam court records from 1951 on when native tribunals became African courts which means that the parties were still excluded to have legal representation.

5. Unchanged change: maintaining the legal hierarchy

The early 1960s marked the era of independence for many African countries, and so it was for Kenya, where, following the particularly brutal Mau Mau war which significantly altered the political scene, independence was finally being negotiated. Independence was preceded extensive negotiations at the Lancaster Conferences in 1960, 1962, and 1963 with Kenyan politicians followed by a period of transition (Ochich 2011: 107). Even before then, the question of the law had proved central to the establishment of the political and economic power relations between European settlers and African

communities, which is why the conference on the "Future of Law in Africa" was held in London in 1959 to preserve them. About 60 delegates from African countries with British law as the basis of the legal systems discussed the administration of customary laws and their conflicts with British laws (Allott 1960: 14). The participants of the conference were representatives of the colonial administration working in an African country but African representatives that carried out legal functions were not included. Therefore, the discussed topics at the conference solely reflected the British side of the colonial administration in its variations in different countries but excluded the views of the local chiefs, the council of elders, and the population.

Kenya became independent on the 12th of December of 1963. The country was then ruled by the KANU party (Kenya African National Union), led by Jomo Kenyatta. After independence, most African countries extended the imported European laws to all citizens not only because it seemed more suited to fulfill international standards but to meet the requirements for independence (Mancuso 2014: 5f). Also, it was easier to find a compromise with colonial powers to adopt their western pattern of individualism and centralization of laws instead of deconstructing the colonial rules and implementing community-centered laws nationwide. Since customary laws and even more indigenous laws in Kenya were subordinated to the British laws throughout the colonial period, reforms could have led to their upgrade. Kenya's leading party enacted various reforms to fulfill the requirements for independence such as the continuity of existing laws that included foremost British laws and to adopt a constitution (Ghai/McAuslan 1970: 180). Unlike other countries, the Kenyan government did not aspire to equal status of customary law to the other existing laws in the country but kept its subordinate position in the legal order (Ochich 2011: 103).

Under Section 3 (2) of the Judicature Act 1967[1], courts were solely to be guided by customary laws. The Judicature Act is a set of rules that all courts are bound by in exercising their jurisdiction to ensure that they all apply the law in the same way. Consequently, the courts were not obliged to apply customary law, nor did they make much effort to do so, as judges and the lawyers received British training, which also kept the predominant continuity of British laws (Ghai/McAuslan 1970: 402 f). Moreover, the parties had to prove customary laws for the judges to consider them in resolving cases.

[1] The Judicature Act, 1967, http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%208. [23.3.2022]

After independence, the institution of assessors was still in place (Kariuki 2015: 8 f). During colonialism that was carried out by the local chiefs and council of elders that administered justice since they were part of the local communities and familiar with the local customs and practices. As assessors, they assisted judges to understand those customs and putting them into a context which was essential since the European judges were obliged to enforce customary law when African Courts were introduced in 1951 (Kariuki 2015:9). The importance of the assessors has changed with the Judicature Act since their opinions had no longer mandatory effect on the decision-making of the judges.

Since customs are specific to every community and that judges and lawyers were not familiar with them, they preferred to rely on the well know British laws and to disregard local customary laws (Kariuki 2015:8). The application of customary laws would have required further examination in statutory forms as well as lived customs and practices at the time of the dispute. Such an assessment on a case-by-case basis would go beyond the possibilities of a court as the judiciary organ but requires the expertise of social science. Overall, it seems more practical to continue the application of British laws if the Kenyan legal system does not embrace its legal plurality. This approach is similar in many post-independence African countries that is why African scholars such as Diala call for interdisciplinary training of judges and advocates to include history studies and anthropological methods to foster customary laws in their lived nature into legal systems (2019: 23).

The legal reforms did not lead to an integration of customary law nor its primacy instead, there was a continuity in their application during colonialism and after independence (Ochich 2011: 107). Until the new Constitution in 2010 there were no changes in the legal status of customary law and its application remained subordinated to the official Kenyan law system that derived from British law. Article 159 (2) (c) of the Constitution[2] states that courts should promote traditional dispute resolution mechanisms only if it is consistent with any written law and if it is not repugnant to justice and morality without any definition of the terms “justice” and “morality” (Kariuki 2015: 13). Furthermore, the principles of inconsistency and repugnancy were already introduced by the British administration to defer customary law in case of conflict with British laws.

[2] The Constitution of Kenya, 2010, http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=Const2010. [23.3.2022]

According to the principle of inconsistency, customary law must be equivalent to written law, which was formerly British law and later state law whereas under the principle of repugnancy, customs that a judge considers harmful to a social community and a person's physical well-being are prohibited (Kariuki 2015: 7; Ochich 2011: 122). On the one hand, Article 159 (2) (c) of the Kenyan Constitution should promote traditional dispute resolution mechanisms that derive from the practices and customs of social groups. On the other hand, it limits its application by the same restrictions imposed during colonialism, continued after independence, which upholds the inferiority of customary law in the Kenyan Constitution (Kariuki 2015: 12).

If we look back on the creation of customary law, we see that it resulted out of a negotiation process between colonial administrators and local chiefs or councils of elders who were all eager to push their personal advancement in a colonial society (Diala/Kangwa 2019: 192). Therefore, the developed customary law was a variation of local customs and practices that were not necessarily identical with the reality at that time. Since the law was foremost administered by local chiefs and the councils of elders, it was directly applied by the authorities and at the same time challenged through the parties at dispute. If the courts in the post-colonial system do not actively engage with customary law, the lack of records prevents its official development (Ochich 2011: 127). Instead, customary law remains predominantly relevant within its community without the official recognition of its rules.

Overall, there were no attempts to decolonize the law in Kenya after independence. British law prevailed, and customary law, which was an artificial creation of the colonial era, played a subordinate role in the national courts. However, local laws of the respective ethnic groups, were still not recognized. Just as the law strengthened the position of European settlers during the colonial period, it then benefited the interests of Kenyan elites and politicians who could afford to use the legal system during the post-colonial period. A large part of the population did not have access to the national legal system because the costs were too high or political pressure manipulated judges' decisions. With the independence of Kenya, it was able to enter into international agreements, which added another level to the legal plurality of African countries and created new opportunities to claim rights.

6. Beyond national boarders – Regional and global integration

The post-colonial legal order was marked by the independence of African countries when they were required to install a constitutional system (Gebeye 2007: 241). With a constitution on top of the national legal order, African countries adopted the European legal theory with its centralist approach. Research on legal pluralism in African countries focused on state law as a foreign imposition, that was superior to customary and religious laws (Gebeye 2017: 233). It reinforced the theory of legal centralism that assumed the existence of distinct parallel legal systems. While the recognition of customary law in each member state remains a national question, the interaction in the continental forum of the African Union remains on a state-to-state level between its 55 member states.

Traditionally, international law regulated state-to-state interaction, but the changing world economy expanded the research to law in the context of globalization. Instead of power-based realism, socio-legal realism came into focus to address the plurality of the international community as a collection of interests (Berman 2007: 305). The delegation of state power to private actors, that hold quasi-public/quasi-private authority expanded the perspectives of negotiated interests. In addition to Berman's concept of global legal pluralism that includes different layers of law, such as commitments of communities, state policy formation and private actors, his concept of hybrid legal pluralism centers the interaction of these players to create spaces for contestation, resistance, and adaption (Ferreira-Snyman/Ferreira 2010: 610). The pluralist approach in international law aims to create a shared social space to bring role players together to foster hybrid decision-making bodies (Ferreira-Snyman/ Ferreira 2010: 624). The hybrid legal pluralism approach legitimates the decision-making process by representing various actors and norm penetration from the domestic to international level. Shared spaces only imply procedural harmonization that is limited to substantive law but avoids the harmonization of general laws that require the transfer of sovereignty of member states (Ferreira-Snyman/ Ferreira 2010: 627).

The integration of post-colonial African countries in a global political system expanded their legal orders from local and national to regional and supranational, that interact with each other in multiple ways (Tamanaha 2008: 387). African states became members of the AU and the UN where western notions of legal centralism are manifested in state-to-state interactions. The western legal understanding prevails since African

countries adopted their legal structures and principles. In a situation of competing versions of each type of legal order, clashes occur, that lead strategic actors to intervene by exercising their persuasive powers to lend legitimacy, resource, and coercion to their cause (Tamanaha 2008: 406). Discussions on legal pluralism in the connection with international organizations usually occur in the context of harmonization of laws to facilitate the trade of goods. However, such analyzes about the AU or its predecessor the Organization of African Unity were not researched. Only in 2010 did the scholars Ferreira-Snyman and Ferreira write about the issue of legal pluralism and the African Union in their article “The Harmonization of Laws within the African Union and the Viability of Legal Pluralism as an Alternative” (Ferreira-Snyman/ Ferreira 2010).

The goal of harmonization of laws is to strengthen the internal market by removing trade barriers in certain areas such as the European Union or Regional Economic Communities of African states. The Organization for Harmonization of African Business Laws has the leading role in West- and Central Africa to set a legal framework for the approximation of laws to facilitate business affairs (Amao 2018: 78). Meanwhile, the East African Community established the East African Court of Justice (EACJ) to ensure their primary goal of trade integration in the region (Gathii 2016: 41). Business affairs not only include governments but also the private sector, who prefer administrative solutions because suing the government deteriorates their business relations (Gathii 2016: 45). Only foreign investors and well-funded businesses are even able to rely on formal business laws by affording lawyers who have the expertise to raise their claims in front of the court. However, businesses of the informal sector might not have the financial resources and they are bases on customary laws that might rely on different practices than recognized in formal laws (Gathii 2016 49ff).

Instead, human rights groups established the jurisdiction of EACJ on human rights cases through their litigation strategies (Gathii 2016: 54). They supported lawyers and litigants even though the EAC Establishment Treaty[3] was not clear on the EACJs competence by declaring “human rights and other jurisdiction […] will be determined by the Council at a suitable subsequent date” (Art 27 (2)). The judges decided on their competence in human rights cases which lead to their predominance since businesses are reluctant to rely on the court. As a result, the EACJ does not carry out a role in

[3] The Treaty for the Establishment of the East African Community, 30th November 1999, https://www.eacj.org/?page_id=33#toc-article-27-jurisdiction-of-the-court. [23.3.2022]

harmonizing laws anymore but promotes and protects human rights instead. Human rights organizations became strategic actors in bringing human rights cases to the court to strengthen its jurisdiction and thus increase pressure on governments to comply with human rights.

The specific issue of the "*African Commission on Human and Peoples' Rights v. Kenya*", on which this thesis focuses, demonstrates not only the ways various legal orders compete with each other but also the way local, national and international, as well as state and non-state actors interact with each other. It is a human rights case that was filed due to evictions of Ogiek people, an ethnic group living in the Mau Forest with about 20,000 members (Ogiek Judgement, para 6). On the national level, the right to land on the basis of community interest, ethnicity, or culture is protected in Article 63 of the Kenya's 2010 Constitution but the Ogiek community did not have a recognized status as a protected group (Ogiek Judgement, para 146). On the international level, the Kenyan government committed itself to the African Charter including the right to property under Article 14 and the right to culture under Article 17 that apply regardless of the recognition as a social group.

At stake in this case are the human rights of the Ogiek people in the Mau Forest, which were violated by the British administration during the colonial period and later by Kenyan governments. Although the Ogiek communities have been oppressed throughout history, it was only the Kenyan government's international human rights commitments that provided an opportunity to claim their rights before an international court. In particular, it was the African Charter, on the basis of which important human rights institutions have been established for the benefit of minority communities like the Ogiek people. In the 1980s and 1990s, an international human rights movement emerged to pressure dictator-ruled countries to initiate political, social, and economic reforms (Mutua 2009: 17 f). During these years the African Charter came into force in 1986, the Kenyan government ratified it in 1992 and therefore transformed its contents into national law, and legal activists formed human rights NGOs to defend democratic values. NGOs became agents of threatened communities by monitoring governmental compliance with human rights (Mutua 2009: 18).

Members of NGOs belong to the privileged group of the population, since they can secure a livelihood through their work and have a legal education. However, the victims of human rights violations are usually minority groups, who are dependent on the help

of NGOs due to their weak position in the society. For this reason, structures within the organizations are necessary to ensure good communication between the victims and their representatives in order to advocate for them effectively (Mutua 2009: 34). In the Ogiek case, three NGOs were involved in filing the complaint in front of the African Court on Human and Peoples' Rights (African Court), the local NGO Ogiek Peoples' Development Program (OPDP), the Kenyan NGO Centre for Minority Rights Development (CEMIRIDE) and the British NGO Minority Rights Group International (MRG) (Ogiek Judgement, para 3). The international network of human rights NGOs gave them the power to create public and political pressure on national governments to respect human rights which the Ogiek people used to fight their forced eviction from the Mau Forest.

The theoretical framework on legal pluralism showed the emergence of legal pluralism in the 1970s as an intersection between anthropology and law, contrary to the legal positivist understanding of law, which acknowledges only state law. The legal positivist approach also prevailed when the Europeans conquest African societies and imposed their view of ethnicity, law and order upon them. The colonial encounter also brought opportunities for local elites, council of elders, and chiefs to assert their economic interests in their role of intermediaries between the British administration and their respective communities. Despite language barriers, ambiguities in terminologies, and the fact that British legal concepts did not fit the local conditions, the colonial administration created a set of rules for African communities based on their alleged customs. The subordinate role of those created customary laws subsequently exemplified the inequality between European settlers and African communities. During the independence negotiations representatives of the British government and of the interim Kenyan government agreed to maintain the existing laws with the subordinate role of customary law to British law, which became state law.

Legal pluralism in Kenya consisted of local laws of African communities, customary law, state law, to which international law was added with the membership in the UN and the AU. With the several existing legal regimes in a country, there are also different possibilities to assert rights, be it through eldest councils, national, regional, or international courts. Land as a necessary resource for livelihood as well as economic income played an important role in national politics. The analysis of the Ogiek case will show how they were deprived of their land during the colonial period, how they were

fighting for recognition of their land rights in national courts and then ultimately in the international African Court.

Chapter 2: Caught in a web of legal frameworks: the Oigek people's land struggles

The central issue of the case *"African Commission on Human and Peoples' Rights v. Republic of Kenya"* was the recognition of Ogiek peoples' land rights in the Mau Forest. The Ogiek people of the Mau Forest are a Kenyan ethnic group of about 20,000 members that pursue their traditional way of life through hunting and beekeeping. The Mau Forest is the largest of five water towers in the country with the largest forest cover. The primary settlement of the Ogiek community was already documented in colonial records when the British administration declared the Mau Forest a protected conservation area in 1932, one of the so-called Crown Forests which became state ownership after independence (Musembi/ Kameri-Mbote 2013: 13 f). Access to land enables housing, food, economic independence and to secure the livelihood through land rights enable community development in the form of education, the construction of medical facilities and infrastructure.

The Ogiek communities have been deprived of their ancestral land ever since European settlers claimed the Mau Forest for themselves and evicted them. The colonial administration advocated for the European settlers and secured their land rights through their governance. Continuous dispossessions and forceful evictions followed that have driven them into poverty. After Kenya's independence in 1963, the land issue persisted, and further land reforms complicated their claim to their land while their living conditions deteriorated. The respective political leaders distributed land titles to political allies to secure their support. It was only with the human rights movement in the 1980s and 1990s, which advocated for the protection of fundamental rights, that the Ogiek communities found allies to support their cause. It led to the enactment of the African Charter on Human and Peoples' Rights in 1986, the creation of the African Commission on Human and Peoples' Rights in 1987, and to the creation of NGOs to monitor states' compliance with human rights.

1. Institutionalizing indigenous rights in African contexts

The international indigenous rights movement is rooted in the US and Canada, where since 1974 organizations promote indigenous rights (Majekolagbe/ Akinkugbe 2018: 22). Indigenous rights are part of human rights protecting communities that are culturally distinct from the dominant majority society with a focus on cultural rights, land rights

and the use of natural resources. Due to the similar history of invasion in the US, Canada, and Australia, where indigenous people were almost extinct by Europeans, those states were in the forefront of the international indigenous rights movement. The United Nations Working Group on Indigenous Populations was established in 1982 and provided a platform for indigenous communities to express themselves and address the UN with their concerns. When a Massai community from Tanzania joined the UN Working Group on Indigenous Populations in 1989, the first African representative became part of the indigenous movement (Majekolagbe/ Akinkugbe 2018: 22). In Kenya the Endorois people, the Sabaot people, the Pokot people, and the Ogiek people, among others, identify themselves as indigenous peoples, all of whom are primarily located in the Rift Valley province (Ndahinda 2016: 36 f; Zips-Mairitsch 2013: 392).

Since 1987, the African Commission on Human and Peoples' Rights (African Commission) was the only human rights body of the African Union until the African Court on Human and Peoples' Rights delivered its first judgment in 2009 (Zips-Mairitsch 2013: 101, 107). Based on Article 30 of the African Charter the African Commission was established "to promote human and peoples' rights and ensure their protection" in African countries and to interpret all provisions of the African Charter upon request (Article 45 (3) African Charter). The African Commission is a quasi-judicial body, since it can only make recommendations to state parties that violate human rights, which are not legally binding.

The African Commission joined the international indigenous movement in 1999 and since then promotes indigenous people's rights in African states (Ndahinda 2016: 33). The African Commission established the Working Group on Indigenous Populations in Africa[4] and published an Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples in 2007[5], granting all African people the status of indigeneity (Majekolagbe/ Akinkugbe 2018: 23 f). Nevertheless, the concept of indigenous people has been contested in African countries. Legal scholar Ndahinda criticizes the confusion of peoples' rights as indigenous rights by the African Commission just to follow the international movement in fostering the latter in the African human rights system (Ndahinda 2016: 30). He argues that the application of peoples' rights to all ethnic

[4] ACHPR/Res.51(XXVIII)00, https://www.achpr.org/sessions/resolutions?id=56. [23.3.2022]

[5] African Commission (2007): Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, https://www.achpr.org/public/Document/file/Any/un_advisory_opinion_idp_eng.pdf. [23.3.2022]

groups regardless of their indigenous status is unnecessary and that the African Commission failed to conclude what collective identities constitute peoples to differentiate when indigenous rights apply (Ndahinda 2016: 54 f).

That indigenous peoples' rights are integrated into human rights is a strategic advantage in their advocacy. Local, national and international human rights organizations are well connected and support each other in their respective capacities to create political pressure and to take legal actions. In the Ogiek case, three non-governmental human rights organizations worked together in filing the complaint to the African Commission. the local organization OPDP, the Kenyan national human rights organization CEMIRIDE, and the international organization MRG. Individuals and NGOs are not allowed to file a case before the African Court, that is why they had to address the African Commission first, who could then defend the Ogiek community in the proceeding before the African Court against the Kenyan government. CEMIRIDE and MRG already had experience in the legal action brought before the African Commission when they filed a complaint about human rights violations by the Kenyan government on behalf of the Endorois community.

Since indigenous groups in African countries are more concerned about issues of political and socio-economic marginalization, the UN Declaration on National, Ethnic, Religious and Linguistic Minorities is an alternative framework that could have been applied instead of the concept of indigenous people (Majekolagbe/ Akinkugbe 2018: 17). While the concept of indigeneity requires the "priority in time" the minority concept focuses on the conditions of "long ancestral, traditional and spiritual attachment and connections to the lands and territories" as well as the core features of "numerical inferior, non-dominance, distinct ethnic, religious and linguistic characteristics" (Majekolagbe/ Akinkugbe 2018: 27). The minority concept is the politically accepted one, since it is not possible to distinguish between indigenous Africans and non-indigenous Africans. The UN Declaration on the Rights of Indigenous Peoples (UNDRIP)[6], which was adopted in 2007, just provides a broader scope of rights and is preferred by advocacy groups whereas minority rights are narrower (Majekolagbe/ Akinkugbe 2018: 28).

Regardless of the discussion of whether the international indigenous peoples' framework is suitable for African countries or not, it is used as a tool for political persuasion

[6] A/Res/61/295 (2007), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/512/07/PDF/N0651207.pdf?OpenElement. [23.3.2022]

(Majekolagbe/ Akinkugbe 2018: 26). The NGOs CEMIRIDE, MRG and OPDP sought access to legal rights, in particular land rights on behalf of the Ogiek people of the Mau Forest based on their indigeneity. Central to their struggle was the recognition of the land rights to their ancestral territory in the Mau Forest. By rendering the judgment on the Ogiek case in 2017 the African Court did not engage with the discussion on the concept of indigenous people due to its political dimension but only focused on judicial issues of the case (Majekolagbe/ Akinkugbe 2018: 4). The African Court is the judicial body of the African Union and therefore one of the regional human rights courts together with the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR). The African Court reinforces and complements the functions of the African Commission by making binding decisions rather than merely recommendations. However, the African Court is required to balance political and judicial interests because it relies on the cooperation of the states (Majekolagbe/ Akinkugbe 2018: 8). This fact makes the independence of the African Court questionable, as any court case in favor of the applicant has negative impacts on the states but its existence depends on the political will of the state's leaders.

Through the African Commission's long working experience, it has determined human rights jurisprudence over the years and seeks the African Court's affirmation of its decisions. At the same time the African Court did not have much jurisprudence on human rights cases because it was newly established and started operating in 2009. The work of the African Commission and the African Court are therefore connected to each other since they have the same goal, which is to strengthen the jurisprudence of human rights. The African Commission's reasoning for the Ogiek case reflected its own case law form the Endorois case, which also involved an indigenous group in Kenya who claimed their rights to their ancestral lands.

2. The African Commission on indigenous rights: the Endorois case

The Endorois case[7] was the landmark decision of the African Commission in 2009 by granting indigenous rights over ancestral land (Ndahinda 2016: 30, Claridge 2019: 268), not to confuse it with the first decision of the African Court on indigenous rights in the Ogiek case in 2017. The Endorois case and the Ogiek case deal with the same

[7] African Commission on Human and Peoples' Rights (2009), 276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council)/ Kenya. https://www.achpr.org/public/Document/file/English/achpr46_276_03_eng.pdf. [23.3.2022]

issues of human rights violations by the Kenyan government by addressing indigenous rights, land rights and arbitrary evictions. The Endorois people are a Kenyan ethnic group comprising about 60,000 people (Claridge 2019: 269). The Kenyan government evicted and dispossessed the Endorois in 1973 to later create the Lake Bogoria Game Reserve in 1978 (Claridge 2019: 269). The Endorois community challenged the eviction all the way to the Kenyan High Court who decided in favor of the Kenyan government in 2002. It determined that customary claims to the land had been extinguished due to the designation of the area as a game reserve (Claridge 2019: 269).

After national legal remedies were unsuccessful, the NGOs CEMIRIDE and MRG presented the case before the African Commission on behalf of the Endorois community. These NGOs also brought the case before the African Commission on behalf of the Ogiek community. The case was decided by the African Commission since the African Court was not in place at that time when the procedures started in 2003 and the African Commission was the central organ to settle human rights issues (Endorois Judgment, para 23). According to its judgment, the Kenyan government violated the state obligation to implement the African Charter (Article 1), the right to free practice of religion (Article 8), the right to property (Article 14), the right to culture (Article 17), the right to free disposition of natural resources (Article 21) and the right to development (Article 22).

In the Ogiek case, the African Court ruled on the same human rights violations and additionally on the right of non-discrimination under Article 2 of the African Charter. The precedent of the African Commission's Endorois judgment was a good basis for argumentation in the Ogiek case, to which reference was made several times, as the aim was to strengthen human rights jurisprudence within the African. However, the African Commission found that the Kenyan government violated the human rights of the Endorois by evicting and not paying them adequate compensation for events that occurred before 1992 (Ndahinda 2016: 39). The findings of the African Commission are inconsistent with the fact that the Kenyan government ratified the African Charter in 1992, which means that the Kenyan government should not be held responsible for human rights violations under the African Charter when it was not in force (Ndahinda 2016: 39).

The decision shows a strong emphasis on human rights protection by declaring a violation of the African Charter that predates its ratification. At the same time, it assures

that Ndahinda raised legitimate concerns in the African Commissions' approach of the promotion of indigenous rights in African countries without differentiating the concept of indigeneity and minority. Although the Kenyan government did not even vote for the UNDRIP the African Commission applied the definition of indigenousness based on the declaration in the Endorois case and further did also the African Court in the Ogiek case (Majekolagbe/ Akinkugbe 2018: 19f; Ogiek Judgment para 126).

The central issues in the Endorois case as well as in the Ogiek case were land. Both communities resided on land owned by the Kenyan government that took administrative actions which were detrimental to the respective communities and violated their human rights. The complex situation of land rights is rooted in the colonial period when the British administration manifested legal ownership of fertile land for their economic advantage and did not grant African communities the status of ownership to their land so they would always remain at risk of forced evictions.

3. Unravelling the land issue: a historical overview

The land is a highly disputed subject in African countries since colonial times. With the East African Land Regulation of 1897, the British administration secured land ownership for European settlers. According to the regulation native rights to land were only temporary and under the condition of actual occupation of land (Kameri-Mbote/ Kindiki 2008: 176). Consequently, free land constituted land that was not occupied at that moment of appropriation, despite the fact that nomadic communities only remain on land for seasonal periods and leave to allow its regeneration (Ohenjo/ Majid 2019: 7). Pastoralism and hunter-gathering communities depend on large tracts of land for seasonal occupation. The misconception that land ownership depended on physical occupation ignored the nomadic or semi-nomadic nature of indigenous livelihoods (Ohenjo/ Majid 2019: 4). As a result, the Ogiek communities were wildly dispossessed due to their pastoralist and hunter-gatherer livelihood, they searched for water, food, and pasture in a wide area which made their lands seem “unoccupied”.

Since the beginning of the British settlement, the law was instrumentalized to secure land interests and legitimize them through legal regulations (Kameri-Mbote/ Kindiki 2008: 174). Several land tenure reforms followed to foster property relations such as the Crown Lands Ordinance of 1915 that declared all land within the protectorate to be Crown land regardless of natives’ occupation and the Native Trust Bill of 1926 which designated certain areas for exclusive use by Africans (Kameri-Mbote/ Kindiki 2008:

177 f). The application of the British concept of ownership introduced private property rights which became essential in the administration of land. Property ownership was designated to the state to secure superior rights and only granted rights of use for cultivation of the land. This approach secured land ownership for a small number of European settlers on the one hand and user rights for a large African peasantry on the other (Kameri-Mbote/ Kindiki 2008: 174). In fact, communal tenure was granted to African communities but was unregulated, however colonial authorities enjoyed individualized tenure based on British laws (Kameri-Mbote/ Oduor 2009: 172). Effectively, the laws on private property manifested European settlers' right to land while the communal tenure left African communities in an uncertain legal position.

Land tenure reforms were popular political instruments to foster property relations in favor of European settlers such as the Kenyan Land Commission of 1933 which set the basis for native reserves. African peasants could only acquire user rights in their designated native reserves to prevent their migration, in the meantime the best quality of land was allocated to European settlers known as White Highlands (Kameri-Mbote/ Oduor 2009: 171; Kanyinga/ Lumumba/ Amanor 2008: 102). Displacing the African population in reserves lead to the migration of male members of the respective communities to plantations and urban areas to seek paid employment, while women who were left behind in the reserves took on the role of managers of the local environment (Kameri-Mbote/ Oduor 2009: 181).

For the Ogiek people the struggle for their land rights were fostered when they were not granted the tribal status in the Kenyan Land Commission. In 1933 the Ogiek communities were not recognized as an ethnic group and therefore did not receive a native reserve in further settlement schemes (Musembi/ Kameri-Mbote 2013: 7). Contrary to the ethnic groups that were considered “tribes”, the political perception of the Ogiek people was determined by their lacking legal status and their threat to the environment. The Land Commission concluded their forced assimilation into other ethnic groups (Ohenjo/ Majid 2019: 5). Contrary to the assumption that the Ogiek people posed a threat to the natural environment, their livelihood depended on the land, so they were conservators of the forest by keeping its balance of usage and recreation which was later ascertained through a national court in the Civil Case 238 of 1999 Kemai & 9 others v Attorney General & 3 others (Ohenjo/ Majid 2019: 13).

The British administration prevented an improvement of the living situation for the African population in order to preserve the advantage of the European settlers, be it in land ownership or in the market economy. In the native reserves land resources were not enough. The most fertile lands that were colonized were located in central Kenya where most of the Kikuyu population lived. The demand for more land in the reserves grew due to the increase of the population living there and to produce more (Kanyinga/ Lumumba/ Amanor 2008: 102). Providing more land to the people in the reserves would mean taking land from European settlers, which was not pursued by the British administration. Although the boundaries of the native reserves were intended to prevent migration, the alienation of the Kikuyu people's land led them to migrate primarily to the Rift Valley region, where they remained as squatters on land allocated to European settlers (Kanyinga/ Lumumba/ Amanor 2008: 102). Squatters worked on the farms of European settlers. They were able to secure their livelihood not through their low wages, but through the sale of their products. Since this made them competitors with the settlers whose land they farmed, the administration again protected the interests of the settlers (Berman/ Lonsdale 1992: 107). Regulations followed that limited the work of the squatters on servitudes.

The Rift Valley province of western Kenya became home to many ethnic groups for whom the land played a central role. It was the ancestral land to the Endorois people, the Sabaot people, the Pokot people, and the Ogiek people, who claim their land rights based on pre-colonial usage (Hornsby 2012: 59). Additionally other ethnic groups moved to the Rift Valley as squatters to cultivate the land. Unlike the indigenous people and the migrated people, only the British Crown and the European settlers had land rights. After independence, Crown Land became state land, and the European settlers were gradually replaced by privileged groups benefiting from their political affiliation to the new independent regime.

4. Political dimensions of land rights

Land rights have been at the heart of the formation of political organizations in Kenya. Early political organizations emerged in the late 1910s, such as the East African Association (EAA), created in 1919, which presented different ethnic groups in their resistance to colonial rules such as hut-tax, forced labor, and the passbook for identification and ended after the Nairobi riots in 1922 (Ajulu 2002: 255). The Kenya African Union (KAU), created in 1946, had larger nationalist ambitions but comprised the

educated elite, the trader class, and the labor movement and focused on the politics for the elite, the urbanized, educated society (Ajulu 2002: 255 f). Even though KAU appeared representative for Kenya's population it did not include the population outside the urban area such as nomadic or semi-nomadic ethnic groups (Ajulu 2002: 256). The elitist group of that time no longer consisted only of influential people such as council of elders, chiefs and important merchants, but included the first generation of people who had completed secondary education (Hornsby 2012: 57). Nevertheless, these people were either children of chiefs, Christian families or individuals with strong material assets, and had in common the relationship with the colonial administration. They were trained in Kenya or in other colonies on the European model to become teachers, administrators, civil servants, health workers or lawyers (Hornsby 2012: 57).

Most importantly perhaps, these political organizations all defended a constitutionalist, moderate approach to the question of land owning. It was therefore not long until the Mau Mau war was declared in 1952, as some, the so-called Mau Mau fighters, considered land had to be immediately decolonized and given back to indigenous populations, through violent means. During the Mau Mau war, a ban on political party activities was imposed until 1959 (Ajulu 2002: 256). Meanwhile, the British administration had already started planning land redistribution, enacting the Native Land Tenure Rules of 1956 on the basis of the Swynnerton Plan of 1954 to intensify the agricultural development as a reaction to the Mau Mau movement. Accordingly, only the land rights of registered landowners were recognized, which led to the denial of land rights for landless and not registered people (Kameri-Mbote/ Oduor 2009: 174f). The rules only permitted the registration of individuals and therefore limited landholdings of families to one landowner. In the consideration of which family member should be registered the decision usually fell on the eldest son or a male head of household (Kameri-Mbote/ Oduor 2009: 175). Even though the laws were gender-neutral, they created a situation of de facto discrimination. In fact, less than one percent of women even had title deeds to land in Kenya (Kameri-Mbote/ Oduor 2009: 178). In the end, the Swynnerton Plan failed to resolve the issues at that time.

The problems of land alienation, unequal ownership between European settlers and the African population and within African communities were not addressed. Instead, land redistribution served to strengthen the connection between British colonial officers and a moderate Kenyan elite (Angelo 2019: 139 f). Chiefs, so-called "loyal" politicians

(loyal to the British administration) and wealthy individuals purchased more land and gained individual land rights through registration (Karuti/Odenda/Kojo 2008: 105 f). The Native Lands Registration Ordinance of 1959 was the last legal regulation on land that was implemented by the colonial administration. It enacted a trusteeship over land and duties of registered proprietors as trustees according to the British laws that did not include customary notions of trusteeship (Kameri-Mbote/ Kindiki 2008: 180). According to the Ordinance, a first registration could not be challenged. Besides the fact that under the Ordinance, five people could be named as owners of the land, families usually chose one person within the family to be registered (Kameri-Mbote/ Kindiki 2008: 181). Under those circumstances, elder male family members represented their families and therefore registered as landowners (Kameri-Mbote/ Kindiki 2008: 181). If women and younger men had rights of use under customary law, they were legally excluded from controlling the land. Even though the regulation did not aim at fostering gender inequalities, it caused it as a side effect by centralizing the power of the family on the registered person that could access land rights as the most economic resource of the family and who could not be deprived of them in case of mismanaging (Kameri-Mbote/ Kindiki 2008: 181).

Severe land conflicts issues and historical injustice persisted after independence (Kameri-Mbote/ Kindiki 2008: 178). The land question was highly discussed in the Lancaster House independent talks, but discussions centered on how to ensure European settlers' property rights in post-colonial Kenya (Angelo 2019: 141). Following Kenya's independence in 1963, the land issue remained central. A series of resettlement schemes were meant to resolve the injustices committed to displaces communities during colonialism (Kameri-Mbote/ Kindiki 2008: 184; Musembi/ Kameri-Mbote 2013: 6). Still, land redistribution remained extremely politicized and untransparent; for the largest part of the population, access to land was scarce and economic inequalities were strengthened.

The redistributions schemes were based on the market system which only led people with financial means to acquire land and neglected ethnic groups like the Ogiek people, which were continuously dispossessed from their land and therefore not even able to build economic capital (Kameri-Mbote/ Kindiki 2008: 184). The free-market system to acquire land created even more disparities in the society comprising a rich elite and poor pastoralist communities.

5. Ethnicities for politics vs politics for ethnicities

The years before independence marked a multi-party-political setting in Kenya competing against each other for the negotiation of a new constitution with the British administration at the Lancaster House between 1961 and 1963 and to take over the subsequent governance of the country. The parties involved were the Kenya African National Union (KANU), which defended a bigger ethnic group and a centralized state and the Kenya African Democratic Union (KADU) representing ethnic minorities which defended regionalism (Ghai/ McAusland 1970: 182 f; Karuti/ Odenda/Kojo 2008: 108 f). KADU promoted the federal project of controlling land called "majimboism" to create provincial autonomy based on ethnicity (Ajulu 2002: 258; Kameri-Mbote/ Kindiki 2008: 186).

Land was the real topic of the majimbo debate, as settlers, landless people and the new African leaders wanted access to available white farms and Crown land (Hornsby 2012: 68). The Rift Valley area was in particular affected since other ethnic groups settled in the region during the colonial period in addition to indigenous groups (Anderson 2005: 552). The Rift Valley Province comprised a large area in western Kenya from north to south of the country, including the Mau Forest. The support for KADU's regionalism project was limited to the Rift Valley region and the coastal region (Anderson 2005: 554). When the federal constitution initially received approval at the Lancaster House negotiations, it was a matter of defining regional boundaries that had previously been irrelevant to the British administration during the colonial period. Specially, in areas where diverse populations lived, such as the Rift Valley region, communities claimed their historical precedence and recognized status. Evidence included colonial documents for status and rights, ancestral lines of chiefs for evidence of political power, and research studies as sources of ethnicity and kinship (Anderson 2005: 558). Instead of relying on local knowledge, colonial constructs were used as evidence on which regional boundaries, and thus access to land rights, depended.

Throughout the post-colonial period, the land question remained a central issue, and instead of resolving it, the government intensified it through political maneuvering of the land issue around ethnicity. At the election in May 1963 KANU won with a majority vote with Jomo Kenyatta as their party leader who one year later became the first president of the Kenyan Republic (Anderson 2005: 561). When KADU dissolved and joined KANU, Kenya became a one-party state from 1964 until 1992. From then on,

the competition for political control in post-independence Kenya took place within the same party and focused even more on ethnicities to defend and to advocate for political interests (Ajulu 2002: 259). The KANU government introduced a centralized government instead of the federal system under "majimboism". Jomo Kenyatta, the first president of independent Kenya and of Kikuyu ethnicity fostered his patronage networks through the political use of land to reward his allies and to ensure their loyalty. He favored particularly the Kikuyu elite during his presidency by allocating land titles to them or by putting them into leading positions creating a power structure around his authority (Kameri-Mbote/ Kindiki 2008: 184).

The Kenyatta regime introduced a land purchase program on the one hand and resettlement schemes on the other. The land purchase program enabled land acquisition by people who had the economic means and thus concentrated land ownership among capitalist farmers and politically influential people (Karuti/Odenda/Kojo 2008: 112). The resettlement schemes centered the struggle for land between land owning and landless ethnic groups. Since the Kikuyu population, one of the largest ethnic groups in Kenya, were most affected by land alienation during the colonial period in the so-called "fertile highlands", they were allocated land under resettlement schemes, but also interfered with schemes intended for other ethnic groups through political support (Karuti/Odenda/Kojo 2008: 113). This practice arbitrary land allocation continued during the following governments, so that the majority of Ogiek people did not receive land according to the resettlement schemes.

Ethnic tensions continued to be fueled by responding to local land demands by granting land to non-locals to create a political power structure. When Daniel arap Moi became Kenya's second president in 1978 (he would remain in power until 2002), he secured his power structure by rewarding elites from different ethnic communities with land he considered strategically important (Anderson 2005; Karuti/Odenda/Kojo 2008: 117). As a member of the Kalenjins people, Moi allocated public and private investments such as roads, educational infrastructure, and agricultural investments to projects in the Rift Valley area, their ancestral land (Ajulu 2002: 263). Forest land, which was Crown Land during the colonial period continued to be legally owned by the government, regardless of the ancestral connection of indigenous people to the land. This public forest land, such as the Mau Forest, was popularly allocated for allotment to political allies, continuing under the guise of resettlement schemes. In a 1997

resettlement, Ogiek communities should have been relocated on 1,812 hectares of forest land which only a small number of Ogiek members received while most of it was allocated to wealthy individuals and companies (Karuti/Odenda/Kojo 2008: 117).

The government under the presidency of Mwai Kibaki between 2002 and 2013 established a National Land Commission to study the land issue in Kenya in light of a new constitution that recognized that the Ogiek communities had not received their allocated land (Karuti/Odenda/Kojo 2008: 121; CSA para 37). Despite the findings, the Forest Service of the Kenyan government issued the 30-day eviction notice in 2009 the inhabitants of the Mau Forest, that was later contested before the African Court from 2012 until 2017 on behalf of the Ogiek people. The report of the National Land Commission showed that the land issue was embedded in the colonial legacy of land policy, economic interests, and political processes, but excluded the landless to whom land reforms were targeted (Karuti/Odenda/Kojo 2008: 121). The analysis of the land issue during the different presidencies indicated that ethnic groups rely on political representation and allies to access land rights, the dispossession of which placed them in precarious living conditions.

6. Socio-economic consequences for the Ogiek people

Historical injustices through lack of access to political power, forced assimilation, indiscriminate evictions led to the poor living conditions of the Ogiek people today. Since independence, the Ogiek population was not recognized as a tribe which hindered them to claim their land rights in the Mau Forest due to their lack of legal recognition (Claridge 2019: 270). Despite the profits of commercial logging of the Mau Forest for which all three Kenyan presidents granted his political allies land rights, the Ogiek people were excluded from the benefits even though they were deprived of their livelihood (Claridge 2019: 270). The continuous evictions prevented the Ogiek communities to establish a secure standard of living and accessing their ancestral land to practice their religious and cultural rights. The following memory of an Ogiek elder demonstrates the violence that went along with evictions, that not only lead to the loss of property but also the loss of lives:

> After several discussions with former President Moi, we were to get land on which to settle…. a census was conducted, and it was established that the Ogiek were 976 families. We had suffered violent evictions in 1966, during which I lost my wife who had just delivered. She was thrown into a police lorry like a sack of

> cereal, without any care in the world, even after the police had been informed that she had just delivered. They did not care. In 1981, after a lot of suffering, the then District Commissioner called Ogola declared all land around here on the edge of the forest to belong to the Ogiek community, and said that documentation will be processed. However, the then Provincial Commissioner would hear none of it! He insisted that we must mix with other communities and when we resisted, we were once more violently evicted. This trend continued through 1986 when the then President, Daniel Arap Moi ordered that our claim to the land that we previously occupied be recognised. However, this directive was again interfered with when government officials, instead of setting up a reserve for the Ogiek, decided to have a settlement scheme, so as it provide[s] opportunities for settling people from other communities. (Ohenjo/ Majid 2019: 11).

The story of the Ogiek elder shows that political representation is of particular importance to raise issues on county and national levels and to find adequate solutions that serve the Ogiek society instead of politicians that manage to assert personal goals. Since the Ogiek people were not a recognized ethnic group they were also excluded from decision-making processes. Article 56 of the Constitution requires representation and participation of minority groups in governance but there are no representatives or only a few that do not have any influence (Ohenjo/ Majid 2019: 17). Ogiek communities are thus dependent on the goodwill of politicians, which has not led to any positive developments throughout the post-colonial period.

The forceful displacements of the Ogiek also led to the continuous disruption of school life that resulted in a high illiteracy rate in the community which prevents members of the Ogiek community to participate in political activities (Ohenjo/ Majid 2019: 13). That means that children regularly dropped out of school due to eviction and remained in poor living conditions since they could not pursue further education that would allow them to find secured working opportunities. An Ogiek father of four children explained the consequences of the evictions on their education:

> […] My children have not gone to school properly because of this. This is because I do not have sustainable income since I depend on goodwill of people to volunteer their pieces of land for me to farm so as to get some little money to clothe and educate my children. If I owned my own land, I would have been able to better organise myself. But because of this my first born dropped out of Class

> 7 and got married and right now he has five children, who also because of instability, their education is frequently disrupted. My two other children are in Class 7 and another one Class 6. But they are learning through difficulties. The school they attend is more than two kilometres away, and most of the time they go without lunch. It is a hard life. (Interview with Wilson Warionga at Marioshoni on 11th July 2018) (Ohenjo/ Majid 2019: 17)

If it was even possible for parents to send their children to school, they usually favor the boy to get the education. In certain cases, girls were being educated nevertheless they are more likely to face unemployment (Ohenjo/ Majid 2019: 21). Although Kenya's 2010 Constitution introduced a progressive land regime, the three land tenure systems of community, private, and government, the discussions about women's rights to land were very contested (Kameri-Mbote 2018: 36). The debates showed the entrenched customary patriarchal norms that justified the opposition to women's rights to the land because women's access in rural areas depends on their relationship with male family members or their husbands. For this reason, a claim to land has not included women, as they are not even entitled to own land within the community (Kameri-Mbote/ Oduor 2009: 192).

Within the Ogiek society, women are the most affected by the continuous evictions that impact their socio-economic status and preserve patriarchal structures. Ogiek people have always been forest-dwelling hunter-gatherers but adapted their lifestyle to farming throughout the colonial and post-colonial period (Kameri-Mbote/ Oduor 2009: 188). However, frequent evictions led to the loss of livestock such as cattle, goats, and sheep and the loss of cultivation. Effectively, the communities have become more affected by poverty because they could not sustain their living standard. The precarious living conditions hinder particularly women's development towards a self-determined way of life. Instead, they are married off as children, have no school education, and are thus forced to remain in poor living conditions, dependent on the man of the household.

Even when Ogiek members provided their expertise on the Mau Forest to government institutions by taking on the task of conservators, they did not receive a salary for it and thus could not secure a livelihood through a regular income (Ohenjo/ Majid 2019: 16). The Forest Conservation and Management Act, 2016[8] provides that state control

[8] Forest Conservation and Management Act, 2016, http://www.kenyaforestservice.org/documents/ForestConservationandManagementActNo34of2016.pdf. [23.3.2022]

ensures an effective and sustainable framework for long-term planning and policy implementation. The Act provides for community participation under section 48 with registered community forest associations that are bound to fulfill administrative requirements such as a list of members, financial resources, and a constitution of the association. The participation is therefore aimed at associations as legal entities and not at indigenous groups. Compared to government employees who carry out the task of forest management, the Ogiek people saw themselves in the best position to take on the community management of the Mau Forest due to their long occupation and knowledge of it (Musembi/ Kameri-Mbote 2013: 18). Through community management, members of the Ogiek communities could get official responsibility as caretakers of the forest but without a regular income their livelihood remains at stake. The following statement shows the contribution of an Ogiek member to the conservation of the forest:

> My work involves protecting the forest from destruction and generally I guard against charcoal burning and other destructive practices like people encroaching into the forests. If I get anyone burning charcoal, I can arrest that person, using my other scouts, after which I will inform the Forester to assist in the prosecution of such an individual. Members of the Ogiek community have a lot of experience in forest conservation and protection because as a community, they diligently protected these forests. The government found unadulterated forests because of the Ogiek conservation skills of my forefathers. I am not however paid for this work, am just volunteering even though I have been trained by OPDP and Kenya Forest Service (KFS). (Interview with Daniel Prengei at Marioshoni on 11th July 2018) (Ohenjo/ Majid 2019: 16)

The expertise of the Ogiek member in forest conservation is based on his community knowledge and additionally, he carries out executive power by arresting people who endanger the forest. Unfortunately, his contribution remained voluntary even though he assisted the governmental organization Kenya Forest Service to perform their duties. Ultimately his work effort was neither renumerated nor could he realize a better standard of living. The socio-economic conditions of the Ogiek people are characterized by the lack of political representation, persistent violence by government officials during evictions, early marriages of women, lack of education, and lack of recognition of local knowledge, which altogether threatens their livelihoods.

The chapter demonstrated that the land struggle of the Ogiek people is rooted in the interconnections between politics, ethnicity, law and land. Instead of correcting historical injustices of the colonial administration, the governments under Kenyatta, Moi and Kibaki maintained them and granted the influential African elite access to resources to secure political power structures and increase economic wealth. Land is the essential resource to make profit and to secure a livelihood but since the colonial period it required agency to access it. Political officials gave land to allies and secured their rights through title deeds. Ethnicity played a role because it simulated kinship with decision making officials and was thus a means of obtaining land rights. Even though the Ogiek people were left out in the land allocation throughout the colonial and post-colonial period, the indigenous rights movement provided a possibility for them to claim their rights. Their agencies became the human rights organizations OPDP, CEMIRIDE and MRG and foremost the African Commission who promotes the protection of their fundamental rights within the African Union and defended the case before the African Court. The judgment on the Ogiek case by the African Court from May 26th, 2017, is unique because it is the first time that the Ogiek people have been awarded the right to their ancestral lands in the Mau Forest, which has been denied to them before. It is also the first time that the African Court has ruled on indigenous rights and therefore setting a precedent for future land disputes involving indigenous groups.

Chapter 3: "African Commission on Human and Peoples' Rights v. Kenya": examining legal documents

This chapter presents the procedure of the Ogiek case before the African Court, focusing on the legal documents to show the steps taken by the parties before the African Court rendered its judgment. The interplay between three NGOs, the African Commission and the African Court, all human rights institutions involved in the case, will show their different capacities. The NGOs had initiated the first phase of the proceedings at the African Commission after the Kenyan Forestry Service issued the 30-day eviction notice to the Ogiek community of the Mau Forest in 2009 (Ogiek Judgment para 3). The African Commission was established under Article 30 of the African Charter "to promote human and peoples' rights and [to] ensure their protection". It is a quasi-judicial body in that its decisions, that are called recommendations, are not legally binding, which means there are no mechanisms to enforce them. One of the mandates of the African Commission is to interpret the African Charter (Art. 45 African Charter), which it has been doing since 1987 and has thus created significant legislation on human rights violations at the continental level.

The African Commission was the only human rights institution of the AU rendering non-binding recommendations on human rights issues. To create a more effective human rights body the AU established the African Court that can render binding decisions (Zips-Mairitsch 2013: 104 f). The relationship between the African Commission and the African Court is complementary and regulated in part five of the African Commissions' Rules of Procedure[9] and Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol)[10]. The African Commission is a body of eleven members just like the African Court, which is composed of eleven judges with equitable geographical and gender representation (Zips-Mairitsch 2013: 101, 106 f).

In the second phase of the proceedings, the African Commission took on the Ogiek case in 2012 to represent the Ogiek people before the African Court, basing its

[9] Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020, https://www.achpr.org/public/Document/file/English/Rules%20of%20Procedure%202020_ENG.pdf. [23.3.2022]

[10] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 2004, https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf. [23.3.2022]

arguments on the work of the NGOs. The case was filed with the African Court by the African Commission and not directly by the affected members of the Ogiek community because only certain parties are allowed to submit cases, namely the African Commission, the affected state party, and African intergovernmental organizations (Rule 33 Rules of Court). That means that the African Commission has changed its role from judicial authority to representing the Ogiek people before the court. A chronological reconstruction of the case will reveal the relevant actors at each stage of the proceedings, their arguments on behalf of the Ogiek people and the changing roles of human rights NGOs, the African Commission, and the African Court.

1. Presentation of the sources

The documents that will be discussed in this case study (*"African Commission on Human and Peoples' Rights v. Republic of Kenya")* entail:

- the complainants' submission on admissibility to the African Commission;
- the order of provisional measures by the African Court;
- the submission on the merits by the African Commission to the African Court;
- the oral intervention by one representative of the complainants;
- the judgment itself.

There are no documents from the Kenyan government because they did not publish their statements of the court case. Documents abouts the case were only available at the website of the African Court and on the website of Minority Rights International organization (MRG) (which documented their actions on behalf of the Ogiek community).

On 5th August 2010, the complainants filed a submission on admissibility to the African Commission. CEMIRIDE, MRG, and OPDP submitted the communication on behalf of the Ogiek community, titled *"CEMIRIDE, Minority Rights Group International & Ogiek Peoples Development Programme (On behalf of the Ogiek Community) v Republic of Kenya"* under the communication number 381/09. These are the three NGOs that appear as complainants on the submission on behalf of the Ogiek community. Their submission on admissibility comprised 64 pages (introduction; background to the communication and arguments on admissibility; submission on admissibility; and conclusion) and 47 annexes attached to the document. The finding of the complainants was based

on oral statements of Ogiek members, so-called affidavits, Kenyan national court documents, laws, reports, a letter of communication between the Chairman of the Nkaroni Group Ranch to Narok District Commissioner, previous communications and legal decisions of the African Commission.

On 15 March 2013, the African Court issued an eight-page order (application umber 006/2012) of provisional measures directed at the Kenyan government. It was the first time the African Court got involved in the procedure by imposing measures to protect the members of the Ogiek community from irreparable harm. The submission on merits by the African Commission to the African Court comprised a document of 288 pages that was divided into fifteen parts and 92 annexes. The annexes included affidavits, which were statements of members of the Ogiek community made under oath, as well as governmental letters addressed to them. The African Commission made the argument that the Ogiek community is entitled to their ancestral land in the Mau Forest by setting out their history in the forest, their role as conservationists as well as their continued evictions from different parts of the forest since the British colonial administration until to date. The African Commission further analyzed the government's discrimination against the Ogiek in the areas of education, health, employment, and their lack of access to judicial institutions.

During the public hearing on 27th and 28th November 2014 Lucy Claridge, Head of Law at MRG, made an oral intervention on behalf of the complainants to the African Commission. She presented an eight-page summary of the arguments on admissibility and supplemented them with the events that have occurred in the meantime, between July 2012 and November 2014 to emphasize the threatening situation of the Ogiek from the Kenyan government.

The judgment on the case *"African Commission on Human and Peoples' Rights v. Republic of Kenya"* was 69 pages long (with application number 006/2012). The judges did not treat the alleged violations chronologically. Every subject of the judgment was divided into three parts: on procedural issues into the respondent's objection, applicant's submission, and the court's assessment; on the assessment of the merits into the applicant's submission, respondent's submission, and the court's assessment. The African Court made the mistake in referring to Ogiek community as "Ogieks", which is wrong since Ogiek is already the plural term while Ogiot is the singular, as the African Commission explained in its submission on the merits (SoM para 402n695).

The legal documents issued by the African Court were accessible on its website[11]. They comprised a case summary, the ruling of the provisional measures, the judgment, and Orders on applications for intervention. While the court documents were easily accessible, getting access to the submissions of the parties required further investigation. Even though the NGOs CEMIRIDE and MRG filed the communication to the African Commission together, their legal submission could only be found on the website of MRG[12]. There was a section with key documents to the case divided into case documents, briefing papers and reports, advocacy at the African Commission and the United Nations, MRG press releases, academic articles, and evaluation report. For my study only the submission by the African Commission to the African Court and the MRG oral intervention at the hearing before the African Court were relevant and the case documents were accessed directly from the African Court online.

There was also a Youtube channel of the African Court called "African Court, English Channel". Referring to it as the "English Channel" was confusing because there are no channels in the other official languages of the African Court French, Arabic, or Portuguese. Therefore, the channel "African Court, English Channel" was the official representation of the African Court on Youtube. The used languages depended on the parties involved in the proceedings, however, there were no subtitles nor simultaneous translation. The channel mostly comprised judgment deliveries but also hearings in front of the African Court, documentaries, and parts of ordinary sessions.

The streaming of the Ogiek judgment on May 26th, 2017, in English was divided into three parts: "African Court on 26 May 2017, delivered a Judgment filed by the ACHPR v. Rep of Kenya Part one", "African Court on 26 May 2017, delivered a Judgment filed by the ACHPR v. Rep of Kenya Part Two" and "African Court on 26 May 2017, delivered a Judgment filed by the ACHPR v Rep of Kenya Part Three". The judgment was rendered by eleven judges but not all of them were present at its delivery. Judge Augustino S.L. Ramadhani presented the judgment by starting with the facts of the matter. He highlighted the aspects of the procedure that lead to the ruling of the African Court that included the proposition of an amicable settlement under Article 9 of the Protocol and Rule 57 of its Rules (Ogiek Judgment para 31) and the failure thereof which led to

[11] African Court on Human and Peoples' Rights (2012): Application 006/2012 – The African Commission on Human and Peoples' Rights v. Republic of Kenya. https://www.african-court.org/cpmt/details-case/0062012 [23.3.2022]
[12] MRG (2016): African Commission of Human and Peoples and Peoples' Rights v. Kenya (the 'Ogiek case'). https://minorityrights.org/law-and-legal-cases/the-ogiek-case/ [23.3.2022]

the judgment (Ogiek Judgment para 39). He continued with the court's assessments without the respondent's objections or the applicant's submissions. Present at the delivery were the judges, a representative of the African Commission as the applicant of the case, a representative of the Kenyan government as the respondent of the case, and members of the Ogiek community in the audience.

2. Building a case: How the representatives of the Ogiek people documented and argued for their complaints

October 2009 – July 2012

Only the African Commission was allowed to represent the Ogiek community before the African Court (Art. 5 (1) lit a The Protocol). For this reason, the NGOs CEMIRIDE, MRG and addressed the African Commission on behalf of the Ogiek community to convince it about the human rights violations by the Kenyan government. As the African Commission is a quasi-judicial human rights institution, NGOs must follow formal rules of procedure to argue the case. The process is divided into two phases: the admissibility of the case and the decision on the merits. This means that the African Commission must first determine the admissibility of the case before addressing the content of the human rights violations. After individuals of the Ogiek community living in the Mau Forest received the eviction notice from the Kenya Forestry Service in October 2009 to leave the forest within 30 days, CEMIRIDE, MRG and OPDP filed a complaint on behalf of the Ogiek community to the African Commission (Ogiek Judgment para 3). Thereafter the African Commission issued an order for provisional measures to stop immediate human rights violations by the Kenyan government connected to the eviction. It took the NGOs another year to make the submission on admissibility to the African Commission on 5th August 2010, starting procedures at the international level.

The introduction of the submission on admissibility began with a description of the complainants and a summary of the alleged violations. CEMIRIDE is a Kenyan non-governmental organization active in research, policy advocacy, and legal assistance and has observer status at the African Commission (CSA para 3). NGOs with observer status may participate in proceedings of the African Commission according to Chapter II of the Annex to the *361 Resolution on the Criteria for Granting and Maintaining Observer Status to Non-Governmental Organizations working on Human and Peoples'*

Rights in Africa - ACHPR/Res.361(LIX)2016[13]. They are privileged in that they can be present at the opening and closing of the meeting of the African Commission; they have access to non-confidential, general, and specialized documents concerning their interests; and they can make a statement on a subject that concerns them (ACHPR/Res.361(LIX)2016 Chapter II). NGOs are therefore involved in the activities of the African Commission, in particular by drawing attention to human rights violations and monitoring the state's compliance with the African Charter.

The international NGO MRG not only has observer status at the African Commission on Human and Peoples' Rights but also consultative status with the Economic and Social Council of the United Nations (ECOSOC) (CSA para 4). Through their international network, it can promote the rights of ethnic, religious, and linguistic minorities working with over 150 organizations worldwide. Contrary to MRG's international outreach, the Ogiek Peoples' Development Program (OPDP) works directly with the Ogiek people. OPDP is a Kenyan NGO that was formed by Ogiek elders, activists and professionals to promote the recognition and identity of Ogiek culture, participation, and inclusion of the community, claiming their land rights and ensuring environmental protection (CSA para 5). With the three organizations jointly addressing the African Commission, they bring together their expertise at the local, national, and international levels. They alleged that the government of Kenya has infringed Articles 1, 2, 4, 8, 14, 17, 21, and 22 of the African Charter but did not go further into detail of each article (CSA para 6).

In the "Background to the communication and the arguments on admissibility" the organizations briefly introduced the Ogiek people, the Kenyan national laws that the on which the Ogiek people can rely regarding their land rights, examples of evictions they have suffered since the 1980s, and the chronology of their unsuccessful domestic actions. These facts were necessary to show that national legal action have already been tried several times but have been ineffective due to political intimidations, because only in the case of exhaustion of national remedies the African Commission can be addressed (African Charter Art 56 (5)). The total number of Ogiek members was contested: the official court documents stated that the Ogiek community had 20,000

[13] ACHPR/Res.361(LIX)2016, https://www.achpr.org/sessions/resolutions?id=373. [23.3.2022]

members, although the MRG website[14] and the oral intervention at the African Court, during the 35th Ordinary Session held from 24th November until 5th December 2014, by Lucy Claridge, Head of Law at MRG stated a total of 30,000 members (Ogiek Judgment para 6; MRG Oral Intervention: 1). In any case, it remained undisputed that 15,000 members of the Ogiek community were threatened with evictions from their traditional lands in the Mau Forest.

In contrast to the concept of individual land ownership, the Ogiek conceived land rights as close relationship between the land and their traditional way of life. The Ogiek communities from the respective regions exercise their right as a collective because their land belongs to the community of present and future generations, in this sense they consider themselves trustees of this land (CSA para 12). However, the national laws that determined the land rights of the Ogiek people were based on the regulations from the colonial period, when the British administration divided the area into White Highlands and native reserves (CSA para 15). Additionally, the colonial Kenyan Land Commission examined the ethnic status for the designation of native reserves in 1933, which was the starting point of the Ogiek struggle to claim their ancestral land. The Kenyan Land Commission did not designate the Ogiek their ethnic status for which they were not granted a native reserve (CSA para 15). Finally, the Ogiek land became Crown Land under the Crown Land Ordinance, which became Government Land after independence, making the Ogiek people who lived in the Mau Forest squatters of the state (CSA para 16).

The complainants continued by briefly explaining what regulations governed the land right of the Ogiek people in post-independence Kenya because it depended on the applicable laws which rights of ownership members of the Ogiek could claim. At the time of submission, the Kenyan 1969 Constitution was still in force and did not recognize collective ownership, but only regulated trust land in Section 114, which before independence referred to as "special reserves", "temporary special reserves" or "communal reserves" (CSA para 17). Only the land occupied by Ogiek people near the Maasai Mau became trust land and is therefore protected under the 1969 Constitution. Since the laws are structured according to a hierarchical principle, the constitution is on the highest rank and all other laws must be derivable from it. Therefore, regulation

[14] Claridge, Lucy (2020): Kenya: 'The Ogiek journey in the corridors of justice, from Kenya to Banjul then Arusha, was never a bed of roses, it had ups and downs, but thanks to MRG's support throughout, the litigation process was a success'. https://minorityrights.org/fifty/report/ogiek/. [23.3.2022]

of trust land at the constitutional level generally provides the highest level of protection. Nevertheless, the complainants briefly demonstrated the evictions of the Ogiek members in the Maasai Mau from 1979 until 2009 (CSA para 28).

Also, the Ogiek at Mount Elgon argued that they were dispossessed of their trust lands for the establishment of the Mount Elgon Game Reserve, with a few of them becoming landowners under the Registered Lands Act, as the majority of the Mount Elgon Ogiek became land squatters under the Government Lands Act and the Forest Act (CSA para 27). In the case, *Fred Matei & 3 Others v Mount Elgon County Council, Kitale High Court Civil Case No 109 of 2008* four members of the Mount Elgon Ogiek contested the gazette notice in the Kitale High Court because the government acted without prior consultation or compensation (CSA para 68). The complainants illustrated the situation of Mount Elgon Ogiek, who are part of the Ogiek community but were not affected by the court case before the African Court, which only concerns the Ogiek people in the Mau Forest.

Most of the Ogiek people's ancestral land fell under the Forest Act, which legally meant that it was unoccupied and therefore constituted unalienated land. According to Chapter 280 of the Government Lands Act, the president allocated unalienated land to private individuals, who acquired absolute ownership under Chapter 300 of the Registered Land Act (CSA para 19 f). The term "absolute property right" means *de jure* ownership as compared to *de facto* ownership and establishes a stronger legal position in case of disputes of competing property rights. The minister of environment manages the forest area, and in the event of changes, the public must be informed within 28 days through a notice in the Kenya Gazette (CSA para 22). This was the case in October 2009, when the Kenya Forestry Service, on behalf of the minister, issued the eviction notice to the Ogiek.

Further, the "Chronology of Domestic Action" is the main part of the submission on admissibility, in which the complainants presented the lawsuits with which the Ogiek people have tried to challenge their evictions in national courts. This is of particular importance because of the principle of exhaustion of domestic remedies, according to which a case can only be decided by an international body such as the African Commission and the African Court if no more domestic remedies are available. From a series of legal cases, the complainants selected eight cases that highlighted the eviction of the Ogiek communities from their ancestral land and the denial of indigenous

land rights. By demonstrating this selection of cases to the African Commission, the complainants point out that the Kenyan government acted arbitrarily and not based on the law. Furthermore, litigation was prolonged and judicial decisions were not followed by the government, making it ineffective

Under these conditions, proving customary rights to the land has been a particularly difficult task for the Ogiek communities. Only the Ogiek populations living in Narok have been able to prove their customary rights to the land and thus have been granted group ranch status under Chapter 287 of the Land (Group Representatives) Act (CSA para 23). The community thereby became a legal entity with a statute, representatives elected according to the statute, regular meeting for the decision-making process and can ultimately sue and be sued after registration as a legal entity (CSA para 24). Despite the Ogiek peoples' incorporation as a legal entity, the government began dividing Nkaroni and Enakishomi Group Ranches of Ogiek communities among its members, issuing them, as well as non-members, individual title deeds (para 59). In response, the Ogiek representatives brought the case *Johnstone Kipketer Talam and 3 Others v Principal Land Adjudication & Settlement Officer and 2 Others, Nakuru High Court Civil Case no 446 of 1999* before Nakuru High Court, which was still pending at the time of submission to the African Commission.

Additionally, the Ogiek brought the case *Joseph Kimetto Ole Mapelu & Others v County Council of Narok, Nakuru High Court Civil Case no 157 of 2005* to the Nakuru High Court when they were evicted from Nkaroni and Enakishomi Group Ranches because 141.7 hectares of land had been unlawfully transferred to a private company, which was then even increased to 1364.7 hectares (CSA para 62). Following the eviction notice Ogiek members of Nkaroni and Enakishomi Group Ranches also brought the case *Kalyasoi Farmers Co-Operative Society & 6 Others v County Council of Narok, HCCA Case 664 of 2005* before the Nairobi High Court to seek an injunction, which was granted. Nevertheless, the government evicted the Ogiek community and demolished their buildings (CSA para 64). Finally, they appealed to the High Court, which ruled in their favor, but the Ogiek community was still not allowed to return to their land until 2007. The cases were still pending at the court at the time of the submission to the African Commission.

In the case, *Francis Kemai and 9 Others v Attorney-General and 3 Others, HCCA case no 238 of 1999* ten applicants challenged an eviction notice on behalf of 5000 Ogiek

members of Tinet, South Western Mau before the Nairobi High Court (CSA para 50). The following year, the court issued a ruling in favor of the Kenyan government, denying discriminatory treatment of the Ogiek people, which they did not challenge due to political intimidation (CSA para 51 f). Three years later, however, the Ogiek people filed another lawsuit *Republic v Minister for Environment and 5 Others, ex parte the Kenya Alliance of Resident Associations and 4 Others, HCCA case no 421 of 2002* in the Nairobi High Court to challenge the notice on environmental grounds rather than discriminatory treatment on ethnicity (CSA para 53). But at the time of filing the submission to the African Commission, the case was not yet closed and even disappeared from the court's registry for two years until it was retrieved (CSA para 55). The case *Republic ex parte William Kipsoi Kimeto & Others v Commissioner of Lands and Others, Nakuru High Court Civil Case no 157 of 2005* was also still pending in Nakuru High Court at the time of submission. The proceedings began in 2005 with another challenge to the Tinet forest notice. The applicants argued that the government had failed to apply the Ogiek census conducted between 1991 and 1994, the so-called "Blue Book" to allocate land and give priority to the Ogiek (CSA para 56).

In *Joseph Letuya and 21 others v Attorney General and 5 others, HCCA case no 635 of 1997, and Joseph Letuya and 21 others v Minister of Environment, HCCA case no 228 of 2001* the Ogiek of Eastern Mau sought an injunction prohibiting the further allotment of their traditional lands, and thus the settlement of additional people in the forests in East Mau before the Nairobi High Court in 1997 (CSA para 41). Even though the injunction was granted, President Moi intimidated the judiciary by ignoring it and nevertheless served 700 more title deeds, with the consequence that there has been no further hearing until the filing of the submission (CSA para 43). In 2001, the government again violated the injunction by cutting 35,000 hectares of Eastern Mau Forest (CSA para 45).

In the third part on the submissions on admissibility, the complainants focus on procedural questions with an emphasis on the principle of exhaustion of domestic remedies, which is one of the requirements for admissibility of the communication under Article 56 (5) of the African Charter. It is intended to ensure that the African Commission remains a court of last resort and that state legal institutions cannot be circumvented. The African Commission has already recognized in its jurisprudence that local remedies can only be exhausted if they are available, effective, and sufficient which is

questionable in the case of the Kenyan judiciary (CSA para 90). A remedy is available if the plaintiff, the party making the claim, can file it without hindrance. The effectiveness is fulfilled if the remedy has reasonable chances of success, and it is sufficient if it is suited to achieve relief from the complaint. The legal remedies that the Ogiek people raised were ineffective because the 1969 Kenyan constitution did not recognize community rights (para 96). The complainants accused the Kenyan government of undermining the efficiency of the judiciary by failing to participate in proceedings and instead unduly delaying them (CSA para 102).

Moreover, any remaining obligation on the part of the complainants to seek domestic remedies was negated by the actions of the Kenyan government in obstructing their attempted pursuit of such domestic remedies through harassment, arbitrary arrests, demolition of their homes, and other intimidation (CSA para 165 ff). To make their argument clear that the Ogiek people could not exhaust remedies in the Kenyan legal system, even though they had tried to do so several times, the complainants repeatedly emphasize that "prolonged litigation and intentional obstruction of justice may indicate that domestic remedies are ineffective" and the "corrupt, inefficient and lack independence" of the Kenyan judicial system (CSA para 136, 140, 143, 152). Given that the Kenyan government has had time to address the complaint since the 1960s, with legal actions only being taken since 1997, the complainants were to call on the African Commission to act (CSA para 168 ff).

The complainants rebutted the Kenyan government's argument that they should have filed an official complaint with the Kenya National Human Rights Commission (KNHRC) by explaining that the KNHRC is a quasi-judicial independent human rights institution and not a judicial body (CSA para 157 ff). Therefore, the complainants were not required to exhaust extraordinary remedies. They also argued that it was not necessary to exhaust domestic remedies when it is “impractical or undesirable” for complainants to resort to the domestic courts in the case of every violation, given the large number of Ogiek members, approximately 20,000, who require the assertion of group or collective rights as well as the large number of cases already pending in the domestic courts (CSA para 162 ff).

Other requirements than the exhaustion of local remedies for the admissibility of communication according to Article 56 of the African Charter, the African Commission's Rules of Procedure and its jurisprudence are: the indication of the author, no

disparaging or insulting language, no media-based communication and that the communication has not been reviewed by any other international mechanism. Article 56 (2) of the African Charter indicates further the personal and the temporal scope of the admissibility of the communication. Personal scope includes that the communication must be addressed to a state party to the African Charter and must be submitted by an individual or group entitled to do so. Kenya has ratified the Charter in 1992 and is, therefore, a state party to it. Since the communication does not need to be brought by the victim him/herself, directly or indirectly affected parties can also complain to the Commission (CSA para 76). While OPDP worked directly for the improvement of the Ogiek people and consisted of members of the community, the NGO is a party directly concerned and therefore entitled to submit the communication according to Article 56 (2) of the African Charter. CEMIRIDE and MRG have already represented the Endorois, a similar case to the Ogiek, in their communication. The African Commission has therefore already confirmed their admissibility of a communication.

According to the temporal scope of admissibility, the alleged violations of the African Charter must have been committed during its period of application, which is in line with the principle of non-retroactivity (CSA para 79). Two exceptions to the principle of non-retroactivity exist: when the violation continues after the After Charter enters into force and when effects occur, which in themselves constitute a breach of the African Charter (CSA para 81). The situation of the Ogiek people at the time of the submission date to events before 1992 when the Kenyan government ratified the Charter (para 83). In addition, the Kenyan government's continued eviction of the Ogiek communities from the Mau Forest, which threatened their traditional livelihood, was a violation of the African Charter itself. The temporal scope was fulfilled in any case because the violations of the African Charter took place during the period of its applicability. The government's actions against the Ogiek people therefore occurred before and after the applicability of the African Charter, and its effects such as expropriation of land, deprivation of livelihood, and violation of physical integrity were themselves violations under the Charter.

CEMIRIDE, MRG and OPDP presented a solid case in the submission on admissibility proving the unique relationship of the Ogiek people with the Mau Forest. The introduction of a set of legal cases showed that national regulations governing land rights did not protect the interests of the Ogiek communities, instead continued the colonial legacy of land expropriation. Moreover, the NGOs made clear that national remedies were

unavailable, ineffective, and insufficient for the Ogiek communities due to political intimidations by the Kenyan government and that the procedural requirements were met to pursue the case. The African Commission was convinced by the NGOs' arguments, so it filed the application before the African Court and made the submission on the merits[15] on 12th July 2012, to which the Kenyan government contested five months later with preliminary objections (Ogiek Judgment para 12).

3. The African Court intervenes and orders provisional measures December 2012 – March 2013

On 28th December 2012 the African Commission requested the African Court to issue an order for provisional measures (Ogiek Judgment para 13). These measures are intended to protect the rights of a party to the dispute until the court reached the final decision. On 15th March 2013, the African Court issued the order for provisional measures[16] directed at the Kenyan government based on a "situation of extreme gravity and urgency as well as a risk of irreparable harm" to the Ogiek people to protect the rights of the Ogiek communities until it rendered the judgment (Ogiek Judgment para 16). The order contained the following measures:

> 1) The Respondent shall immediately reinstate the restrictions it had imposed on land transactions in the Mau Forest Complex and refrain from any act or thing that would or might irreparably prejudice the main application before the Court, until the final determination of the said application;
>
> 2) The Respondent shall report to the Court within a period of fifteen (15) days from the date of receipt hereof, on the measures taken to implement this Order. (Ogiek Judgment para 16)

The complainants, MRG, CERMIRIDE, and OPDP already argued for the "situation of extreme gravity and urgency" in their submission on admissibility to the African Commission (CSA para 173), which the African Court ascertains in its order and MRG emphasized again in their oral intervention before the African Court during the public

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[15] African Commission on Human and Peoples' Rights v. Republic of Kenya, 2012, https://minorityrights.org/wp-content/uploads/2015/03/Final-MRG-merits-submissions-pdf.pdf. [23.3.2022]

[16] African Commission on Human and Peoples' Rights v. The Republic of Kenya, 2013, https://www.african-court.org/cpmt/storage/app/uploads/public/5f5/5fe/07c/5f55fe07c80fa986012720.pdf. [23.3.2022]

hearing (Claridge 2014: 8). Such a situation is the precondition for the African Court to set provisional measures according to Article 27 (2) of the Protocol.

Parties to the procedure before the African Court were the applicant, the African Commission, and the respondent state party, the Kenyan government. Ten judges of the African Court ruled on the eight-page order, with seven of them also rendering the judgment on the merits. The African Court started the order by stating the procedural history of the case from its perspective, beginning with the African Commission's application on 12th July 2012. The African Court further expresses its concerns that the Kenyan government has lifted restrictions on land transactions for all parcels of five acres or less within the Mau Forest and requests the Kenyan government to reinstate the ban on transactions and provide the court with information on implementation under Rule 51 (5) of the Rules of Court[17] (OPM para 10). Contrary to the instructions, the Kenyan government has not commented on the applicant's requests or responded to any further notices (OPM para 12 ff).

The African Court ascertains its jurisdiction under Articles 3 and 5 of the Protocol (OPM para 15). Before the court decides a case, it must assess that it has the competence to do so according to the rules of the Protocol. Once it has concluded that it has jurisdiction, the court then examines the content of the case. According to Article 3 of the Protocol, the African Court has jurisdiction over cases "concerning the interpretation and application of the Charter" and that the African Commission is entitled to submit cases under Article 5. Other admissible applicants are only state parties and African intergovernmental organizations. Finally, the African Court concluded that it had jurisdiction and that provisional measures should be imposed following Article 27 (2) of the Protocol (OPM para 21) an on 30th April 2013 representatives of the Kenyan government reported the measures taken to comply with the order for provisional measures (Ogiek Judgment para 17).

4. The public hearing and MRG's oral intervention June 2013 – November 2014

The African Court announced during its 29th Ordinary Session from 3rd to 21st June 2013 to hold a public hearing on the case and to close the pleadings, which are the

[17] Rules of Court, 2010, https://www.african-court.org/en/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf. [23.3.2022]

written statements by parties stating the reasons for legal actions and the reactions to those reasons (Ogiek Judgment para 19). In the meantime, both the African Commission and the Kenyan government requested an extension to submit further arguments and evidence. This was granted by the African Court and the date for the public hearing was postponed to November 2014.

On 27th and 28th November 2014 the public hearing was held during the 35th Ordinary Session of the African Court in Addis Ababa, Ethiopia (Ogiek Judgment para 28). In this the public hearing, all parties were represented: on the applicant's side one commissioner and three counsels, two witnesses, who were members of the Ogiek community, and one expert witness, who was a specialist on international land tenure. On the respondent's side, there were three representatives: one solicitor and two litigation counsels (Ogiek Judgment para 28). The judges of the African Court put questions to the parties to which they responded. During the public hearing, Lucy Claridge, who was the Head of Law at MRG at that time, held an oral intervention on behalf of the complainants MRG, CEMIRIDE, OPDP according to Rule 45 (1) and Rule 29 (3) c of the Rules of Court[18] (Ogiek Judgment para 29). Accordingly, the NGOs who brought the communication to the African Commission can be heard by the African Court to clarify the facts of the case. There was a live stream of the hearings on Vimeo, which cannot be accessed anymore.

Lucy Claridge, Korir Sing'oei, Strategy and Legal Advisor at CEMIRIDE, and Mr. Daniel Kobei, Executive Director of OPDP already requested to intervene and to be heard in the case as original complainants before the Commission in January 2013, which was granted over one year later in September 2014 (Ogiek Judgment para 27). Claridge presented an eight-page summary of the arguments on admissibility and supplemented them with the events that have occurred between 2012 and 2014. Claridge stated that the Ogiek communities comprise 30,000 members, although the complainants put the number at 20,000 in their communication to the African Commission (CSA para 7) as well as in its application to the African Court, who also based its figures on 20,000 Ogiek members, 15,000 of whom live in the Mau Forest (Ogiek Judgment para 6).

[18] In the Ogiek judgment it is referred to Rule 29 (1) c of the Rules of Court, which does not exist. The correct Rule is 29 (3) c of the Rules of Court.

Claridge indicated that the Kenyan government had not complied with the court's order for provisional measures and continued to violate the provisions of the African Charter. Since March 2013 the government had continued to evict the Ogiek people from their traditional land, arbitrary harassing, detaining, and pressing charges against them. This was particularly happening in Nakuru County in collaboration between the Nakuru District Land Registry, the District Commissioner of Njoro, and the Nessuit Assistant Chief, for the benefit of third parties (MRG Oral Intervention: 2). In addition, there were physical attacks on Ogiek activists to intimidate them in their activities on land issues. Logging in the Mau Forest also continued threatening the livelihood of the Ogiek in the Mau Forest and contributing to environmental degradation (MRG Oral Intervention: 3). The Kenyan government, under the Clean Development Mechanism established by the Kyoto Protocol, the United Nations Framework Convention on Climate Change, even joined a reforestation and restoration project to plant mainly non-native trees in the Mau Forest without consulting the Ogiek people about it (MRG Oral Intervention: 4).

Furthermore, the Kenyan president publicly announced that he would lift the ban on land transactions in the Mau Forest contrary to the order of provisional measures of the African Court, but he did not realize it at the time of the oral intervention (MRG Oral Intervention: 4). Claridge has pointed out that the failure of the Kenyan government to implement the measures could call into question the credibility of the court in protecting human rights. That is why she also warns that the Kenyan government will need support and monitoring in implementing a ruling in favor of the Ogiek, which is evidenced by the lack of political will to comply with the provisional measures and the Endorois decision adopted by the African Commission five years ago (MRG Oral Intervention: 7). The oral intervention on behalf of MRG, CEMIRIDE and OPDP basically highlighted that despite the ongoing proceedings before the African Court, the Kenyan government did not comply with the provisional measures and is unwilling to set political measures to stop human rights violations towards the Ogiek community.

5. The African Court tries to avoid its ruling March 2015 – March 2016

The African Court held its 36th Ordinary Session from 9th to 27th March 2015 and suggested that the case be settled amicably according to Article 9 of the Protocol and Rule 57 of its Rules (Ogiek Judgment para 31). A court ruling usually hardens the fronts, as

there is a winner and a loser of the dispute. An amicable settlement, on the other hand, is intended to reach an agreement on an equal term. The aim of an amicable settlement is for the parties to negotiate a solution together, with the court playing a mediating role. If the amicable settlement is successful, the African Court issues a judgment "limited to a brief statement of the facts and of the solution adopted" (Rule 57 of the Rules of Court). Both the African Commission and the Kenyan government agreed to an amicable settlement and set out the conditions and the issues to be discussed.

On 13th January 2016, the African Commission responded to the Kenyan government's proposed terms with a letter to the African Court stating that it was not satisfied with the proposal and requesting the African Court to pursue the matter further and to issue a judgment (Ogiek Judgment para 38). The Kenyan government gave the impression of being unwilling to engage in amicable settlement by replying to the fourth proposal for an amicable settlement within one month, that the state considered that no further action was required to recognize the provisions of the African Charter, as it had already been implemented into national law (Ogiek Judgment para 38). Further, the government did not agree with the condition that the negotiation process should be completed within one year and with foreign mediators. Since the attempt to reach an amicable settlement was unsuccessful, at the 40th Ordinary Session held from 29th February to 18th March 2016, the African Court decided to continue with proceedings and to render a judgment (Ogiek Judgment para 39).

At that point of the proceedings the NGOs CEMIRIDE, MRG and OPDP had filed the complaint with the African Commission on behalf of the Ogiek community. The African Commission accepted the case and pursued it before the African Court against the Kenyan government. To prevent immediate human rights violations against the Ogiek community the African Court ordered provisional measures against the Kenyan government, which it assured to comply with. During the public hearing the representatives of the African Commission and of the Kenyan government presented their arguments and counter arguments before the judges of the African Court and supported their statements with expert witnesses and evidence. Additionally, Claridge held an oral intervention on behalf of the original complainants of the case MRG, CEMIRIDE and OPDP pointing out the continued threat the Kenyan government imposed on the livelihood of the Ogiek community. Further, the African Court proposed an amicable settlement between the parties to negotiate a solution on equal terms, which was

unsuccessful because the parties could not agree on the issues and conditions to be discussed.

6. Who is entitled to rule? Procedures before the African Court

By the time the African Court decided to continue the proceedings, the taking of evidence and the public hearing had already taken place. Only the judgment remained to be rendered. The African Court is bound to procedural rules that must be addressed at the beginning of every judgment and it must justify accordingly its competence to even decide a case. In its organization, jurisdiction, functioning, and procedures, the African Court is bound by the Protocol and the Rules of Court. The Ogiek judgment was decided by nine judges. One of the judges was a Kenyan national and was therefore excluded from the proceedings under Article 22 of the Protocol and Rule 8 (2) of the Rules of Court, which provide that judges who have the same nationality as the state party shall be excluded from the proceedings. The judgment was divided into nine parts: the parties, subject matter of the application, procedure, prayers of the parties, jurisdiction, admissibility, on the merits, remedies, reparations, and costs.

Parties to the procedure before the African Court were the African Commission with four representatives, as the applicant, and the Kenyan government with three legal representatives. The subject matter of the application consisted of the facts of the matter, which is a summary of the events, and the articles alleging violations to the African Charter (Ogiek Judgment para 3). The claims the parties made before the African Court were titled "prayers of the parties". The African Court first repeated the African Commission's requests as previously put forward by the complainants: to stop the evictions from the Mau Forest; the recognition of the Ogiek ancestral land; the payment of compensation; to decide on the alleged violations of Articles 1, 2, 4, 8, 14, 17 (2) and (3), 21 and 22 of the African Charter; the restitution of their ancestral land; adoption of legislative, administrative and other measures; an apology and a public monument for the Ogiek people (Ogiek Judgment para 43). The claim of the Kenyan government comprised in one paragraph that the African Court should rule on the inadmissibility of the case; that the African Commission should present evidence of the allegations; and that the African Court should find that the allegations were false (Ogiek Judgment para 46).

The African Court confirmed that it had the competence to decide on the facts and dismissed any objections raised by the respondent (the Kenyan government). On the

admissibility of the application, the respondent rose objections relating to some preliminary procedures; in brief, it considered that the applicant had not exhausted local remedies (Ogiek Judgment para 69). The African Court rejected the objections, arguing that a complaint to the African Commission was not relevant to the admissibility of an application before it. Considering that human rights violations can only be brought to the African Court by the African Commission or by the state party itself, the African Commission could not be an effective human rights institution if it could not act on the complainants' behalf before it.

On the exhaustion of local remedies, the African Court confirmed the validity of deciding the case (Ogiek Judgment para 93). Still, the African Commission pointed out that the Kenyan judiciary had the opportunity to address the matter several times in its national courts (Ogiek Judgment para 94). The application thereby met the requirement of exhaustion of local remedies, according to Article 56 (5) of the Charter and Rule 40 (5) of the Rules.

The African Commission filed the submission on the merits against the Republic of Kenya at the African Court on 12th July 2012. The submission on the merits dealt with the content of the case, which comprised the actions of the Kenyan government against the Ogiek people leading to the violations of their rights under the African Charter.[19] While a submission on admissibility deals with procedural questions whether the African Court is eligible to decide the case, in the submission on the merits the African Commission applies the law on the facts by proving each human rights violation with evidence that is then evaluated by the African Court. The African Commission appeared as the applicant of the case in front of the African Court defending the rights of the Ogiek people.

Chapter 4: The African Court's groundbreaking judgment

After concluding the procedural questions, the judges evaluated the arguments brought forward by the parties in their judgment, which will be the discussed in this chapter. Since the judges predominantly based their conclusions on the submission

[19] The African Charter on Human and Peoples' Rights is the basic legal document on the protection of human rights in African countries. The declaration was adopted by eighteenth Assembly of Heads of State and Government in June 1981 in Nairobi, Kenya. The Kenyan government ratified the African Charter on January 23, 1992 without any reservations. https://www.achpr.org/legalinstruments/detail?id=49. [23.3.2022]

on the merits made by the African Commission, that submission and the judgment are the two sources I will focus on in the following analysis, presenting the human rights violations. The statements of the Kenyan government can only be concluded from the judgment as the government has not published its submissions to the case. In the violation of the African Charter, the African Commission claimed the infringement of state obligations (Article 1), the right to non-discrimination (Article 2), the right to life (Article 4), the right to free practice of religion (Article 8), the right to property (Article 14), the right to culture (Article 17), the right to free disposition of natural resources (Article 21) and the right to development (Article 22). Further, the African Commission demanded a separate judgment on remedies and reparations in form of restitution of the Ogiek peoples' ancestral land, compensation for the damages the Ogiek people have suffered, and the development of legislative and administrative measures for effective consultation about projects in the Mau Forest. Finally, the African Commission called for an apology, a public monument, fully legal and political recognition of the Ogiek people.

As already mentioned, the Ogiek judgment is a landmark decision as it was the first indigenous rights case before the African Court and therefore set a precedent for indigenous peoples' land rights in African countries. The African Commission proved that the Ogiek peoples' ancestral land was the Mau Forest, even though the communities did not have one unified experience. The Ogiek communities are spread in the same territory, and they are divided into sub-tribes and clans that do not have a centralized political structure. Accordingly, the African Commission presented a historical overview of the Ogiek experience based on individual groups in the Eastern Mau, Massai Mau, Southwestern, and Western Mau (SoM para 4). It demonstrated the ancestral connection of the Ogiek communities to the Mau Forest, the dependency of their identity and traditional lifestyle to the forest. Despite the continued evictions during the colonial and post-colonial period, the essential connections of the Ogiek people to the Mau Forest remained.

The African Commission involved Ogiek members in the fact finding. In total, 48 Ogiek members contributed to the submission on the merits with their given statements under oath, with twice as many men as women. The testimonies of the selected Ogiek members not only reflected on personal lives but the history of the community across generations. Since the Ogiek community is geographically spread across the Mau Forest

their statements demonstrated different developments in the respective regions of the forest: Northern Tinderet, Londiani/Tinderet, Koibatek, Maasai Mau, Eastern Mau, Southwest Mau, Western Mau, and Transmara (SoM para 133).

Including elders of the sub-regions Sururu, Ol Pusimoru, Sorget, Koibatek, and Aino/Kuresoi represent experiences from leading people of the community. Ironically, the historical overview was based on the ethnographic works of the Western researchers John Distefano, Thomas Evans, Corinne Kratz, and G.W.B Huntingford that were conducted between 1955 and 1990. They focused on certain sub-tribes of the Ogiek for example Huntingford conducted his research in the north of the Mau Forest in Tindiret and Kratz researched in the south of the Mau Forest (SoM para 62). Those regions were already differently affected by the colonial administration, while there were repeated evictions of the Ogiek people in Tindiret, there were only a few in the south of the Mau (SoM para 58). Despite the efforts of preventing Ogiek communities from pursuing their traditional way of life of hunting, beekeeping, and practicing their religion they strive to retain their traditional lifestyle (SoM para 80 ff).

The use of anthropological research shows that the history of African communities, in particular that of the Ogiek community, was (and is) still legitimized by Western researchers. The analysis of anthropologists in the first chapter has already made it clear that they played a critical role in the early phase of colonization when they judged their findings on African societies as an inferior system of governance, and the colonial administration based their political actions on them. Even fifty years after independence, African communities are still defined by Western researchers for political purposes but this time the political environment has changed. During colonial times the administrators acted on behalf of the political interests of the Crown whereas the African Commission is the agent for the Ogiek community. It utilizes the ethnographic findings as evidence to defend Ogiek people's rights against the Kenyan government. However, it is necessary to manifest the importance of African research by applying its results. Research remains a tool to enforce political interests, but its use must be diversified and not solely depend on findings by Western researchers.

1. Defining traditional livelihood: historical, legal, and political ambiguities

The African Commission demonstrated the role of Ogiek communities as conservationists of the Mau Forest. It involved historical, political and environmental arguments

to make its case, retracing in detail the eviction and destruction of the forest since colonization and after independence (SoM para 132, 139, 173). The recognition of the role of indigenous peoples as conservationists from international institutions such as the UN Committee on the Elimination of Racial Discrimination, the International Union for Nature Conservation, the international declarations Convention on Biological Diversity and the COP Decision X/31 on Protected Areas, emphasized that the Ogiek communities had a close connection with the forest (SoM para 95 ff). The Ogiek people preserve their environment to secure their sources of food and due to their spirituality, that does not allow the cutting of trees because they are God's creation. Therefore, the destruction of the forest by the Kenyan government stood in sharp contrast.

The African Commission has conclusively laid out the legal manifestation of the exclusion of the Ogiek people from their land rights from times of colonization to the filing of the submission. While the Crown declared the title to land, African populations only had the right to occupy that land until the Crown removed this differentiation and determined all the land for itself (SoM para 275 f). The implementation of the recommendations of the Kenyan Land Commission extinguished the land rights outside the reserves which left the Ogiek people with no land rights at all (SoM para 279). Under Kenya's first Constitution the interference or restriction of property rights required it to be necessary for the public interest, reasonable justification, and the prompt payment of full compensation (SoM para 280). The President, through the Commissioner of Lands, has full authority to grant unalienated lands to any person. These are lands that belong to the government and over which no private ownership has been created. Most of the areas inhabited by the Ogiek people are covered by the Forest Act and are therefore considered unalienated land which means that they are officially not occupied (SoM para 283).

The colonial administration and the subsequent Kenyan government have not only denied the Ogiek people their land rights but also restricted their traditional livelihood with the Wildlife Act and the Forest Act. Hunting was criminalized and a hunting license was required for permission, for which a fee had to be paid (SoM para 291). Other activities that were part of the Ogiek traditional life also required a license such as the exploitation of forest produce, being in the forest between 9 pm and 6 am, collecting honey or beeswax, or attaching honey barrels (SoM para 292). The 2010 Constitution should have led to the improvement of the Ogiek people with the recognition of community

rights in its article 63 according to which “Community land consists of land that is ancestral lands and lands traditionally occupied by hunter-gatherer communities”. However, the African Commission criticized that its impact depended on further administrative laws on community land on how to obtain legal protection for their land (SoM para 296). Meanwhile, the respective County Governments hold the land in trust for the communities, who were already found to be corrupt in the complainants’ submissions on admissibility.

2. Struggle for categories: defining the Ogiek communities as “indigenous”

The African Commission continued to justify the claim for collective rights under the African Charter as well as from international law. It referred to its Endorois decision, the various definitions on indigenous peoples under the International Labour Organization (ILO) 169, the General Recommendation VIII of the CERD that all find “self-identification” a key characteristic. The African Commission’s Working Group of Experts on Indigenous Populations/Communities in Africa found the further criteria of a special relationship to their traditional territory as well as the experience of “subjugation, marginalization, dispossession, exclusion or discrimination” which were also adopted the World Bank Group (SoM para 319). The African Commission stressed that the Ogiek people fell into the category of indigenous people on an international as well as national level. The Kenyan Government recognized the Ogiek communities as indigenous people in the Indigenous Peoples Planning Framework (IPPF) in 2006 (SoM para 334) and in its 2010 Constitution under section 260 that recognizes “an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy”.

The respondent emphasized that the Ogiek society was a mixture of different ethnic communities rather than one distinct ethnic group and that the indigenous population of the 1930s was currently living a modern life through permanent housing, keeping livestock, and farming (Ogiek Judgment para 104). Before determining the alleged violations, the African Court addressed the issue shortly by acknowledging that "the Ogiek have priority in time, with respect to the occupation and use of the Mau Forest", which assures their indigeneity as well as the forest as their ancestral home (Ogiek Judgment para 109). Despite the legal and political restrictions on the Ogiek people to practice their traditional livelihood during the colonial and post-colonial administration,

the African Commission argued that the communities continued their traditional activities of hunter-gatherers where possible (SoM para 349). Having substantially argued the history of the Ogiek people, their specific connection to the Mau Forest, the legal framework, and the political environment that led to numerous evictions the African Commission set forth its arguments on the violation of the African Charter by the Kenyan government. It examined the facts of the case, how they met the facts under the African Charter, and thereby resulted in human rights violations of the government. This step is called subsumption, the application of the legal norm to the facts. There may be overlapping violations because the facts fulfill multiple charter provisions.

3. The government's discrimination against the Ogiek communities

Under Article 2 of the African Charter:

> Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

This is a non-exhaustive list of the right to non-discrimination which is indicated by the term “such as”. It is uncommon to use the term “distinction” rather than “discrimination”, but that does not change the protection under the provision. Since neither term is defined in the Charter, the Commission has developed a definition that is in line with the IACtHR and the ECtHR.

Discrimination is, therefore “any act which has either the purpose (direct discrimination) or effect (indirect discrimination) of impairing the enjoyment of all persons of all rights and freedoms” (SoM para 370). Thus, direct (de jure) discrimination is “less favorable treatment based on a prohibited ground” such as ethnicity or gender, whereas indirect (de facto) discrimination occurs when “a practice, rule or requirement is neutral on its face (ie makes no reference to a prohibited ground) but impacts particular groups disproportionately” (SoM para 370). Discrimination may be justified if the government is pursuing a legitimate state interest, but the less favorable treatment must be proportionate and necessary to achieve that state interest. The burden of proving objective and reasonable justification for discrimination rests with the Kenyan government.

As the Kenyan government disputed its discrimination against the Ogiek communities, citing its national statutory prohibition on discrimination, the African Court interpreted the right to non-discrimination as going beyond the right to equal treatment before the law (Ogiek Judgment para 138). Since the Kenyan government kept the laws enacted during the colonial period with only a few changes, their effect has also remained to this date. Until the 2010 Constitution, Kenyan laws thus recognized the concept of ethnic groups or tribes. Just as the laws dated back to colonial times, so did the Ogiek community's demand for recognition as a tribe, which was a prerequisite for access to their land. By denying them their tribal status, they were not granted their land rights from then until that point (Ogiek Judgment para 141). To exemplify the situation, the African Court compared them to the Maasai, who are a recognized tribe and enjoy all the rights associated with it. In theory, Kenya's 2010 Constitution recognized the protection of indigenous people as part of a marginalized community. By contrast, the ongoing evictions of Ogiek members and the failure of government authorities to comply with the orders of the national courts demonstrated that the legal safeguards were ineffective (Ogiek Judgment para 144). The African Court, therefore, affirmed that the Kenyan government violated the right to non-discrimination under Article 2.

4. Endangering the lives of Ogiek people

Article 4 of the African Charter provides the right to life:

> Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.

According to the jurisdiction of the African Commission the right to life comprises the right to physical and moral integrity (SoM para 393). The Kenyan government must therefore refrain from any actions that may violate the right to life and must take affirmative action to realize it. The African Commission further argues that the restrictions placed on Ogiek communities to the Mau Forest deprived them of their livelihoods and thus violated their right to live (SoM para 401). The respondent objected that the economic activities in the Mau Forest were for the benefit of all Kenyans and therefore public interest (Ogiek Judgment para 150). The African Court believed that there was a difference between the classical meaning of the right to life and the right to the dignified existence of a community and that evictions did not automatically constitute a violation of the right to life (Ogiek Judgment para 154). Consequently, the African Court

finds that there was no violation of the right to life because the African Commission has not presented sufficient evidence to show a causal link between the evictions and the alleged deaths.

5. Religious practices under constraints

The right to free practice of religion is protected under Article 8 of the Charter:

> Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms.

The African Commission submitted that the evictions of the Ogiek, as well as the logging of their ancestral land under the Kenyan authority, posed restrictions to the right to free practice of religion. The violation of Article 8 was one of the key problems in the Endorois decision, which was decided by the African Commission in 2009. Therefore, the African Commission drew several connections of argumentation between the Endorois and the Ogiek case. Invoking their decisions strengthens the importance of their own jurisprudence to have it recognized by the African Court. To apply Article 8 started with the interpretation of religion. International law has a broad interpretation of the term "religion" that includes spiritual beliefs and ceremonial practices (SoM para 420).

Religious practices of the Ogiek communities in the Mau Forest included weddings, funerals, circumcisions, and traditional initiations. Furthermore, the Ogiek people believed that the simotwet tree, a native tree of the Mau Forest, had a special connection to God (SoM para 427). Therefore, they did not eat its fruit and sought its spirit during important meetings and prayers. Their expulsion from the Mau Forest, as their sacred land, prevented them from practicing their religion and was, therefore, a violation of Article 8 (SoM para 437). The African Commission argued that by evicting the Ogiek people and permitting commercial logging on their ancestral lands, the Kenyan government has failed to demarcate and to protect the religious sites of Ogiek communitie. (SoM para 443). Even if economic development or environmental protection were legitimate interests of the state, there was no justification for interference because the restriction must have been the least restrictive possible to achieve the legitimate goal (SoM para 450). In any case, forced evictions are not the least restrictive means of economic development or environmental protection.

The respondent submitted that Ogiek people have converted to Christianity and their traditional religious practices would threaten law and order. The African Court notes the spiritual connection between traditional societies and their natural environment, and to the fact that the Mau Forest was also central to the Ogiek society even though some members have converted to Christianity, they continue their traditional religious practices (Ogiek Judgment para 165, 168). Any restrictions in the interest of law and order must therefore be proportional and reasonable. The African Court found that other measures, such as an education campaign about the obligation to bury their dead following the requirements of the Public Health Act, could have been taken to offset the fact that the Ogiek people continued to exercise their right to religious freedom, but according to Kenyan law (Ogiek Judgment 167). Consequently, the African Court affirmed the respondent's violation of Article 8 of the African Charter.

6. Disputed property ownership

Article 14 of the African Charter protects the property right:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.

The scope of property rights under Article 14 of the African Charter depends on the definition of property, which is autonomous under international law and must be understood in a broader sense than the domestic legal definition under Kenyan law. Until the 2010 Constitution, Kenyan law recognized African customary law only to a very limited extent, failing to consider the collective nature of land rights and the cultural and spiritual connection of the Ogiek society to the Mau Forest (SoM para 495). The Nairobi High Court upheld the lack of property rights in its decision on the case *Kemai and Ohters v Attorney General and Others* in the year 2000 and held that a license is sufficient to carry out traditional livelihoods (SoM para 500). Contrary, the African Commission granted collective land rights in the Endorois case and decided the precedent in its jurisdiction that property includes the right to land, the right to have access to it, the right not to have one's property interfered with.

To determine a violation of Article 14 by the Kenyan government, the African Commission asked the African Court to establish a definition of the term "property" keeping in mind that only legal ownership grants effective protection (SoM para 465, 482). Even

though the African Commission had already recognized collective property rights in the Endorois decision, the Kenyan government has not taken any actions to comply with the Endorois decision in the four years that have passed since the Ogiek case was presented to the African Court (SoM para 504). Ignoring the jurisdiction of the African Commission is possible for African states because human rights institution do not have any possibility to enforce their decisions. However, the judgments of the African Court are legally binding. Since indigenous groups have a special form of land ownership, the Ogiek community demanded recognition of their communal property by the African Court, as the African Commission did in its Endorois decision (SoM para 470).

An encroachment of Article 14 may be justified in case of public need or general interest of the community according to the proportionality principle (SoM para 513). The legitimate interest at stake for public need or general interest was the protection of land, and the means used the eviction of the Ogiek people. Replacing members of the Ogiek communities with other residents who have no connection to the land cannot serve a public need or have a legitimate aim (SoM para 528). Further, the evictions were not the least restrictive measures to protect the land, instead, the government could have incorporated the expertise of the Ogiek communities as a conservationist and appointed its members as forest managers. As a result, the Kenyan government failed to pursue their supposedly legitimate aim of land protection by not applying the most restrictive means to achieve that aim. It was therefore a disproportionate response to any public need to forcefully displace a community to take their property rights over their ancestral lands (SoM para 529). Consequently, the African Commission argued that the encroachment was not justified, and the Kenyan government was in violation of the Ogiek community's right to property.

The respondent objected to the right to property of the Ogiek communities by the fact that they were not the only indigenous group inhabiting the Mau Forest and could therefore not claim absolute ownership thereof (Ogiek Judgment para 120). Further, the respondent disputed the African Commission's arguments, stating that the Kenyan land laws did recognize community ownership, and Ogiek members could participate in the conservation and management of the forest and use the forest with licenses. Accordingly, the government asked the African Court to apply the proportionality test to find a violation of the right to property. Before the African Court considered the proportionality of the measures, it interpreted the term property. It explained that the

property right could be individual or collective and comprised three elements: the right to use the land (usus), its fruits (fructus), and to transfer it (abusus) (Ogiek Judgment para 123 f). Further, the African Court interpreted the right to property by reference to Article 26 of the UNDRIP that emphasizes the rights of possession, occupation, and use of the land (Ogiek Judgment 127). Since the Mau Forest was undisputedly the ancestral land of the Ogiek people, they had the right to occupy, use and enjoy it under Article 14 of the African Charter in conjunction with Article 26 of the UNDRIP (Ogiek Judgment para 128). In assessing the proportionality of the restriction on property rights, the African Court followed the African Commission's findings and determined that the Ogiek peoples' eviction was not necessary to prevent environmental degradation, but instead that deforestation and unreasonable logging concessions were the main cause (Ogiek Judgment para 130). The African Court, therefore, affirmed the state violation of Article 14.

7. Disregarding cultural activities for environmental protection

Under Article 17 of the African Charter the right to culture is protected, with the African Commission invoking only sub-articles 2 and 3:

> (2) Every individual may freely, take part in the cultural life of his community.
>
> (3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

In defining culture, the African Commission has recognized culture as capital through material heritage and as creativity through artistic and scientific creation, which in sum is distinct from other communities (SoM para 540 f). The Ogiek people are a marginalized community within Kenya due to their traditional lifestyle as a hunter-gatherer which constitutes a culture under the African Charter. The scope of article 17 includes the commitment of the Kenyan government "to respect, protect, and fulfil the realization" of cultural rights according to the African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights (SoM para 563). Therefore, the government and its branches must not interfere with cultural rights, which include the resources the Ogiek communities need to practice their culture, such as their ancestral lands and the trees that grow there. It also means taking positive measures to protect the Ogiek communities from third parties, such as private and international companies or private individuals. In addition, the Kenyan government

must raise awareness of the existence of cultural rights, and finally, it should continuously promote their enjoyment.

Contrary to the government's obligation, it has denied the Ogiek peoples' right to culture. The evictions of Ogiek members led to the denial of access to their religious and cultural sites which were located in the Mau Forest. Instead of protecting the Ogiek community's cultural rights from third parties, the government has transferred their land for commercial activities to companies and private individuals (SoM para 579). Unlike the previous civil and political rights, the African Commission did not need to apply the proportionality test to Article 17. The right to culture, like economic and social rights, is absolute and may not be restricted (SoM para 583). The African Commission, however, applied the principle of proportionality hypothetical to Article 17 to demonstrate to the African Court the disproportionate action of the Kenyan government. Accordingly, the protection of the Mau Forest may be a legitimate aim but the relocation of the Ogiek people was not the least restrictive measure to achieve that aim, considering forest conservation as part of the Ogiek livelihood (SoM para 589 f). Finally, depriving the Ogiek people of the right to culture was disproportionate to protecting the forest.

The respondent stressed its responsibility to balance cultural rights and environmental protection but believes that the Ogiek population have adapted to modern life and no longer maintained their cultural and traditional practices as hunter-gatherers who preserve the Mau Forest (Ogiek Judgment 174 f). However, the African Court found that the right to development goes beyond the duty not to destroy their culture and acknowledges their distinctiveness:

> [T]he Ogiek population has a distinct way of life centred and dependent on the Mau Forest Complex. As a hunter-gatherer community, they get their means of survival through hunting animals and gathering honey and fruits, they have their own traditional clothes, their own language, distinct way of entombing the dead, practicing rituals and traditional medicine, and their own spiritual and traditional values, which distinguish them from other communities living around and outside the Mau Forest Complex. (Ogiek Judgment para 182).

Witness Mary Jepkemei, a member of the Ogiek community, testified that the Ogiek people still maintained their traditional values and ceremonies, but evictions and restrictions on access to the Mau Forest imposed by the respondent have severely impacted their ability to practice their traditions (Ogiek Judgment para 183. 186). Just as

the respondent has not proven what practices and how these practices of the Ogiek have harmed the Mau Forest, it has not shown that the change of lifestyle has abolished the distinctiveness of the Ogiek people (Ogiek Judgment 185, 189). As a result, the African Court affirmed the violation of the right to culture by the respondents under Article 17 (2) and (3) of the African Charter.

8. Natural resources of (and for) the Ogiek people

Under Article 21:

> (1) All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.
>
> (2) In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

The right to natural resources is an absolute right, that does not provide for any limitations, which is evident from the wording “[i]n no case shall a people be deprived of it”. Compared to the right to property under Article 14, the scope of Article 21 goes further by granting the right to resources regardless of the ownership of the land. The Ogiek people could therefore claim the right to the natural resources of their ancestral lands, which included their right to exploit the resources in the Mau Forest and the right to give or withhold their consent to its exploitation (SoM para 605). The natural resources of the Ogiek people are the bees, their traditional honey, herbs, plants, native trees, and bushes. By distributing logging concessions, granting permission for the cultivation of tea plantations to third parties, and evicting Ogiek members from the Mau Forest, the Kenyan government violated the right of the Ogiek people to freely dispose of their wealth and natural resources, deprived them of it, and ignored the exclusivity of the interests of the Ogiek people (SoM para 612).

According to Article 21 (2), the Ogiek community were a dispossessed people by the Kenyan government and were therefore entitled to recovery of their property as well as to adequate compensation. However, at the time of the submission on the merits by the African Commission to the African Court, the Ogiek communities had neither recovered their property nor received adequate compensation for the losses they have suffered (SoM para 616). As a result, the African Commission demonstrated that the Kenyan government violated Article 21, the right to free disposition of natural

resources. Since the African Charter does not define the term "people," the African Court interpreted that "people" refers not only to the population of the state but also specifically to its ethnic groups and communities, if they do not challenge the sovereignty and territorial integrity of the state (Ogiek Judgment para 199). This means that specific groups such as the Ogiek people could also assert their right to natural resources, which made the provision more concrete. As the Ogiek people were denied the right to use and freely dispose of their natural food resource produced on their traditional lands, the African Court found a violation of Article 21 of the African Charter by the Kenyan government.

9. Development under detrimental conditions…not possible!

Article 22 of the African Charter protects the right to development:

> (1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
>
> (2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The most recent case in which the African Commission found a violation of Article 22 was the Endorois decision, in which the Kenyan government was also the respondent (SoM para 623). The similarities between the Endorois case and the Ogiek case also led to several references when arguing the right to development. Among the favorable conditions for development is the participation of the population in the process, a condition advocated by the African Commission in its previous human rights decisions, the UNDP, and the World Bank (SoM para 652). Moreover, only freedom of choice in economic, social, and cultural life could ensure effective participation for the benefit of the Ogiek people. Therefore, the African Commission referred to its decision in the Endorois case that the community had the right to prior consultation and consent concerning their ancestral lands (SoM para 647).

Control over the land provides space for cultural and social reproduction and realizes the right to development. The lack of control through ownership of their land allowed the evictions of Ogiek communities by the Kenyan government. These government actions have had a serious impact on the Ogiek people and their ability to develop individually and as a community (SoM para 642). They lost access to their herbs,

beehives, game, and trees that provided food, medicine, and spiritual connections. The result was the violation of the right to development of the Ogiek people by the Kenyan government. Ogiek members were neither consulted before their eviction nor did they give their consent for their relocations (SoM para 671). By the time they were served with the eviction notice, all the facts had already been established, and they had no opportunity to participate.

In conclusion, the Kenyan government violated the right to development of the Ogiek people under sub-section 1 and failed its obligation under sub-article 2 to create favorable conditions for the development of the Ogiek people. In response to the Kenyan government's objection that the African Commission should have demonstrated specifically in which development processes the Ogiek people were excluded, the African Court countered the repeated evictions of Ogiek communities from the Mau Forest without effectively consulting them (Ogiek Judgment para 205, 210). Therefore, the African Court confirmed that the respondent party violated the right to development of the Ogiek people.

10. Consequential violation

The African Commission submitted the violation of state obligations under Article 1 of the African Charter:

> The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.

The African Commission's jurisprudence has established that a violation of any other provision of the African Charter is automatically a violation of Article 1. The violation of state obligation was the failure by the Kenyan government to take sufficient measures to fulfill the provisions of the African Charter (SoM para 354). Although the Kenyan government has not submitted any arguments regarding the alleged violation, it has taken some legislative steps to ensure African Charter rights through the most recently enacted 2010 Constitution and other legislations (Ogiek Judgment para 213, 216). However, the African Court found that the Kenyan government failed to consider the Ogiek society as a distinct tribe, which denied them access to their land in the Mau Forest and resulted in the violations of their rights under the Articles 2, 8, 14, 17 (2)

and (3), 21, and 22. In the lack of adequate legislative and other measures, the African Court found a violation of Article 1.

To conclude the analysis of the human rights violations by the Kenyan government towards the Ogiek communities of the Mau Forest, the African Court confirmed the submission by the African Commission that the government violated Articles 1, 2, 8, 14, 17 (2) and (3), 21, and 22 of the African Charter. The court only denied a violation of Article 4, the right to life. After the determination by the African Court of the individual human rights violations by the Kenyan government, the decision on reparations for the damage caused remained to be made.

11. How can the Kenyan government make up for the endured suffering?

Finally, the African Commission requested for remedies and reparation. Article 27 (1) of the Protocol to the African Charter[20] creates the legal basis:

> If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

Reparation is intended to eliminate the consequences of the unlawful act and restore a situation that would exist if the crime had not been committed. However, reparations are not limited to monetary compensation but also include "restitution, rehabilitation, satisfaction, and guarantees of non-repetition" (SoM para 682). Thus, reparation is a wider term than compensation, which is limited to a monetary amount. The African Commission held that the Ogiek people were entitled to the return of their ancestral lands under Article 21 of the African Charter, as well as adequate compensation (SoM para 689). As for the specific amount, the African Commission followed the practice of the Inter-American Commission and the UN Human Rights Committee, which generally do not determine damages in monetary terms (SoM para 694). Only the international human rights courts, the IACtHR, and the ECtHR have determined the amount of compensation, so it is up to the African Court to assess a specific sum.

[20] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 2004, https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf. [23.3.2022]

The African Commission asked the African Court to issue a separate judgment on reparations under Rule 63 of the Rules of Court (SoM para 700). The reparations requested include the return of the Ogiek peoples' ancestral land through a legislative process within one year of the judgment and a demarcation process within three years of the judgment. In addition, the African Commission demanded compensation for all damages suffered by the Ogiek people and required the Kenyan government to take legislative, administrative, and other measures to realize the right to develop within one year of the judgment (SoM para 700). Finally, it demanded an apology from the government to the Ogiek people within three months of the judgment, a public monument for the Ogiek people within six months of the judgment, fully legal and political recognition, and representation for the Ogiek people. The government denied the request for reparations because the Ogiek people have adjusted to a modern lifestyle and thus could not claim losses due to their former lifestyle as hunter-gatherers. According to the respondent, the evictions served the purpose of fulfilling the national and international laws for the protection and conservation of the natural environment of the Mau Forest and therefore the Ogiek people were not entitled to compensation (Ogiek Judgment para 221). The African Court concluded that it would rule on reparations in a separate decision.

The analysis of the Ogiek case showed the long process until a judgment was made, the different actors involved in advocating for the Ogiek people, and the procedural requirements to which the process was bound. In building the case before the African Court, the mandate of the respective actors had to be clear, as well as their limits of taking actions. Since national legal remedies were unsuccessful, the NGOs OPDP, CEMIRIDE and MRG represented the Ogiek people in international legal proceedings. The NGOs ensured local, national, and international expertise to act on the behalf of the Ogiek people. They brought the case before the African Commission, a quasi-judicial body of the AU that can make recommendations to national governments but cannot enforce them. However, only the African Commission can bring the case on behalf of the Ogiek people before the African Court, so it must first be convinced of the human rights violations by the Kenyan government, which the NGOs have done in their submission on admissibility in 2010, one year after the Ogiek people received the eviction notice from the Kenya Forestry Service to leave the Mau Forest within 30 days.

In 2012 the African Commission brought the case before the African Court to issue provisional measures because the Kenyan government had lifted restrictions on land transactions, which further endangered the situation of the Ogiek people in the Mau Forest. Unlike the recommendations of the African Commission, the orders and judgments of the African Court are binding. The parties before the African Court were the African Commission and the Kenyan government, which means that the NGOs who initially filed the case did no longer play a role in the court proceedings. During the public hearing in November 2014, it was the first time all parties appeared before the judges of the African Court and could give their statements: representatives of the African Commission and their witnesses, as well as representatives of the Kenyan government. Additionally, a representative of the NGOs as original complainants had the permission to give an oral statement on the situation of the Ogiek people emphasizing the continued threat to their livelihoods through physical violence against their members and deforestation of the Mau Forest.

Prior to the ruling, the African Court proposed an amicable settlement between the African Commission and the Kenyan government to jointly negotiate a solution, instead of determining a winner and a loser of the dispute through a judgment. However, the amicable settlement was unsuccessful because the parties could not agree on the content and terms of the negotiations. Since the African Court is only allowed to operate within its procedural rules specified in the Protocol and the Rules of Court, it had to affirm its competence before rendering the judgment so as not to conflict with national courts, which have priority in resolving disputes. In the judgment the judges evaluated the arguments by the parties and gave their conclusions. The judges determined that the Ogiek people who live in the Mau Forest perform the role of conservationists as part of their traditional livelihood. Despite the challenges to the UNDRIP by African states, the judges recognized that the Ogiek people had priority in time and that the Mau Forest constituted their ancestral home. It further found the Kenyan government in violation of Articles 1 (state obligation), 2 (right to non-discrimination), 8 (right to free practice of religion), 14 (right to property), 17 (2) and (3) (right to culture), 21 (right to natural resources), and 22 (right to development) of the African Charter. Finally, the judges of the African Court did not rule on the reparations for the endured suffering of the Ogiek people but decided to assess that matter separately.

The proceedings of the Ogiek case showed the competing agencies of national and international political actors. While the Kenyan national government opened possibilities for the elite group to acquiring land to increase their economic profits in exchange for political support, the African Commission and the African Court are the key human rights bodies within the AU that protect fundamental rights and ascertained land rights to the Ogiek people in the Mau Forest. Since the African Commission and the African Court have complementary mandates, they strengthen human rights jurisprudence. The situation of legal pluralism persists, as both national and international law grant land rights in the Mau Forest to different actors. However, it depends on political will whose rights prevail. Even though, the ruling of the African Court is legally binding, it requires the political commitment of the Kenyan government to implement the decision.

Chapter 5: Implementing and challenging the judgment

The African Court's landmark ruling in favor of the Ogiek people promised positive change and captured media attention (Vigliar 2017; BBC 2017). It was the first time the African Court ruled on indigenous peoples' rights which gave hope to the Ogiek people which have been deprived of their ancestral land since colonial times. Even though the judgment was legally binding, which means that the Kenyan government is obliged to implement the ruling of the African Court, the judgment on the reparations to compensate the Ogiek people for their endured suffering through out all those decades is still pending in 2022, five years after the judgment. Meanwhile, new actors have stepped in to oppose the ruling. In addition, the Kenyan government has continued to evict Ogiek members from the Mau Forest and distributed title deeds to non-Ogiek people.

With the ruling, the African Court awarded the Ogiek people land rights in the Mau Forest that had already been allocated company owners and individuals by the Kenyan government. This created a situation of competing land rights, which met with resistance from the registered landowners. After the pleadings for reparations were closed on 20th September 2018, Wilson Barngetuny Koimet together with 119 others, as well as Peter Kibiegon Rono with 1300 others, all of them registered as landowners in the Mau Forest, filed two separate applications to challenge the African Court's judgment on the Ogiek case. The African Court dealt with those two applications at the same time, according to the principle of effectiveness and process economy of proceedings meaning that the court may join proceedings if they are closely connected (Intervention 2019 para 4). As the registered owners of the disputed land and therefore as affected parties to the case, the applicants requested to intervene in the proceedings in order to exercise their right to be heard by the African Court (Intervention 2019 para 5 ff). Additionally, they accused the members of the Ogiek community of fraud and withholding essential facts in the proceedings before the African Court (Intervention 2019 para 7).

To determine the admissibility of the applications, the African Court relied on Article 5 (2) of the Protocol, Rule 33 (2) and Rule 53 of the Rules to Court. These provisions refer only to the intervention of state parties and not to individual persons, therefore, third parties such as the applicants could not intervene (Intervention 2019 para 14). Additionally, an application for intervention can only be filed before the closing of

pleadings, but the applicants filed their application one year and eleven months after the judgment (Intervention 2019 para 15). Considering the fact that proceedings before the African Court lasted six years and eight months and got significant media attention, it can be assumed that the dispute became common knowledge, but the applicants have failed to explain their delay in filing their application. The African Court therefore dismissed the application for intervention on 4th July 2019.

In reaction to the dismissed application Wilson Barngetuny Koimet and 119 others filed the application for review of the court's order on the legal grounds of Article 28 (principal of finality) of the Protocol and Rule 67 of the Rules of Court (Review 2019 para 5). Accordingly, no further evidence could be presented after the decision had been made and new evidence could be brought to the court only if the party became aware of it within six months after the judgment. The applicants claimed that three land sections did not belong to the Mau Forest by attaching a map of the Mau Forest from the Kenya Forest Service, a letter from Chief Land Registrar to the District Land Registrar, letters from the Kenya National Archives dating back to 1941, a research paper submitted to the University of Nairobi in 2009 (Review 2019 para 14). However, the applicants have not shown that they were unaware of this evidence by the time the African Court issued the judgment. Therefore, Mr. Koimet together with 119 others did not meet the requirements in Rule 67 (1) of the Rules of Court (Review 2019 para 15). Regarding their alleged right to be heard before the African Court, Rule 27 (1) of the Rules of Court do not compel the African Court to hold public hearings (Review 2019 para 16). The African Court is not required to consider all applications and has the power under Rule 38 of the Rules to dismiss applications that are not well justified. Consequently, the African Court also dismissed the application for review on 11th November 2019.

After the judges of the African Court dismissed both attempts that challenged the Ogiek judgment, the lawyer representing Wilson Barngetuny Koimet and 119 others filed another application to the court. This time, he represented Ogiek members living in the Tinet Settlement Scheme, where they received their title deeds in 2005 (Order 2019 para 4 f). The applicants presented the negative impacts of the transaction ban on land in the Mau Forest that prevented the Ogiek members to use their land as security for credit institutions to strengthen their capital for economic activities (Order 2019 para 6). Additionally, they accused the Ogiek members in the case of fraudulently obtaining the judgment since the government had already issued them individual title deeds and

that it was their personal will to sell their plots. Finally, the applicants claimed that the case was filed by the NGOs OPDP, CEMIRIDE and MRG without the consent of the Oigek people of Tinet and that they did not have any intentions of converting the land into community land (Order 2019 para 7 f). Again, the African Court dismissed the application for intervention on 28th November 2019 based on Article 5 (2) of the Protocol, Rule 33 (2) of the Rules, Rule 53 of the Rules, which do not allow individuals to join an ongoing proceeding before the court.

The challenge to the judgment by member of the Ogiek people questions the legitimacy of the NGOs working on their behalf. As demonstrated earlier, the Ogiek people of the Tinet Settlement Program themselves have struggled to obtain their title deeds by filing the two lawsuits after an eviction notice on behalf of 5000 Ogiek members *Francis Kemai and 9 Others v Attorney-General and 3 Others, HCCA case no 238 of 1999* and *Republic v Minister for Environment and 5 Others, ex parte the Kenya Alliance of Resident Associations and 4 Others, HCCA case no 421 of 2002* in the Nairobi High Court and have been subjected to political intimidation in the process. Thus, the Ogiek of the Tinet Settlement Program were affected by the very human rights violations that were subject of the ruling. Even though they oppose the ruling and did not feel represented by the NGOs, they should have brought this objection within the eight years of proceedings starting with the African Commission and ending with the African Court.

The judgment by the African Court is binding but its implementation depends on political will, as there are no coercive mechanisms to implement it. Since the African Court was established to strengthen human rights on the continental level, it is concerning that Kenyan government undermines its authority by not taking any serious measures to implement the judgment. Director of ODPD even addressed the African Commission complaining that the appointment of task forces to implement the judgment had never produced results, either in the form of reports accessible to the public or in the form of action (OPDP 2020: 1). Contrary to the judgment 1000 Ogiek members were evicted from the Mau Forest in July and August 2020 and ethnic tensions arose between Ogiek and non-Ogiek communities, who fear of being forced to move due to the judgment. Instead of implementing the ruling, local authorities sought to resolve ethnic tensions by issuing title deeds for 5-acre land to Ogiek and non-Ogiek families without considering the Ogiek peoples' claim to collective ownership of the Mau Forest and without consulting them (OPDP 2020: 2).

After the judgment, the Kenyan government also delayed further proceedings before the African Court on the ruling on reparations. Once the parties made their statements on reparations, a public hearing was scheduled for the 6th of March 2020, which was postponed twice due to the COVID pandemic and was finally supposed to be held as a virtual hearing between the 7th and 8th of September 2020 (Procedure 2021 para 5 f). The Kenyan government had even expressed difficulties to participate in the virtual hearing and postponed the date for it twice under the excuse of the COVID pandemic. It is evident that the Kenyan government wanted to prolong the procedure before the African Court while evicting 1000 Ogiek people from the Mau Forest. Due to the uncertainty surrounding the COVID pandemic, the African Court decided on the most appropriate procedure to conclude this matter in accordance with Rule 90 of the Rules of Court (Procedure 2021 para 18). Thereupon, the African Court decided unanimously that all claims for reparations are to be determined on the submissions made by the parties without a hearing, which is still pending to date (Procedure 2021 para 20).

The judgment by the African Court in favor of the Ogiek people was a major step toward legal recognition of their ancestral lands in the Mau Forest. However, the legal challenges of third parties applying for intervention, political maneuvers by prolonging the procedures and undermining the judgment through further evictions of the Ogiek people have shown that the judgment is contested and political will is foremost needed to implement the African Court's ruling. Even if the African Court plays a supporting role in the implementation process rather than enforcing it through coercive measures, the judgment causes political pressure on the Kenyan government within the African Union to respect the rule of law.

Conclusion

The African Court delivered its landmark decision on indigenous rights on 26th May 2017 after the Kenyan Forestry Service issued a 30-day eviction notice to the Ogiek people of the Mau Forest in 2009. The court found the Kenyan government had violated the African Charter in Article 1 (state obligation), Article 2 (right to non-discrimination), Article 8 (right to free practice of religion), Article 14 (right to property), Article 17 (2) and (3) (right to culture), Article 21 (Right to natural resources), and 22 (right to development). With the ruling it was the first time that a court acknowledged the land rights of the Ogiek people to their ancestral land, the Mau Forest. The contested resource of land enables housing, food, economic independence and livelihood security through land rights which in turn enables community development in the form of education, the construction of medical facilities and infrastructure. Since the colonial period, the Ogiek people were denied their rights thereof, first by the colonial administration and later by the Kenyan governments. While the colonial administration allocated land rights to white settlers, the Kenyan governments distributed land titles to third parties such as corporate entities and private actors. The ruling has thus created a situation of competing land rights that required a political solution, which the Kenyan government did not approve of in order to preserve its political structures through strong economic allies.

In the thesis, I examined the complex Ogiek case, that involved many actors, political and legal implications dating back to the colonial period, as well as conflicting legal understandings of land rights at the local, national, and international levels. With my interdisciplinary approach in law, politics and history, I have brought a new perspective to the existing analysis of the case by including the judicial proceedings before the African Court. Using primary sources, which included the legal documents issued by the African Court as well as the parties' submissions to the court, and secondary literature, I critically discussed the judicial material in order to question the approaches taken by political actors to maintain their power structure to the detriment of the already marginalized Ogiek communities.

One of the objectives of this thesis was to show how judicial and political actors created competing entitlements for land allocation. Legal pluralism was introduced in Kenya by the Europeans conquest over African societies, as they not only implemented their social structure based on ethnicity but also their understanding of the law. Local laws

were brought into written form through a negotiation process between representatives of the colonial administration and local elites, council of elders or chiefs. The results were customary laws under language barriers, ambiguities in terminologies, and the fact that British legal concepts did not fit the local conditions. The subordinate role of these created customary rights was embedded by rules such as the principle of inconsistency and repugnancy, according to which customary law must have been equivalent to British laws and customs that a judge considered harmful to a social community and a person's physical well-being were prohibited (Kariuki 2015: 7; Ochich 2011: 122).

During the independence negotiations representatives of the British government and of the interim Kenyan government agreed to maintain the existing laws with the subordinate role of customary law to British law, which became state law. With the memberships in the UN and the AU, legal pluralism in Kenya consisted of local laws of African communities, customary law, state law and international law. The subordinate role of customary law in the national legal system hindered its further development through legal practices but it did not prevent their application in the respective communities. Members of local communities had easier access to local chiefs or council of elders than national courts to decide over disputes. However, looking at the Ogiek case from a gender perspective has shown that women's rights, which are primarily protected by international and national regulations, did not reach local communities. For this reason, most Ogiek women do not own land which is preserved for the men and in general only one percent of women in Kenya even hold title deeds to land (Kameri-Mbote/ Oduor 2009: 178).

Legal regulations and governance were crucial to the land dispossession of the Ogiek people. The land struggle of the Ogiek people dated back to the colonial period when the British administration secured the economic advantage of European settlers through land acquisition. The ancestral land of the Ogiek people, the Mau Forest which is the largest of five water towers in the country with the largest forest cover, was declared Crown land, while African communities had to live in designated native reserves along ethnic lines. The Ogiek people were denied the status of being a distinct ethnic group but instead forced to assimilate with others. The Ogiek people resisted the evictions from the Mau Forest by returning to it to continue their lifestyle as a hunter and gatherer community, until they were evicted again. In the meantime, the colonial administration secured the most fruitful land to European settlers through land tenure

reforms, on which people from African communities could only stay as squatters. With the continuity of law after independence, as state law rather than British law, inequalities also persisted.

Instead of correcting the historical injustices of colonial administration, the governments under Presidents Kenyatta, Moi and Kibaki maintained them and granted the influential African elite access to resources to secure political power structures and increase economic wealth. The resettlement programs were intended to resolve the situation regarding land rights, but political officials awarded title deeds to allies and to people based on their ethnicity, as that simulated kinship. This type of land allocation did not solve the land problems at all, on the contrary, the majority of the Ogiek people did not receive their promised land as it was allocated to non-Ogiek people. For this reason, they were unable to secure their housing, food and economic independence, but were forced to remain in poor living conditions, in constant fear of being forcibly displaced.

The post-independence period for the Ogiek people was marked by continued evictions from the Mau Forest and lack of access to justice. The proceedings before the national courts have shown that the judicial system was not independent, but rather under political influence. The human rights movement in the 1980s and 1990s, which also promoted indigenous rights, has opened up new opportunities for the Ogiek people to advocate for their land rights. The African Charter became the legal framework in 1986, the following year the African Commission started operating and NGOs became agents of threatened communities by monitoring governmental compliance with human rights (Mutua 2009: 18). Since the decisions of the African Commission were not binding, AU member states established the African Court, which delivered its first judgment in 2009, to give binding effect to decisions on human rights. Through the agency of three NGOs, OPDP, CEMERIDE, and MRG, and the African Commission, the Ogiek people were represented before the African Court challenging the 30-day eviction notice issued by the Kenya Forestry Service in 2009.

Another objective of this thesis was to show how the Ogiek people, as a marginalized community, accessed justice in a multi-layered legal setting to acquire their land rights. Since colonial times, the political leadership of each government has prevented the Ogiek people from acquiring their land rights. It was only with the establishment of human rights systems that agencies were created that were connected at local,

national, and international levels so that the Ogiek people could eventually use this legal framework to obtain their land rights in the Mau Forest through the African Court. The proceedings have shown that the procedural requirements can only be met with the support of NGOs that have experience in filing legal claims to convince the African Commission to take the case to the African Court. OPDP, CEMERIDE, and MRG working together in representing the Ogiek people had the local, national and international expertise needed to successfully argue the case. Finally, the African Court found the Kenyan guilty in violating the African Charter in Articles 1, 2, 8, 14, 17 (2) and (3), 21 and 22 and it was the first time that a court awarded land rights in the Mau Forest to the Ogiek people.

Even though the judgment by the African Court in favor of the Ogiek people was a major step toward legal recognition of their ancestral lands in the Mau Forest, it depends on the Kenyan government to implement it. The joy, the singing and the celebration of the Ogiek men and women at the African Court in Arusha, Tanzania after Justice Ramadhani delivered the judgment on 26th May 2017 was a moment of victory after all the years of displacement from their ancestral land. However, this relief did not last long. During the last five years, since the ruling, the Kenyan government has not taken any steps to comply with the ruling. On the contrary, it has continued the eviction of the Ogiek people from the Mau Forest and delayed further hearings for the judgment on reparations. Therefore, it cannot be concluded that the Ogiek people have received justice as a result of the judgment, since it is still up to the Kenyan government to establish this lawful situation.

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Appendix

1. Abstract

On 26th May 2017, the African Court on Human and Peoples' Rights issued its landmark decision on indigenous rights in the case "African Commission on Human and Peoples' Rights v. Kenya" in favor of the Ogiek people, a Kenyan ethnic group. The central issue was land rights to the Mau Forest, which had been denied to the Ogiek people since the colonial as well as the post-colonial periods. This thesis examines how judicial and political actors have created competing entitlements for land allocation in Kenya and how the Ogiek people, as a marginalized community, accessed justice in a multi-layered legal setting to acquire their land rights. The thesis finds that land rights are strategically distributed by the Kenyan government to secure political allies, to the detriment of the Ogiek people. However, the legal framework of human rights led to a distribution of power to international human rights institutions such as non-governmental organizations, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, which provide an additional access to the judiciary. The complex case requires historical as well as legal analysis to contextualize political and legal intersections that, as a result, reveal the colonial legacy of laws in connection with the persistence of political power structures. The study further notes that the favorable court ruling is not sufficient to guarantee access to land rights. Political will is ultimately required to implement judicial decisions and thus establish justice.

2. Zusammenfassung

Am 26. Mai 2017 fällte der Afrikanische Gerichtshof für Menschenrechte und Rechte der Völker seine Grundsatzentscheidung zu den Rechten indigener Völker im Fall "African Commission on Human and Peoples' Rights v. Kenya" zugunsten der Ogiek Bevölkerung, einer kenianischen ethnischen Gruppe. Die Problematik waren die Landrechte für den Mau-Wald, die der Ogiek Bevölkerung seit der Kolonial- sowie der Postkolonialzeit verweigert worden waren. Diese Arbeit untersucht, wie juristische und politische Akteur:innen konkurrierende Ansprüche bei der Landvergabe in Kenia geschaffen haben und wie die Ogiek Bevölkerung als marginalisierte Gemeinschaft in einem pluralistischen Rechtsrahmen ihre Rechte erlangt haben. Die Arbeit zeigt, dass Landrechte von der kenianischen Regierung strategisch verteil werden, um sich politische Unterstützung zu sichern, zum Nachteil der Ogiek Bevölkerung. Der rechtliche Rahmen der Menschenrechte führte jedoch zu einer Machtverteilung an internationale Menschenrechtsinstitutionen wie NGOs, die Afrikanische Kommission für Menschenrechte und Rechte der Völker und den Afrikanischen Gerichtshof für Menschenrechte und Rechte der Völker, der einen zusätzlichen Rechtsweg ermöglicht. Der komplexe Fall erfordert eine historische sowie eine juristische Analyse, um politische und juristische Überschneidungen zu kontextualisieren, die im Ergebnis das koloniale Erbe von Gesetzen in Verbindung mit dem Fortbestehen politischer Machtstrukturen aufzeigen. Die Arbeit stellt ferner fest, dass ein positives Gerichtsurteil nicht ausreicht, um den Zugang zu Landrechten zu garantieren. Es bedarf letztendlich des politischen Willens, um die Gerichtsentscheidung umzusetzen und damit einen rechtskonformen Zustand herzustellen.