AFRICAN UNION		UNION AFRICAINE
الاتحاد الأفريقي		UNIÃO AFRICANA
AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES		

THE MATTER OF

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

V.

REPUBLIC OF KENYA

APPLICATION No. 006/2012

JUDGMENT
(REPARATIONS)

23 JUNE 2022

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The Court composed of: Imani D. ABOUD, President; Blaise TCHIKAYA, Vice-President, Rafaâ BEN ACHOUR, Suzanne MENGUE, M-Thérèse MUKAMULISA, Tujilane R. CHIZUMILA, Chafika BENSAOULA, Stella I. ANUKAM, Dumisa B. NTSEBEZA, Modibo SACKO – Judges; and Robert ENO, Registrar.

In accordance with Article 22 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (hereinafter referred to as "the Protocol") and Rule 9 (2) of the Rules of Court (hereinafter referred to as "the Rules"), Justice Ben KIOKO, member of the Court and a national of Kenya, did not hear the Application.

In the Matter of:

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (ACHPR)

Represented by:

i. Hon. Solomon DERSSO, Commissioner, ACHPR
ii. Mr. Bahame Tom NYANDUGA, Counsel
iii. Mr. Donald DEYA, Counsel

Versus

REPUBLIC OF KENYA

Represented by:

i. Mr. Kennedy OGETO , Solicitor General
ii. Mr. Emmanuel BITTA, Principal Litigation Counsel
iii. Mr. Peter NGUMI, Litigation Counsel

after deliberation,

renders the following judgment

I. BACKGROUND TO THE MATTER

1. In its Application, filed on 12 July 2012, the African Commission on Human and Peoples' Rights (hereinafter referred to as “the Applicant” or “the Commission”) alleged that, in October 2009, the Ogiek, an indigenous minority ethnic group in the Republic of Kenya (hereinafter referred to as “the Respondent State”), had received a thirty (30) days eviction notice, issued by the Kenya Forestry Service, to leave the Mau Forest. The Commission filed this Application after receiving, on 14 November 2009, an application from the Centre for Minority Rights Development and Minority Rights Group International, both acting on behalf of the Ogiek of Mau Forest. In the Application, the Commission argued that the eviction notice failed to consider the importance of the Mau Forest for the survival of the Ogiek leading to violations of Articles 1, 2, 4, 8, 14, 17(2) and (3), 21, and 22 of the African Charter on Human and Peoples’ Rights (hereinafter referred to as “the Charter”).

2. The Court delivered its judgment on merits on 26 May 2017. In the operative part of its judgment, the Court pronounced itself as follows:

> On the Merits
> i) Declares that the Respondent has violated Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter;
> ii) Declares that the Respondent has not violated Article 4 of the Charter;
> iii) Orders the Respondent to take all appropriate measures within a reasonable time frame to remedy all the violations established and to inform the Court of the measures taken within six (6) months from the date of this judgment;
> iv) Reserves its ruling on reparations;
> v) Requests the Applicant to file submissions on Reparations within 60 days from the date of this judgment and thereafter, the Respondent shall file its Response

thereto within 60 days of receipt of the Applicant's submissions on Reparations and Costs.

II. SUBJECT OF THE APPLICATION

3. In conformity with Rule 69(3) of the Rules, and in implementation of the operative part of its judgment on merits, the Parties filed their submissions on reparations within the times permitted by the Court.

III. SUMMARY OF THE PROCEDURE BEFORE THE COURT

4. On 30 May 2017, the Registry transmitted to the Parties, the African Union Commission and the Executive Council of the African Union certified copies of its judgment on merits.

5. On 10 August 2017, the Registry received an application for leave to participate in the proceedings as *amici curiae* from the Human Rights Implementation Centre of the School of Law at the University of Bristol (hereinafter referred to as “the HRIC”) and Centre for Human Rights, University of Pretoria (hereinafter referred to as “the CHR”). On 30 November 2017, the Court granted them leave to act as *amici curiae,* after duly notifying the Parties of their application .

6. On 23 October 2017, the Registry received the Applicant’s submissions on reparations. These were transmitted to the Respondent State on 25 October 2017, requesting it to file its Response within thirty (30) days of receipt.

7. On 30 January 2018, the *amici curiae* filed their combined brief and on 31 January 2018, this was transmitted to the Parties for their information.

8. On 13 February 2018, the Respondent State filed its submissions on reparations and these were transmitted to the Applicant on 16 February 2018 giving it thirty (30) days to file a Reply, if any. On 21 March 2018, the Respondent State filed its further submissions on reparations which were transmitted to the Applicant on 29 March 2018 for Reply, within thirty (30) days of receipt thereof.

9. On 9 May 2018, the Registry received the Applicant's Reply and this was transmitted to the Respondent State on 11 May 2018, for its observations, if any, within thirty (30) days of receipt of the Notice.

10. On 13 June 2018, the Registry received the Respondent' State's observations and these were transmitted to the Applicant for information on 14 June 2018.

11. On 20 September 2018, the Registry notified the Parties of the closure of the written proceedings effective on that date.

12. On 16 April 2019, the Registry received two applications, one from Wilson Barngetuny Koimet and 119 others, and the other from Peter Kibiegon Rono and 1300 others for leave to join the proceedings as interested parties. These applications were jointly considered by the Court and dismissed on 4 July 2019.[1]

13. On 29 August 2019, the Registry received an application for review of the Court's decision of 4 July 2019. This application was considered by the Court and dismissed on 11 November 2019.[2]**.**

14. On 10 October 2019, the Registry received an "application to intervene at the reparations stage" filed by Kipsang Kilel and others, being members of the Ogiek

[1] *African Commission on Human and Peoples' Rights v Kenya*, AfCHPR, Application No. 006/2012, Order (Intervention) 4 July 2019.
[2] *Application for review by Wilson Barngetuny Koimet and 114 others of the Order of 4 July 2019* (Order) 11 November 2019.

Community residing in the Tinet Settlement Scheme. This Application was considered by the Court and dismissed on 28 November 2019.[3]

15. On 22 November 2019, the Registry informed the Parties and the *amici curiae* of the Court's decision to hold a public hearing which was scheduled for 6 March 2020. The Parties and the *amici curiae* were also sent a list of issues to which their responses were required by 15 January 2021.

16. The Parties and the *amici curiae* all filed their responses to the list of issues within the time permitted by the Court.

17. On 3 March 2020, the Registry informed the Parties and the *amici curiae* of the Court's decision, under Practice Direction 34, to adjourn the hearing scheduled for 6 March 2020 to 5 June 2020 due to the non-availability of the Parties.

18. On the Court's request, two independent expert submissions were filed, one on 2 April 2020 by Dr Elifuraha Laltaika, former expert member of the United Nations Permanent Forum on Indigenous Issues and the other on 30 April 2020 by Victoria Tauli-Corpuz, the then United Nations Special Rapporteur on Rights of Indigenous People. These submissions were duly transmitted to the Parties and the *amici curiae* for their information.

19. On various occasions, in the course of 2020 and 2021, the Court attempted to convene the public hearing but was unable to do so largely due the COVID-19 Pandemic.

20. On 25 June 2021, the Court issued an Order adjourning the public hearing *sine die* and further directed that the reparations phase of the Application would be

[3] Application No. 001/2019, *Application for intervention by Kipsang Killel and others* , (Order) Intervention 28 November 2019.

"disposed of on the basis of the Parties' written pleadings and submissions." This Order was notified to the Parties and the *amici curiae* on 29 June 2021.

21. The Court acknowledges that the Parties filed several submissions in this matter including their responses to the list of issues developed by the Court.

IV. PRAYERS OF THE PARTIES

22. The Applicant prays the Court to order the Respondent to:

i. Undertake a process of delimiting, demarcation and titling of Ogiek ancestral land, within which the Ogiek fully participate, within a timeframe of 1 year of notification of the reparations order;

ii. Establish and facilitate a dialogue mechanism between the Ogiek (via the Original Complainants), KFS [Kenya Forest Service] (where relevant) and relevant private sector operators in order to reach mutual agreement on whether commercial activities on Ogiek land should cease, or whether they will be allowed to continue but operating via a lease of the land and/or royalty and benefit sharing agreement between the Ogiek communal title holders and the commercial operators, in line with provisions 35 to 37 of the Community Land Act, 2016, such dialogue to have concluded within a timeframe of 9 months of notification of the reparations order …;

iii. Pay the sum of US$297 104 578 in pecuniary and non-pecuniary damage into a Community Development Fund for the Ogiek within no more than 1 year of the Court's Order on Reparations;

iv. Take all the necessary administrative, legislative, financial and human resource measures to create a Community Development Fund for the benefit of the members of the Ogiek people within 6 months of notification of the Court's Order on Reparations;

v. Adopt legislative, administrative and other measures to recognize and ensure the right of the Ogiek to be effectively consulted, in accordance with their traditions and customs and/or with the right to give or withhold their free prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land, and implement adequate safeguards to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Ogiek;

vi. Provide for full consultation and participation of the Ogiek, in accordance with their traditions and customs, in the reparations process as a whole, including all steps that the Respondent State and its agencies take in order to comply with the requested Court order to restitute Ogiek land, provide the Ogiek with compensation, and provide other guarantees of satisfaction and non-repetition …;

vii. Introduce specific legislative, administrative and other measures that are necessary to give effect to the obligations of the Respondent State with respect to the restitution, compensation and other guarantees of satisfaction and non-repetition herein sought, as well as with respect to consultation and participation of the Ogiek, which become apparent as the implementation process takes place, and as set out in this brief, with such processes to be completed within 1 year of the date of the Court's order on reparations, and the Applicant accordingly submits that the Respondent State must take appropriate action to comply with the same;

viii. Fully recognize the Ogiek as an indigenous people of Kenya, including but not limited to the recognition of the Ogiek language and Ogiek cultural and religious practices; provision of health, social and education services for the Ogiek; and the enacting of positive steps to ensure national and local political representation of the Ogiek; and

ix. Publicly issue a full apology to the Ogiek for all the violations of their rights as identified by the Judgment, in a newspaper with wide national circulation

and on a radio station with widespread coverage, within 3 months of the date of the date of the Court's order on reparations; and

x. Erect a public monument acknowledging the violation of Ogiek rights, in a place of significant importance to the Ogiek and chosen by them, the design of which also to be agreed by them, within 6 months of the date of the date of the Court's order on reparations.

23. The Respondent State prays the Court to:

i. Find that it remains committed to the implementation of the Court's judgment as evidenced by its establishment of a multi-agency Task Force to oversee the implementation of the Court's judgment;

ii. Order that guarantees of non-repetition together with rehabilitation measures are the most far reaching forms of reparations that could be awarded to redress the root and structural causes of identified human rights violations;

iii. Order that the Court should use its offices to facilitate an amicable settlement with the Ogiek Community on the issue of reparations;

iv. Hold that restitution, for the Applicants, can be achieved by reverse action of guaranteeing and granting access to the Mau Forest, save where encroachment in the interest of public need or in the general interest of the community in accordance with the provisions of the appropriate law and that the modalities of how this can be undertaken to be advised by the Taskforce;

v. Find that demarcation and titling is totally unnecessary for purposes of access, occupation and use of the Mau Forest by the Ogiek; and further that the right to occupy and use the Mau Forest would suffice as adequate

restitution to the Ogiek and that the individual demarcation and titling would undermine common access and use of the land by other people i.e. nomadic groups that have seasonal access to the Mau Forest;

vi. Hold that the Respondent State's 2010 Constitution creates a legal super structure that is meant to address the structural and root causes of violations of Article 2 and that by virtue of the existing laws, the same have been substantially remedied and what is left can be attained by administrative interventions and guarantees of non-repetition;

vii. Find that the Court did not determine that the Ogiek were the owners of the Mau Forest. Additionally, that ownership is not a *sine qua non* for the utilization of land;

viii. Reject the community survey report submitted by the Applicant as not credible and the claim for US$ 297,104,578, as compensation, as being premised on speculative presumptions which are neither fair nor proportionate. Further, that no evidence has been led to prove that the survey was actually conducted;

ix. Find that any compensation due to the Applicants cannot be computed in United States Dollars for a claim involving a country whose currency is not the United States Dollar;

x. Order that the Respondent State's general liability for violations of the Charter can only be computed from 1992, the year when the Respondent became a party to the Charter. Specifically in relation to the eviction of the Ogiek from Mau Forest, that its liability can only be computed from 26 October 2009, when the notice of eviction from South Western Mau Forest was issued;

xi. Find that the Gazette Notice appointing the Task Force to give effect to the decision of the Court suffices as a public notice acknowledging violations of the Charter and should be deemed to be just satisfaction;

xii. Hold that there is no basis for ordering the erection of a monument for the Ogiek commemorating the violation of their rights since the Ogiek have no practice of monument erection and there is no evidence that the same would be of any significance to their community especially as the Respondent State already acknowledged its wrong and is actively taking steps to redress the same;

xiii. Find that any award of reparation made by the Court must take into account the situation of the Respondent State as a country so as not to cause it undue hardship.

xiv. Hold that the jurisprudence of the Inter-American Court of Human Rights is not binding on this Court and cannot be the basis for a claim for restitution before the Court;

xv. Hold that neither Minority Rights Group International not the Ogiek Peoples' Development Program are representative of the Ogiek and that only the Ogiek Council of Elders is recognised as the body that can speak on behalf of the Ogiek;

xvi. Find, overall, that the Applicant's claims are unsubstantiated and the Court should carefully assess all claims so as to exclude speculative claims.

V. RESPONDENT STATE'S OBJECTIONS

24. Before dealing with the claims for reparations, the Court considers it pertinent to

begin by addressing three objections raised by the Respondent State.

A. Liability for activities before 1992

25. The Respondent State contends that there is no basis for a claim for compensation for any violations before the year 1992 when it became party to the Charter. It further contends that "any claim for financial compensation can only be computed from 26 October 2009 and only in relation to the notice given to the Ogiek to vacate the South Western Mau Forest."

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26. The Court recalls that this issue was already resolved in its merits judgment when it confirmed its temporal jurisdiction in this Application.[4] Additionally, the Court takes notice of the fact that the violations alleged by the Applicant, which the Court established in its judgment of 26 May 2017, remain unaddressed up to date.

27. In the circumstances, the Court holds that comprehensive reparations need to take into account not only events after 10 February 1992 but also events before that so long as the same can be connected to the harm suffered by the Ogiek in relation to the infringement of their rights as established by the Court. This would ensure that reparations awarded comprehensively address the prejudice suffered by the Ogiek as a result of the Respondent State's conduct. The Court holds, therefore, that there is nothing barring it from considering events that occurred prior to 10 February 1992 in determining the reparations due to the Ogiek.

[4] See, *African Commission on Human and Peoples' Rights v Republic of Kenya* (merits) (26 May 2017) 2 AfCLR 9 §§ 64-66.

B. The proposal for an amicable settlement

28. The Respondent State submits that the present Application is a proper case for an amicable settlement in line with Article 9 of the Protocol. According to the Respondent State, "a negotiated settlement is the best solution in the peculiar circumstance of this case".

29. The Applicant opposes the Respondent State's submission. It argues that a ruling on reparations is necessary in order to provide clear guidance on reparations to the Respondent State and to ensure the realisation of the Ogiek's rights and guarantee an effective remedy for violations. The Applicant also points out that previous attempts for an amicable settlement have failed. According to the Applicant, therefore, a genuine and efficient amicable settlement procedure is extremely doubtful but may also seriously undermine the possibility of the Ogiek being offered a fair deal and risks prolonging the human rights violations they have already suffered.

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30. The Court observes that Article 9 of the Protocol provides that "the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter." It further observes that Rule 29(2)(a) of the Rules provides that "in the exercise of its contentious jurisdiction, the Court may (a) promote amicable settlement in cases pending before it in accordance with the provisions of the Charter and the Protocol".[5] The Court's powers to facilitate an amicable settlement are further clarified in Rule 64.[6]

[5] Rule 26 (1) (c) Rules of Court, 2 June 2010.

[6] Rule 64, in so far as is material, provides as follows: 1. Pursuant to Article 9 of the Protocol, the Court may promote amicable settlement of cases pending before it. To that end, it may invite the parties and take appropriate measures to facilitate amicable settlement of the dispute; 2. Parties to a case before the Court, may on their own initiative, solicit the Court's intervention to settle their dispute amicably at any time before the Court gives its judgment. (Formerly, Rule 56, Rules of Court 2 June 2010).

31. In the context of the present Application, the Court recalls that at the merits stage of the proceedings, it initiated a process for the possible amicable settlement of this matter. Although both Parties, initially, indicated willingness to participate in the envisaged amicable settlement, this process collapsed when the Parties could not agree on the issues to be covered by the settlement. It was as a result of the preceding that on 7 March 2016, the Court wrote both Parties conveying its decision to proceed with a judicial consideration of the matter especially given the Parties' failure to agree on an amicable settlement.

32. From the totality of the Parties' submissions on reparations, it is clear that they hold opposing views on the possibility of an amicable settlement. The Court stresses in this regard that a key prerequisite for an amicable settlement is that the Parties must be willing to engage in the process. Given the failure of the previous attempt at an amicable settlement in this matter, and also recalling that the provisions of the Protocol and Rules, on amicable settlement, are not mandatory, the Court finds that the prerequisites for an amicable settlement are not met. The Court, therefore, dismisses the Respondent State's prayer.

C. The involvement of the "original complainants" in the proceedings

33. The Respondent State questions the involvement of the Centre for Minority Rights Development (hereinafter referred to as "CEMIRIDE"), Minority Rights Group International (hereinafter referred to as "MRGI") and the Ogiek People's Development Programme (hereinafter referred to as "OPDP") in the present proceedings on the basis that these organisations are not representative of the Ogiek. It argues that the present matter could be resolved amicably if "rent seeking western funded organisations" are excluded from the negotiations. The Respondent State further argues that the Rules "do not provide for parties described as original complainants other than the applicant before this Court." The Respondent State invites the Court to "invoke the provisions of either Rules 45 or 46 of the Rules to ascertain the fact of whether the named non-

governmental organisations have the mandate from the Ogiek Council of Elders to speak on their behalf and whether they consulted and obtained by way of a resolution or consent of the said Council of Elders the permission to purport to act for them."

34. The Applicant submits that "the Ogiek have been and remain clear on who should represent them throughout the 9 year journey that this case has been pending before the Commission and then the Court, namely OPDP." In the Applicant's view, this was confirmed to the Respondent State's Attorney General and others by way of letters dated 11 July 2017 and 8 October 2017. The Ogiek, through the OPDP, it is argued, also clarified representation issues in a letter to the Ministry of Environment and Natural Resources dated 7 December 2017, accompanied by a power of attorney signed by forty (40) Ogiek elders from all locations in the Mau Forest, confirming that OPDP should continue to represent them within discussions on reparations and implementation of the Judgment. The Applicant thus submits that the OPDP, which is among the "original complainants" in this case, truly represents the Ogiek Community.

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35. The Court recalls that the question of the representation of the Ogiek in this Application is not arising for the first time. During the merits stage, the Respondent State raised an objection relating to the involvement of the "original complainants" before the Commission in the litigation before this Court.[7] As against this background, the Court reiterates that the Applicant before it is the Commission rather than the "original complainants" that filed the case, on behalf of the Ogiek, before the Commission. As pointed out in the judgment on merits, since the "original complainants" are not appearing before the Court as Parties[8] the Court holds that it has proper Parties before it to enable it dispose of the

[7] *ACHPR v Kenya* (merits) §§ 84-85.
[8] *ACHPR v Kenya* (merits) § 88.

Application.

VI. REPARATIONS

36. The Court recalls that the right to reparations for the breach of human rights obligations is a fundamental principle of international law.[9] A State that is responsible for an international wrong is required to make full reparation for the damage caused. The Permanent Court of International Justice (hereinafter referred to as "the PCIJ") ably restated the position in the following words:[10]

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.

37. This fundamental principle has been consistently reiterated by the Court in its case law.[11] For example, in *Reverend Christopher Mtikila v United Republic of Tanzania* the Court stated as follows: [12]

> One of the fundamental principles of contemporary international law on State responsibility, that constitutes a customary norm of international law, is that, any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation.

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[9] Cf. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005 - https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx.

[10] PCIJ: *The Factory at Chorzow (Jurisdiction)* Judgment of 26 July 1927 p.21; See also: *Idem* (Merits), Judgment of 13 September 1928, Series A, No. 7, p. 29.

[11] *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo and the Burkinabe Movement on Human and Peoples Rights v Burkina Faso* (Reparations) (5 June 2015) 1 AfCLR 258 §§ 20-30; and *Lohe Issa Konate v Burkina Faso* (Reparations) (3 June 2016) 1 AfCLR 346 §§ 15-18.

[12] (14 June 2013) 1 AfCLR 72 §§ 27-29.

38. The Protocol aligns itself with this well-established principle of international law by providing, in Article 27(1), that "if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including payment of fair compensation or reparation."

39. The above principles are reiterated, with a focus on indigenous peoples, in the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter referred to as "the UNDRIP"). For example, Article 28 provides as follows:[13]

> Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
> Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

40. The Court recalls that it is a general principle of international law that the Applicant bears the burden of proof regarding the claim for reparations.[14] Additionally, it is not enough for the Applicant to show that the Respondent State has violated a provision of the Charter, it is also necessary to prove the damage that the State is being required to indemnify.[15] As pointed out in *Zongo and others v Burkina Faso* the existence of a violation of the Charter is not sufficient, *per se*, for reparation to accrue.[16] There must, therefore, be a causal link between the wrongful act that has been established and the alleged prejudice.

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[13] It also bears pointing out that the provisions of Article 28 of the UNDRIP find resonance in Articles 8(2), 11(2) and 20(2) of the same Declaration, where the emphasis is on the right to reparations for violation of indigenous peoples' rights.
[14] *Mtikila v Tanzania* § 40.
[15] Ibid § 31.
[16] *Zongo and others v Burkina Faso* (Reparations) § 24. See also, *Konate v Burkina Faso (Reparations*) § 46.

41. In terms of the damage that reparations must cover, the Court notes that, according to international law, both material and moral damages have to be repaired. [17] While reparations serve multiple functions, fundamentally their objective is to restore an individual(s) to the position that he/she would have been in had he/she not suffered any harm while at the same time establishing means for deterrence to prevent recurrence of violations.[18]

42. In terms of quantification of the reparations, the applicable principle is that of full reparation, commensurate with the prejudice suffered. As stated by the PCIJ in *The Factory at Chorzow*, the State responsible for the violation needs to make effort to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed."[19]

43. The Court observes that whenever it is called upon to adjudicate on reparations, it takes into account not only a fair balance between the form of reparation and the nature of the violation, but also the expressed wishes of the victim.[20] Further, the Court supports a wide interpretation of "victim" such that, in an appropriate case, not only first line heirs can claim damages but also other close relatives of the direct victim. In this connection, the Court notes that in *Zongo and others v Burkina Faso*, it cited with approval the definition of a victim proposed in the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. [21]

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[17] *Zongo and others v Burkina Faso* (Reparations) § 26.
[18] D Shelton *Remedies in international human rights law* (2015) 19-27
[19] PCIJ: *The Factory at Chorzow (Merits*), Judgment of 13 September 1928, Series A, No. 17, p 47.
[20] *Ingabire v Rwanda* (Reparations) § 22.
[21] "Victim" is defined as "… persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization" § 8.

44. In its understanding of a “victim/s” of human rights violations, the Court remains alive to the fact that the notion of “victim” is not limited to individuals and that, subject to certain conditions, groups and communities may be entitled to reparations meant to address collective harm.[22]

45. In the present Application, the Court recalls that the wrongful acts generating the international responsibility of the Respondent State is the violation of Articles 1, 2, 8, 14, 17(2) and (3), 21 and 22 of the Charter. All the reparation claims, therefore, have to be considered and assessed in relation to the violation of the earlier mentioned provisions of the Charter. It is against the above outlined principles that the Court will consider the prayers for both pecuniary and non-pecuniary reparations.

A. Pecuniary reparations

46. The Court notes that the Applicant has requested the award of sums of money as compensation for material harm and moral harm.

i. Material prejudice

47. The Applicant prays for compensation to be awarded to the Ogiek as a result of the violations that the Court found. The Applicant submits that for compensation to the Ogiek to be proportional to the circumstances, the compensation should be awarded for all damage suffered as a result of the violations including the payment of pecuniary damages to reflect the violation of their right to development and the loss of their property and natural resources.

[22] Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities, Forty-fifth Session, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, Final report submitted by Mr Theo van Boven, Special Rapporteur, E/CN.4/Sub.2/1993/8, 2 July 1993 §§ 14-15.

48. As to the violations that should inform the compensation, the Applicant avers that the encroachments on the Ogiek's land is the basis for the claim for compensation. Specifically, the Applicant submits that the eviction of the Ogiek from their land and the resulting loss of their non-movable possessions on the land, including dwellings, religious and cultural sites and beehives, the lack of prompt and full compensation to the Ogiek for the loss of their ability to use and benefit from their property over the years and the denial of benefit, use of and interest in their traditional lands since eviction, including the denial of any financial benefit from the lands resources, such as that generated by logging concessions and tea plantations should inform the award of compensation.

49. In a bid to substantiate its claim, the Applicant submits a report from a community survey (Annex E to the Applicant's submissions on reparations) that was supposedly undertaken among the Ogiek. According to the Applicant, for quantification of pecuniary loss, one hundred and fifty-one (151) members of the Ogiek community, each representative of a distinct household, were interviewed through a questionnaire focused on the pecuniary loss suffered as a direct result of the violation of Article 14 and 21 of the Charter. The Applicant submits that the community survey was complemented by a desk-based analysis to quantify the loss to the Ogiek as a result of denial of financial benefits from the resources on the Ogiek ancestral land.

50. In connection to the community survey, the Applicant further submits that the quantification of pecuniary damage, and even non-pecuniary damage, simply represents the "best efforts of the Applicant to provide the evidentiary elements for the Court to have confidence to set a compensation award for the Ogiek …" The Applicant concedes that calculating the pecuniary, and even non-pecuniary damage, occasioned to the Ogiek over the years is challenging given, among other things, the number of Ogiek involved in the forcible evictions, the passage of time and the dying of some members of the community as well as the peculiar nature of the Ogiek traditional life style which makes it difficult to preserve specific

records and proof of lost property. The Applicant thus submits that the Court should "acknowledge the efforts of the Applicant to quantify the compensation it believes is owed to the Ogiek and accept that some aspects of the quantification may require the Court to speculate and base the award on principles of equity in light of the context in which the human rights violations have occurred."

51. Overall, the Applicant contends that the material loss survey was designed to determine the extent of the loss across the broader Ogiek population. Given the preceding, the Applicant submits that the pecuniary damages due to the Ogiek, as a result of the violations established by the Court, should amount to at least US$204,604,578 (Two hundred and four million, six hundred thousand and four, and five hundred seventy eight United States Dollars). and accordingly prays for this amount to be awarded.

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52. The Respondent State submits that pecuniary damages cannot be awarded on the basis of the "best efforts" of an Applicant which are premised on speculative presumptions but only on legal evidentiary standards based on verifiable empirical data. According to the Respondent State, "pecuniary reparations ought not to be speculative but must be based on cogent proof, the legal and evidential [burden] which squarely falls on the shoulders of the Applicant and to have it otherwise would have no basis in law."

53. The Respondent State also submits that the Applicant's claim for pecuniary damages is fanciful, has no basis in law or practice, and if it were to be awarded alongside other forms of reparations it would be manifestly disproportionate and would constitute unjust enrichment contrary to principles for reparations under international law.

54. Specifically, the Respondent State further submits that the claims on account of loss of farm buildings (US$ 18,029,915 – Eighteen million twenty nine thousand and nine hundred fifteen United States Dollars) and loss of livestock (US$ 97,923,370 – Ninety seven million nine hundred twenty three thousand three hundred seventy United States Dollars) are a clear departure from the Applicant's pleadings and submissions at the merits stage about the Ogiek way of life and are without basis.

55. The Respondent State also submits that, for loss of housing, the principle of causality requiring a causal link between the violation found, the harm produced and the reparation sought is missing because the Applicant failed to demonstrate the materials used in building the houses and to show a clear nexus between the same and the losses occasioned.

56. The Respondent State submits that the claim for US$14,777,233 (Fourteen million seven hundred seventy seven thousand two hundred thirty three United States Dollars), on account of loss of revenue generated from the Mau forest, is fanciful and not premised on any evidence.

57. Overall, the Respondent State opposes the admission into evidence of the community survey report submitted by the Applicant. According to the Respondent State, the community survey report has no probative value, its methodology is flawed, its analysis is faulty and there is no proof that actual interviews were conducted among the Ogiek to inform the report. Further, the Respondent State also opposes the Applicant's computation of damages in United States Dollars when the claim at issue involves an African country and it is before a court sitting in Africa.

58. The Respondent State further submits that any award for compensation, in case the Court decides to award compensation, should not be such as to cause any unjust enrichment and the Court should be careful not to put the Respondent

State into a situation of disproportionate hardship.

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59. The Court acknowledges that compensation is an important means for effecting reparations. For example, in the *Mtikila v Tanzania* the Court reiterated the fact that a State that has violated rights enshrined in the Charter should "take measures to ensure that the victims of human rights abuses are given effective remedies including restitution and compensation".[23]

60. As acknowledged by the Court, however, it is not enough for an Applicant to show that the Respondent State has violated a provision of the Charter, it is also necessary to prove the damage that the State is being required to indemnify.[24] The Applicant, therefore, bears the duty of proving the causal nexus between the violations and the damage suffered. Additionally, all material loss must be specifically proved. In insisting on proof of material loss, however, the Court is alive to the fact that victims of human rights violations may face challenges in collating evidence in support of their claims for various reasons. As such, the Court proceeds on a case by case basis paying attention to the consistency and credibility of the Applicant's assertions in the light of the whole Application.[25]

61. In attempting to prove the pecuniary loss occasioned to the Ogiek, the Applicant relied on a community survey report which was submitted as Annex E to its submissions on reparations. In its further submissions, the Applicant offered clarification about the methods and processes that were used in developing the community survey report especially data collection and analysis. The Court notes, however, that the Respondent State opposes the admission into evidence of this report.

[23] *Mtikila v Tanzania (Reparations)* § 29.
[24] Ibid §§ 31-32.
[25] *Anudo Ochieng Anudo v United Republic of Tanzania* ACtHPR Application No. 012/2015 Judgment of 2 December 2021 (reparations) §§ 31-32.

62. In so far as the community survey report is concerned, the Court notes that the Applicant has conceded some limitations in the process of developing and executing the survey which limitations have the potential of affecting the outcomes. For example, the Applicant posits that the "methodological and logistical challenges of ascribing a precise monetary value to the collective harms suffered by the Ogiek community are numerous."

63. The Court, therefore, while noting the Applicant's effort to deploy a scientific method for determining the compensation due to the Ogiek, holds that the best way forward is to make an equitable award while being mindful of the general challenges of assessing compensation, with mathematical precision, in cases involving violation of indigenous peoples' rights. Resultantly, the Court does not consider itself bound by the community survey report submitted by the Applicant.

64. Specifically, the Court recalls that the claim for compensation by the Applicant relates to the violation of Articles 14 and 21 of the Charter and specifically in relation to the following: the loss of non-moveable possessions from Ogiek land, both houses($59 736 172); and farm buildings ($18 029 915) the loss of livestock reliant on the land from which the Ogiek were evicted ($97 923 370); the loss of household income generated from activities on Ogiek land ($14 137 888); and the loss of revenue generated from activities using the Mau Forest due to the eviction of the Ogiek ($14 777 233). The detailed breakdown for the amounts claimed in respect of each head of loss are contained in Annex E to the Applicant's submissions on reparations, and the total claim is US$204,604,578 (Two hundred and four million, six hundred and four thousand, and five hundred seventy eight United States Dollars).

65. Notwithstanding the limitations with the community survey report submitted by the Applicant, it is incontrovertible that the actions of the Respondent State resulted in a violation of the rights of the Ogiek under Articles 14 and 21 of the

Charter, among other Charter provisions.[26] Given that the Respondent State is responsible for the violation of the rights of the Ogiek, it follows that it bears responsibility for rectifying the consequences of its wrongful acts.

66. The Court, however, acknowledges that the length of time over which the violations occurred, the number of people affected by the violations, the Ogiek way of life and the general difficulties in attaching a monetary value to the loss of resources in the Mau Forest, among other factors, make a precise and mathematically exact quantification of pecuniary loss difficult. It is for the preceding reasons, among others, that the Court must exercise its discretion in equity to determine what amounts to fair compensation to be paid to the Ogiek.

67. In choosing to proceed by way of making an award in equity, the Court does not thereby subject the final award to its absolute and unregulated discretion.[27] The Court has paid particular attention to all the submissions, and the supporting documents, filed by the Parties, the *amici curiae* and also the independent experts in order to inform its decision on the equitable award due to the Ogiek. The Court's award, therefore, though premised on the exercise of its equitable discretion is nevertheless informed by the submissions before it and the applicable law.

68. In terms of the currency in which the moneteray awards must be made, the Court recalls that the Applicant has pegged all its claims in United States Dollars. The Respondent State, however, opposes this approach and insists that any award, if it is made, should be made in its currency.

69. In relation to this issue, the Court recalls that in *Ingabire Victoire Umuhoza v Republic of Rwanda* it held that where an Applicant is residing in the territory of

[26] *ACHPR v Kenya* (merits) § 201.
[27] Cf. IACtHR, *Case of The Kichwa Indigenous People of Sarayaku v. Ecuador* Judgment of June 27, 2012 (Merits and reparations) § 314 available at https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf.

the Respondent State, the amount of reparation should be calculated in the currency of the said State.[28] In the present case, therefore, the Court holds that the currency of any monetary award issued to the Applicant must be in the currency of the Respondent State since the Ogiek, for whose benefit this Application was commenced, are all resident in the territory of the Respondent State and all the violations happened within the territory of the Respondent State.

70. The Court takes particular cognisance of the fact that the claim for compensation relates to the right to property and also the right to freely dispose of wealth and natural resources. The Court is aware that the violations at issue herein have been ongoing for a long time and that they affect a particularly vulnerable section of the Respondent State's population. The award of compensation must, therefore, and in so far as is possible, operate to ameliorate the overall condition of the Ogiek..

71. Given the Parties' contrasting submissions about the relevance of comparative international law, the Court wishes to reiterate that it is not bound by decisions and statutes from other regional human rights systems. Nevertheless, in appropriate cases, it can draw inspiration from pronouncements emerging from other supranational human rights bodies and also distinguish the emerging principles as appropriate.

72. It is against this background that the Court considers the *Case of the Saramaka People v Suriname*[29] , also involving an indigenous community, in which the Inter-American Court of Human Rights ordered the respondent to pay, into a development fund for the benefit of the applicants, the sum of US$75, 000 (Seventy five thousand United States Dollars) as compensation for the material prejudice suffered by the applicants.[30] In this particular case, the material

[28] *Ingabire v Rwanda (Reparations)* § 45. See also, *Anudo Ochieng Anudo v United Republic of Tanzania*, ACtHPR, Application 012/2015, Judgment of 2 December 2021(Reparations) § 21 and *Amir Ramadhani v United Republic of Tanzania,* ACtHPR, Application 010/2015, Judgment of 25 June 2021 (Reparations) § 14.
[29] Judgment of November 28, 2007 (Preliminary Objections, Merits, Reparations and Costs).
[30] http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

damage suffered by the applicants consisted primarily of the illegal exploitation of their lands and natural resources.

73. The Court also notes that in the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador,* also involving an indigenous community, the Inter-American Court found that the sum of US$90 000 (Ninety thousand United States Dollars) was adequate compensation in equity for the pecuniary prejudice suffered by the Sarayaku People.[31] In coming up with this award, the Court took into consideration the fact that the Sarayaku incurred expenses in commencing domestic proceedings to enforce their rights, that their territory and natural resources were damaged, and that their financial situation was affected when their production activities were suspended during certain periods.

74. In so far as distinguishing the earlier referred to cases from the Inter-American System is concerned, and in a non-exhaustive way, the Court takes notice of the fact that the violations at issue in the present Application are not all fours with those established in the the *Case of the Saramaka People* or even the *Case of The Kichwa Indigenous People of Sarayaku*. The Court acknowledges that the violations of the rights of the Ogiek have spanned a long period of time during which the Respondent State has failed/neglected to implement measures meant to safeguard their rights.

75. The Court is aware that the Ogiek have suffered violations that involve multiple rights under the Charter. This points to a systemic violation of their rights.

76. Given the communal nature of the violations, the the Court finds it inappropriate to order that each member of the Ogiek community be paid compensation individually or that compensation be pegged to a sum due to each member of the Ogiek Community. The Court is reinforced in its preceding finding given not only the communal nature of the violations but also due to the practical

[31]IACtHR *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador* Judgment of June 27, 2012 (Merits and reparations) § 317 available at https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf.

challenges of making individual awards for a group numbering approximately 40 000 (forty thousand).

77. Taking all factors into consideration, the Court decides, in the exercise of its equitable jurisdiction, that the Respondent State must compensate the Ogiek with the sum of KES 57 850 000. (Fifty seven million, eight hundred and fifty thousand Kenya Shillings) for the material prejudice suffered.

ii. Moral prejudice

78. The Applicant prays for the payment of compensation for the moral prejudice as a result of violations related to the principle of non-discrimination (Article 2), the right to religion (Article 8), the right to culture (Article 17) and the right to development (Article 22) of the Charter.

79. According to the Applicant, the Ogiek have suffered routine discrimination at the hands of the Respondent State including the non-recognition of their tribal or ethnic identity and their corresponding rights. The Ogiek have not been able to practice their religion including prayers and ceremonies intimately connected to the Mau Forest, to bury their dead in accordance with traditional spiritual rituals, and access sacred sites for initiation and other ceremonies. They have also been denied access to an integrated system of beliefs, values, norms, traditions and artefacts closely linked to the Mau Forest and have had their right to development violated due to the Respondent State's failure to consult with or seek their consent about their shared cultural, economic, and social life within the Mau Forest.

80. The methodology used by the Applicant to quantify the non-pecuniary loss is contained in the compensation analysis report earlier referred to. According to the Applicant, bearing in mind the number of human rights violations found by the Court, the seriousness of the violations, the number of victims at stake and

the anxiety, inconvenience and uncertainty caused by the violations, the sum of US$92 500 000 (ninety two million five hundred thousand United States Dollars) would be adequate to compensate the Ogiek for their moral loss.

81. In coming up with the amount of US$92 500 000, the Applicant has referred the Court to the following cases –*the case of the Kichwa Indigenous People of Sarayaku v Ecuador* (2012) [1200 victims, compensation awarded US$1 250 000], the *Case of the Xakmok Kasek Indigenous Community v Paraguay* (2010) [268 victims, compensation awarded US$700 000], the *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (2006) [407 victims, compensation awarded US$ 1 000 000] and the *Case of the Yakye Axa Indigenous Community v Paraguay* (2005) [319 victims, compensation awarded US$950 000].

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82. The Respondent State disputes the Applicant's claims for moral loss. Specifically, it reiterates its objection to the admissibility of the compensation analysis report filed by the Applicant and avers that all the information contained in the report is incorrect and without any factual basis.

83. In respect of the alleged violation of Article 2 of the Charter, the Respondent State avers that its Constitution of 2010 provides a solid legal super structure which seeks to address the structural and root causes of violations of Article 2 and that the Ogiek's principal grievance lay with the period before the 2010 Constitution was adopted. As for the violation of Article 8 of the Charter, the Respondent State submits that that "the Court in its judgment proposed reparation by means of allowing access to the Mau Forest and government interventions including sensitizing campaigns, collaboration towards maintenance of sites, waiving fees, which the Respondent State has demonstrated willingness to observe and is only structuring the how to."

84. As for the violation of Article 17 of the Charter, the Respondent State submits that it has already addressed the issue of eviction and access to the Mau Forest. In relation to the violation of Article 21 of the Charter, the Respondent submits that the Applicant has misinterpreted the Court's judgment on merits. According to the Respondent State, "the Court did not determine that the Ogiek were the owners of Mau Forest …" and that the Applicants have misapprehended the findings of the Court and placed emphasis on ownership rather than the right to access, use and occupy the land.

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85. The Court notes that, in its judgment on merits, it established that the Respondent State violated the Ogiek's rights under Article 2 of the Charter by failing to recognise the Ogiek as a distinct tribe like other groups;[32] Article 8 of the Charter by making it impossible for the Ogiek to continue practising their religious practices;[33] Article 17(2) and (3) of the Charter by evicting the Ogiek from the Mau Forest area thereby restricting them from exercising their cultural activities and practice; and Article 22 of the Charter due to the manner in which the Ogiek have been evicted from the Mau Forest.[34]

86. The Court confirms that moral prejudice includes both the suffering and distress caused to the direct victims and their families, and the impairment of values that are highly significant to them, as well as other changes of a non-pecuniary nature, in the living conditions of the victims or their family.[35]

87. In so far as the question of causation for moral prejudice is concerned, the Court recalls that in *Zongo and others v Burkina Faso* it held that the causal link

[32] *ACHPR v Kenya* (merits) § 146.
[33] Ibid § 169.
[34] Ibid § 210.
[35] Cf. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala* (Reparations and costs) § 84, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_77_ing.pdf; and *Case of Forneron and daughter v. Argentina* § 194, available at: https://corteidh.or.cr/docs/casos/articulos/seriec_242_ing.pdf.

between the wrongful act and the moral prejudice suffered, may result from the violation of a human right, as an automatic consequence, without any need to prove otherwise. [36] In terms of quantification of damages for moral harm, the Court, reaffirmed that such a determination should be done equitably taking into account the specific circumstances of each case. [37]

88. The Court confirms, therefore, that international law requires that the determination of compensation for moral damage should be done equitably taking into account the specific circumstances of each case.[38] The nature of the violations and the suffering endured by the victims, the impact of the violations on the victim's way of life and length of time that the victims have had to endure the violations are among the factors that the Court considers in determining moral prejudice.

89. In the circumstances of the present Application, it is not contested that members of the Ogiek Community have suffered from the lack of recognition as an indigenous group; from the evictions from their ancestral land; the denial of enjoyment of the benefits emanating from their ancestral land; the failure to practice their religion and culture as well as the right to fully and meaningfully participate in their economic, social and cultural development.

90. While it is not possible to allocate a precise monetary value equivalent to the moral damage suffered by the Ogiek, nevertheless, the Court can award compensation that provides adequate reparation to the Ogiek. In determining reparations for moral prejudice, as earlier pointed out, the Court takes into consideration the reasonable exercise of judicial discretion and bases its decision on the principles of equity taking into account the specific circumstances of each case.[39]

[36] *Zongo and others v Burkina Faso (reparations)* § 55.
[37] D Shelton (n 17 above) 346-348.
[38] Ibid.
[39] *Zongo and others v Burkina Faso (Reparations)* § 61 and *Ingabire v Rwanda (Reparations)* § 20.

91. The Court notes that in the *Case of Sawhoyamaxa Indigenous Community v. Paraguay*[40], the Inter-American Court of Human Rights awarded the sum of "US$ 1,000,000.00 (One million United States Dollars) for moral prejudice to be paid into a fund, which would be used to implement educational, housing, agricultural and health projects, as well as to provide drinking water and to build sanitation infrastructure, for the benefit of the members of the Community."[41]

92. The Court also notes that in *the Case of the Kalina and Lokono Peoples v. Suriname* [42] the Inter-American Court of Human Rights ordered that the Respondent should allocate the sum of US$1 000 000 (One million United States Dollars) to a fund established for the benefit of the applicants to cover for the Applicants' moral prejudice.[43] The case involved the responsibility of the State of Suriname for a series of violations of the rights of members of the Kalina and Lokono indigenous peoples. Specifically, the violations related to the absence of a legal framework recognising the legal personality of the indigenous communities; the failure to recognise collective ownership of the lands, territories and natural resources of the Kalina and Lokono peoples; and the granting of concessions and licences to carry out mining operations on lands belonging to the Kalina and Lokono without consulting them.

93. The Court is mindful that the violations established in the present Application relate to rights that remain central to the very existence of the Ogiek. The Respondent State, therefore, is under a duty to compensate the Ogiek for the moral prejudice they suffered as a result of the violation of their rights. Taking into account the exercise of its reasonable discretion in equity the Court, orders the Respondent to compensate the Ogiek with the sum of KES100 000 000 (One hundred million Kenyan Shillings) for the moral prejudice suffered.

[40] Judgment of March 29, 2006 (Merits, Reparations and Costs).
[41] Ibid § 224.
[42] Judgment of November 25, 2015 (Merits, Reparations and Costs).
[43] http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf § 298.

B. Non-pecuniary reparations

94. The Applicant prays the Court to order several non-pecuniary reparations. The Court now considers the Applicant's prayers in respect of each of the non-pecuniary claims as follows:

i. Restitution of Ogiek ancestral lands

95. The Applicant, relying on the Court's finding of a violation of Article 14 of the Charter, submits that a natural consequence thereof is the restitution of the Ogiek ancestral lands. In the Applicant's view, this violation can be remedied by the recovery of the ancestral lands through delimitation, demarcation and titling or otherwise clarification and protection of all such land. The Applicant submits that all processes in this regard should be undertaken within a timeframe of one (1) year of notification of the reparations order with the full participation of the Ogiek.

96. The Applicant also submits that the legal framework in the Respondent State already possesses legislation that can be used to effect restitution of Ogiek ancestral land including the Community Land Act 2016, the Forest Conservation and Management Act, 2016 and the 2010 Constitution of the Respondent State. According to the Applicant, the Respondent State's laws have established a class of lands known as "community lands" (Article 61, Constitution) and one sub-category of community lands is ancestral lands and lands traditionally occupied by hunter gatherer communities (Article 63(2)(d)(ii), Constitution). The Community Land Act 2016 lays out the procedure to be followed by communities seeking to secure formal title over their lands. The Applicant further submits, with the support of an expert report, that these provisions can be used positively to facilitate restitution of Ogiek ancestral land.

97. The Applicant identified the Ogiek ancestral land to be restituted back to the Ogiek through communally held titles, subject to delimitation, delineation and demarcation, as follows:

    a. The entire Public Forest area, which comprises the Mau Forest Complex, in all its parts, currently defined as public Forest, as well as the Maasai Mau Forest Block. (These lands have been delineated in Annex A to the Applicant's submission on reparations)
    b. Additional areas of Ogiek ancestral land: Kiptagich tea estate and tea factory in South West Mau near Tinet,; the Sojanmi Spring Field flower farm in Njoro area (East Mau) and land owned by a logging company in East Mau (south west of Njoro) measuring about 147 acres.

98. In relation to the ongoing commercial activities on the Ogiek ancestral land, the Applicant submits that the Respondent State should establish and facilitate dialogue mechanisms between the Ogiek (via the original complainants), Kenya Forestry Service (where relevant) and relevant private sector operators in order to reach mutual agreement on whether they will be allowed to continue their activities but operating via a lease of the land and/or royalty and benefit sharing agreement between the Ogiek communal title holders and the commercial operators, in line with Sections 35 to 37 of the Community Land Act 2016. Such dialogue, it is further submitted, must be concluded within a time frame of nine (9) months of notification of the reparations judgment.

99. As to the details of the restitution process, the Applicant submits that the Ogiek should be returned all twenty-two (22) forest blocks within the Mau Forest Complex by means of twenty-four (24) communally held titles. Each community, it is submitted, will hold title according to the procedure set out in the Community Land Act 2016 and will manage the forested areas as community forests under the Forest and Conservation Management Act 2016.

100. The Applicant also prays for the rescission of such titles and concessions found to have been illegally granted with respect to the Ogiek ancestral land; and such land to be returned to the Ogiek with common title within each location. Accordingly, the Applicant submits that the Respondent State should enter into a dialogue with the Ogiek, via the "original complaints", regarding the land to be returned from non-Ogiek to the Ogiek.

101. In so far as the restitution of Ogiek ancestral land is concerned, the Applicant filed a Road Map which it submitted should guide the restitution. According to the Applicant's Road Map, the Court should order a process of restitution that revolves around four elements: first, the appointment of an independent gender balanced panel of experts to oversee the settlement of all claims; second, reclassification of the Mau Forest into three categories depending on the difficulty of resettlement; thirdly, the Court to remain seized of the case until both the merits and reparations are fully implemented and, lastly, the Court to play an active role in overseeing the process of implementation of its judgments.

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102. The Respondent State opposes the Applicant's prayer for restitution of Ogiek ancestral land by means of delimitation, demarcation and titling.

103. The Respondent State reiterates its position that the Applicant has misinterpreted the findings of the Court in relation to the ownership of the Ogiek ancestral land. It emphasises that the Court's judgment on merits did not pronounce that the Ogiek were/are the owners of the Mau Forest. In the Respondent State's view, the Applicant has erroneously emphasised ownership rather than the rights of access, use and occupation which the Court granted the Ogiek in its judgment on merits. According to the Respondent, ownership is not a *sine qua non* to the utilisation of land and any process of demarcating forests and titling for indigenous communities will set a dangerous precedent across the

world.

104. The Respondent State also submits that guarantees of non-repetition together with rehabilitation measures are the most far-reaching forms of reparation that can be awarded to redress human rights violations since they address the root and structural causes of the violations. These remedies, the Respondent State submits, would best address the human rights violations suffered by the Ogiek including those relating to their ancestral land.

105. In relation to Article 14 of the Charter, the Respondent State submits that the Court's finding was that the violation of Article 14 was occasioned by the denial of access to the Mau Forest. According to the Respondent State, therefore, restitution for this violation can be achieved by the reverse action of guaranteeing and granting access to the Mau Forest for the Ogiek, save where encroachment is necessary in the interest of public need or in the general interest of the community.

106. The Respondent State further submits that demarcation and titling is unnecessary for purposes of access, occupation and use of the Mau Forest because such action is inimical with the character of the Ogiek as hunter and gatherer communities who do not have possession based land tenure systems.

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107. The Court observes that, in the context of indigenous peoples' claims to land, demarcation is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground.[44]. Demarcation is important and necessary because

[44] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights *Indigenous peoples and their relationship to land: final working paper* prepared by the Special Rapporteur, Erica-Irene A. Daes – available at https://digitallibrary.un.org/record/419881?ln=en.

mere abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the land is determined and marked. This serves to remove uncertainty on the part of the concerned indigenous people in respect of the land to which they are entitled to exercise their rights.

108. As has been noted:[45]

> The jurisprudence under international law bestows the right of ownership rather than mere access. …. if international law were to grant access only, indigenous people would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous people can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.

109. The Court takes special notice of the fact that the protection of rights to land and natural resources remains fundamental for the survival of indigenous peoples.[46] As confirmed, the right to property includes not only the right to have access to one's property and not to have one's property invaded or encroached upon but also the right to undisturbed possession, use and control of such property however the owner(s) deem fit.[47]

110. The Court thus finds that , in international law, granting indigenous people privileges such as mere access to land is inadequate to protect their rights to land. [48] What is required is to legally and securely recognise their collective title

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[45] *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of the Endorois Welfare Council) v Kenya* available at: https://www.achpr.org/sessions/descions?id=193. § 204.

[46] Report of the African Commission's Working Group Report on Indigenous Populations/Communities, Adopted by the African Commission on Human and Peoples' Rights at the 28th Session, p. 11.

[47] *Social Economic Rights and Accountability Project v Nigeria*; available at: https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2010/109.

[48] See, for example, *Case of the Saramaka People v Suriname*, (Preliminary Objections, Merits, Reparations and Costs), Judgment of 28 November 2007 §§ 110 & 115; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, (Merits, Reparations and Costs), Judgment of August 31 2001, Series C No. 79, § 153; *Case of the Indigenous Community Yakye Axa v. Paraguay*, (Merits, Reparations and Costs) Judgment

to the land in order to guarantee their permanent use and enjoyment of the same.

111. The Court wishes to emphasise though that given the unique situation and way of life of indigenous people, it is important to conceptualise and understand the distinctive dimensions in which their rights to property like land can be manifested. Ownership of land for indigenous people, therefore, is not necessarily the same as other forms of State ownership such as the possession of a fee simple title.[49] At the same time, however, ownership, even for indigenous people, entails the right to control access to indigenous lands. It thus behoves duty bearers, like the Respondent State, to attune their legal systems to accommodate indigenous peoples' rights to property such as land..

112. The Court acknowledges that "among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred on an individual but rather on the group and its community".[50] Indigenous people, therefore, have, by the fact of their existence, the right to live freely in their own territory.[51] The close ties that indigenous peoples have with the land must be recognised and understood as the fundamental basis of their cultures, spiritual life, integrity and economic survival.[52]

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of June 17 2005 Series C No.125, §§ 143 & 215; *Case of the Moiwana Community v. Suriname*.(Preliminary Objections, Merits, Reparations and Costs) Judgment of June 15, 2005. Series C No. 124, § 209.

[49] A Erueti "The demarcation of indigenous peoples' traditional lands: Comparing domestic principles of demarcation with emerging principles of international law" (2006) 23 (3) *Arizona Journal of International and Comparative Law* 543 544.

[50] *Mayagna (Sumo) Awa Tingni v Nicaragua* §149.

[51] Ibid.

[52] *Yakye Axa Indigenous Community v Paraguay* §131. See also, UN Committee on Racial Discrimination *General Comment No. 23* § 5 - Also relevant here is ILO Convention 169 especially Article 14 which provides as follows: 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect; 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession; 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

113. The Court recalls that in its judgment on merits it confirmed that the right to property, as guaranteed in Article 14 of the Charter, applies to groups or communities and can be exercised individually or collectively. The Court also held that in determining the applicability of Article 14 of the Charter to indigenous peoples, comparable international law, such as the UNDRIP, was applicable. As the Court further held, rights that can be recognised for indigenous peoples on their ancestral lands are variable.[53]

114. Given all of the above the Court reiterates its position that the Ogiek have a right to the land that they have occupied and used over the years in the Mau Forest Complex. However, in order to make the protection of the Ogiek's right to land meaningful, there must be more than an abstract or juridical recognition of the right to property.[54] It is for this reason that physical delineation, demarcation and titling is important.[55] This delineation, demarcation and titling must be premised on, among others, the Respondent State's Community Land Act, 2016, and the Forest Conservation and Management Act, 2016, without undermining any of the protections accorded to indigenous people by the applicable international law.

115. In the circumstances, the Court holds that the Respondent State should undertake an exercise of delimitation, demarcation and titling in order to protect the Ogiek's right to property, which in this case revolves around their occupation, use and enjoyment of the Mau Forest Complex and its various resources. The Court does not agree with the Respondent State's submission that delimitation, demarcation and titling is inimical to the ways of life of indigenous people. While the Court recognises that the Ogiek way of life, like that of many indigenous people, has not remained stagnant, the evidence before it demonstrates that they

[53] *ACHPR v Kenya* (merits) 123-127.
[54] Ibid § 143.
[55] In this context, demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground - Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights *Indigenous peoples and their relationship to land: final working paper* prepared by the Special Rapporteur, Erica-Irene A. Daes

have maintained a way of life in and around the Mau Forest that distinguishes them as an indigenous people. Securing their right to property, especially land, creates a conducive context for guaranteeing their continued existence.

116. The Court, therefore, orders the Respondent State to take all necessary measures be they legislative or administrative to identify, in consultation with the Ogiek and/or their representatives, to delimit, demarcate and title Ogiek ancestral land and to grant *de jure* collective title to such land in order to ensure the permanent use, occupation and enjoyment, by the Ogiek, with legal certainty. Where the Respondent State is unable to restitute such land for objective and reasonable grounds, it must enter into negotiations with the Ogiek through their representatives, for purposes of either offering adequate compensation or identifying alternative lands of equal extension and quality to be given for Ogiek use and/or occupation. This process must be undertaken and concluded within two (2) years from the date of notification of this judgment.

117. The Court further orders that , where concessions and/or leases have been granted over Ogiek ancestral land to non-Ogiek and other private individuals or corporations, the Respondent State must commence dialogue and consultations between the Ogiek and/or their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek in line with the Community Land Act. In cases where land was allocated to non-Ogiek and where it proves impossible to reach a compromise, the Respondent State must either compensate the concerned third parties and return the land to the Ogiek or agree on appropriate compensation for the Ogiek.

ii. Recognition of the Ogiek as an indigenous people

118. The Applicant prays for the full recognition of the Ogiek as an indigenous people, including but not limited to the recognition of the Ogiek language and

Ogiek cultural and religious practices; provision of health, social and education services for the Ogiek; and the enacting of positive steps to ensure national and local political representation of the Ogiek.

119. The Applicant further prays for the Respondent State to immediately engage in dialogue with the Ogiek's representatives, in accordance with their traditions and customs, to grant full recognition of the Ogiek, such processes to be completed within one (1) year of the date of the Court's order on reparations.

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120. The Respondent State submits that it has constituted a Task Force to formulate further administrative interventions to redress the violations suffered by the Ogiek including their non-recognition as an indigenous people.

121. The Respondent State further submits that its Constitution of 2010 provides a solid legal superstructure which seeks to address the structural and root cause of the violations suffered by the Ogiek and that the same have been substantially remedied and what is left can be attained by administrative interventions and guarantees of non-repetition.

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122. The Court recalls that in its judgment on merits it found that the Respondent State violated Article 2 of the Charter by failing to recognize the Ogiek's status as a distinct tribe like other similar groups and thereby denying them the rights available to other tribes. [56]

123. The Court notes that the Respondent State, on 23 October 2017, established a multi-agency Task Force with an initial period for operation of six (6) months, to implement its decision on merits. The Court also notes that on 25 October 2018 the Respondent State again appointed a Task Force for the implementation of the Court's judgment, albeit with a different composition from

[56] *ACHPR v Kenya* (merits) § 146.

the one set up on 23 October 2017. The Court observes that while the Respondent State has stated that the Task Force appointed in October 2018 conducted extensive consultations with the Ogiek and other communities likely to be affected by its judgment, the Applicants have seriously questioned the composition of the Task Force as well as the methods it employed.

124. Notwithstanding the Parties' lack of agreement on the utility of the Task Force, the Court notes, from the Respondent State's report to the Court of 25 January 2022, that the Task Force submitted its report to the appointing authority in October 2019. The Court, however, has not been able to access any publicly available record(s) of the findings and recommendations of the Task Force. The Court thus finds that whatever interventions may emerge from the Task Force, the processes afoot this far have not contributed meaningfully to the implementation of its judgment on the merits.

125. Separately, but again from the report filed by the Respondent State on 25 January 2022, the Court notes that the Respondent State, at least from 2019, has recognised the Ogiek as a sub-group of the Kalenjin, for purposes of its Population and Housing Census.

126. In its judgment on the merits, the Court already recognised the Ogiek as an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability.[57] Following from this recognition, the Court, therefore, orders that the Respondent State must take all necessary legislative, administrative and other measures to guarantee the full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition and protection to the Ogiek language and Ogiek cultural and religious practices within twelve (12) months of notification this judgment.

[57] *ACHPR v Kenya* (merits), § 112.

iii. Public apology

127. The Applicant submits that the Respondent State should be ordered to publicly issue a full apology to the Ogiek for all the violations of their rights as identified by the Court, in a newspaper with wide national circulation and on a radio station with widespread coverage, within three (3) months of the date of the Court's order on reparations.

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128. The Respondent State submits that the Gazette Notice appointing the Task Force to give effect to the decision of the Court suffices as a public notice acknowledging violations of the Charter and would constitute just satisfaction for the violations suffered by the Ogiek.

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129. The Court, recalling its jurisprudence, holds that a judgment can constitute a sufficient form of reparation and also a sufficient measure of satisfaction.[58] In the instant case, the Court believes that its judgments, both on the merits and reparations, are a sufficient measure of satisfaction and that, therefore, it is not necessary for the Respondent State to issue a public apology.

iv. Erection of public monument

130. The Applicant submits that the Respondent State should be ordered to erect a public monument acknowledging the violation of Ogiek rights, in a place of significant importance to the Ogiek within six (6) months of the date of the Court's order on reparations.

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[58] *Mtikila v Tanzania (Reparations)* § 45; *Armand Guehi v Tanzania* (merits and reparations) (7 December 2018) 477 § 194 and Application No. 005/2015 *Thobias Mang'ara Mango and another v Tanzania*, ACtHPR, Application No.005/2015, Judgment of 2 December 2021 (merits and reparations) § 106.

131. The Respondent State submits that there is no justification for the erection of a monument as a form of reparations and that the Ogiek have no practice of monument erection and there is no evidence that the same would be of any significance to their community. It further submits that there is no evidence that the erection of a monument would be of any significance to the Ogiek Community especially given that it has "already acknowledged its wrongs and is actively taking steps to redress the same."

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132. Commemoration of victims of human rights violations by way of erecting a memorial or even by way of other acts of public acknowledgment of the violations, is an accepted form of reparations in international law.[59] In the main, this serves as a way of dignifying the victims and also to create a reminder of the violations that occurred and thus, hopefully, spur undertakings not to repeat the violations. The erection of a monument to victims of human rights violations, therefore, is a symbolic gesture which simultaneously acknowledges the violations while deterring further violations.

133. As the Court has established, however, a judgment itself can constitute sufficient reparation.[60] In the present Application, having considered all the circumstances of the case, especially the other orders on reparations that the Court has made, the Court holds that it is not necessary for the Respondent State to erect a monument for the commemoration of the violation of the rights of the Ogiek. Resultantly, the Court dismisses the Applicant's prayer.

[59] Cf. *Gonzales and others (Cotton Field) v Mexico* § 471 (16 November 2009).
[60] *Mtikila v Tanzania (reparations)* § 37.

v. The right to effective consultation and dialogue

134. The Applicant submits that the Court had, in its judgment on merits, found that the Respondent State repeatedly failed to consult with the Ogiek resulting in a violation of Article 22 of the Charter.

135. The Applicant prays the Court to make an order directing the Respondent State to adopt legislative, administrative and other measures to recognise and ensure the right of the Ogiek to be effectively consulted, in accordance with their traditions and customs and/or with the right to give or withhold their free, prior and informed consent, with regard to development, conservation or investment projects on Ogiek ancestral land, and implement adequate safeguards to minimize the damaging effects such projects may have upon the social, economic and cultural survival of the Ogiek, with such processes to be completed within one (1) year of the date of the Court's order on reparation.

136. The Applicant further prays the Court for an order requiring the Respondent State to fully consult and facilitate the participation, in accordance with their traditions and customs, of the Ogiek in the reparation process as a whole, including all steps that the Respondent State and its agencies take in order to comply with the Court's order.

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137. The Respondent State submits that it intends to engage directly with the Ogiek through the Ogiek Council of Elders which it views as the generally accepted body mandated to speak on behalf of the Ogiek community. In the same vein, the Respondent State reiterates its willingness and commitment to offer a comprehensive and long-lasting solution to the predicament of the Ogiek of the Mau Forest in line with the Court's judgment on the merits.

138. The Respondent State, however, has also categorically submitted that "it is opposed to engagement with self-serving third parties …who have been a stumbling block to all attempts to meaningful engagement with the Ogiek Community to resolve this long standing issue."

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139. The Court recalls that in its judgment on merits it found that the Ogiek had been continuously evicted from the Mau Forest without being effectively consulted.[61] As the Court further held, the evictions have adversely impacted on the Ogiek's economic, social, and cultural development. The Court also found that the Ogiek have not been actively involved in developing and determining health, housing and other economic and social programmes affecting them.

140. The Court observes that the Respondent State has not, generally, opposed the establishment of mechanisms and processes which could facilitate engagement with the Ogiek especially in relation to remedying the various violations of their human rights. So far as the Court has been able to discern, from the Respondent State's submissions, its major objection relates to engagement with the complainants that filed this Application before the Commission. In this regard, the Court wishes to reiterate its earlier finding that the complainants that filed this case before the Commission are not Parties to the present case, the only Applicant before it is the Commission.

141. The Court also observes that in its various submissions before it, the Respondent State has expressed its willingness to engage the Ogiek to solve the land problem in the Mau Forest. However, apart from the establishment of the Task Force, the Respondent State has not been forthcoming with information about the concrete steps that it has been taking towards the implementation of the judgment on merits. This seems to contradict the Respondent State's own

[61] *ACHPR v Kenya* (merits) § 210.

submissions in relation to its commitment to engagement towards the resolution of the differences that it has with the Ogiek.

142. As against the above background, the Court reiterates its position, as reflected in the judgment on merits, that it is a basic requirement of international human rights law that indigenous peoples, like the Ogiek, be consulted in all decisions and actions that affect their lives. In the present case, therefore, the Respondent State has an obligation to consult the Ogiek in an active and informed manner, in accordance with their customs and traditions, within the framework of continuing communication between the parties. [62] Such consultations must be undertaken in good faith and using culturally-appropriate procedures. Where development programmes are at stake, the consultation must begin during the early stages of the development plans, and not only when it is necessary to obtain Ogiek's approval. In such a case, it is also incumbent on the Respondent State to ensure that the Ogiek are aware of the potential benefits and risks so they can decide whether to accept the proposed development or not. This would be in line with the notion of Free Prior and Informed Consent which is also reflected in Article 32(2) of the UNDRIP.

143. The Court observes that it is not strange for indigenous peoples to self-organise along lines of national, regional and sometimes even international networks covering non-governmental organisations and other civil society organisations. In the case of the Ogiek, it is clear that they have several bodies that represent their interests. It is thus incumbent on the Respondent State, in line with the obligation to consult in good faith, to create space for engagement with all actors that represent the interests of the Ogiek. This engagement, for the avoidance of doubt, must follow culturally appropriate procedures and processes. In case challenges arise in identifying organisations/bodies to represent the Ogiek, in consultations and engagement with the Respondent, the

[62] IACtHR *Case of The Kichwa Indigenous People of Sarayaku v. Ecuado*r Judgment of June 27, 2012 (Merits and reparations) § 177.

Respondent State must facilitate the creation of civic space, and time, where the Ogiek must be allowed to resolve all representation-related challenges.

144. The Court, therefore, grants the Applicant's prayer and orders that the Respondent State must take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs, and/or with the right to give or withhold their free, prior and informed consent, with regards to development, conservation or investment projects on Ogiek ancestral land and to implement measures that would minimise the damaging effects of such projects on the survival of the Ogiek.

145. Given that the Court has established that the violation of the Ogiek's rights was partly due to the Respondent State's failure to consult the Ogiek, the Court further orders that the Respondent State to ensure the full consultation and participation of the Ogiek, in accordance with their traditions/customs, in the reparation process as a whole including specifically all the steps taken in order to comply with this judgment.

vi. Guarantees of non-repetition

146. The Applicant prays that the Court make an order that the Respondent State guarantees non-repetition of the violation of the rights of the Ogiek People.

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147. The Respondent State does not contest the Applicant's prayer and has submitted that guarantees of non-repetition together with rehabilitation measures are the best means for addressing human rights violation especially where the objective is to address the root and structural causes of the violations.

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148. Guarantees of non-repetition are aimed at ensuring that further violations do not occur. As a form of reparations, they serve to prevent future violations, to cease on-going violations and to assure victims of past violations of the harm they suffered and of action to prevent the repetition thereof.The overall aim of guarantees of non-repetition is to "break the structural causes of societal violence, which are often conducive to an environment in which [human rights violations] take place and are not publicly condemned or adequately punished."[63]

149. The Court recalls that it is trite that a State that is a party to an international human rights instrument thereby undertakes to honour the terms of the instrument including through the modification of its domestic laws to align them with the obligations that it has assumed. In this Application, the Court observes that the Parties are not in dispute on the need for guarantees of non-repetition.

150. In the present case, the Court orders the Respondent State to adopt legislative, administrative and/or any other measures to avoid a recurrence of the violations established by the Court including, inter alia, by the restitution of the Ogiek ancestral lands, the recognition of the Ogiek as an indigenous people, and the establishment of mechanisms/frameworks for consultation and dialogue with the Ogiek on all matters affecting them.

C. Development fund for the Ogiek

151. The Applicant has requested the Court to order the Respondent State to take "all necessary measures administrative, legislative, financial and human resource measure to create a Community Development Fund for the benefit of the members of the Ogiek people within 6 months of notification of the Court's Order on Reparation."

[63] African Commission on Human and Peoples' Rights *General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment* (Article 5) § 45 – available at: https://www.achpr.org/public/Document/file/English/achpr_general_comment_no._4_english.pdf.

152. According to the Applicant, a community development fund provides "the governance framework for the allocation of funds to projects of a collective interest to the indigenous community such as agriculture, education, food security, health housing, water and sanitation projects, resource management and other projects that the indigenous community consider of benefit …"

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153. The Respondent State's submissions did not address this issue.

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154. The Court recalls that it has ordered the Respondent State to pay compensation to the Ogiek for violation of their rights. The Court is aware that the members of the Ogiek in the Mau Forest area number approximately forty thousand (40, 000). Given that the violations leading up to this judgment have been experienced by many members of the Ogiek Community and over a substantial expanse of time, the Court considers it very important that any benefit, as a result of this litigation, should be extended to as many members of the Ogiek Community as possible.. In the circumstances, the establishment of a fund is one mechanism to ensure that all Ogiek benefit from the outcome of this litigation.

155. The Court thus orders the Respondent State to establish a community development fund for the Ogiek which should be a repository of all the funds ordered as reparations in this case. The community development fund shall be used to support projects for the benefit of the Ogiek in the areas of health, education, food security, natural resource management and any other causes beneficial to the well-being of the Ogiek as determined from time to time by the committee managing the fund in consultation with the Ogiek. The Respondent State must, therefore, take the necessary administrative, legislative and any other measures to establish this Fund within twelve (12) months of the notification of this judgment.

156. In terms of administration of the community development fund, the Court orders that the Respondent State should coordinate the process of constituting a committee that will oversee the management of the fund. This Committee must have adequate representation from the Ogiek with such representatives being chosen by the Ogiek themselves.

VII. COSTS

157. None of the Parties made any submissions in respect of costs.

158. The Court, however, recalls that in terms of Rule 32 of the Rules "unless otherwise decided by the Court, each party shall bear its own costs."[64]

159. In the present case, the Court sees no reason to depart from the above general principle and accordingly orders each party to bear its own costs.

VIII. OPERATIVE PART

160. For these reasons:

THE COURT,

Unanimously,

On the Respondent State's objections

i. *Dismisses* all the Respondent State's objections;

[64] Rule 30 of the Rules of Court 2 June 2010.

On pecuniary reparations

ii. *Orders* the Respondent State to pay the sum of KES 57 850 000. (Fifty seven million, eight hundred and fifty thousand Kenya Shillings), free from any government tax, as compensation for the material prejudice suffered by the Ogiek;

iii. *Orders* the Respondent State to pay the sum of KES 100 000 000 (One hundred million Kenya Shillings), free from any government tax, as compensation for the moral prejudice suffered by the Ogiek;

On non-pecuniary reparations

iv. *Orders* the Respondent State to take all necessary measures, legislative, administrative or otherwise to identify, in consultation with the Ogiek and/or their representatives, and delimit, demarcate and title Ogiek ancestral land and to grant collective title to such land in order to ensure, with legal certainty, the Ogiek's use and enjoyment of the same.;

v. *Orders* the Respondent State, where concessions and/or leases have been granted over Ogiek ancestral land, to commence dialogue and consultations between the Ogiek and their representatives and the other concerned parties for purposes of reaching an agreement on whether or not they can be allowed to continue their operations by way of lease and/or royalty and benefit sharing with the Ogiek in line with all applicable laws. Where it proves impossible to reach a compromise, the Respondent State is ordered to compensate the concerned third parties and return such land to the Ogiek;

vi. *Orders* that the Respondent State must take all appropriate measures, within one (1) year, to guarantee full recognition of the Ogiek as an indigenous people of Kenya in an effective manner, including but not limited to according full recognition to the Ogiek language and Ogiek cultural and religious practices;

vii. *Dismisses* the Applicant's prayer for a public apology;

viii. *Dismisses* the Applicant's prayer for the erection of a monument to commemorate the human rights violations suffered by the Ogiek;

ix. *Orders* the Respondent State to take all necessary legislative, administrative or other measures to recognise, respect and protect the right of the Ogiek to be effectively consulted, in accordance with their tradition/customs in respect of all development, conservation or investment projects on Ogiek ancestral land;

x. *Orders* the Respondent State to ensure the full consultation and participation of the Ogiek, in accordance with their traditions/customs, in the reparation process as ordered in this judgment;

xi. *Orders* the Respondent State to adopt legislative, administrative and/or any other measures to give full effect to the terms of this judgment as a means of guaranteeing the non-repetition of the violations identified;

xii. *Orders* the Respondent State to take the necessary administrative, legislative and any other measures within twelve (12) months of the notification of this judgment to establish a community development fund for the Ogiek which should be a repository of all the funds ordered as compensation in this case;

xiii. *Orders* the Respondent State, within twelve (12) months of notification of this judgment, to take legislative, administrative or any other measures to establish and operationalise the Committee for the management of the development fund ordered in this Judgment;

On implementation and reporting

xiv. *Orders* that the Respondent State must, within six (6) months of notification

of this judgment, publish the official English summaries, developed by the Registry of the Court, of this judgment together with that of the judgment of 26 May 2017. These summaries must be published, once in the official Government Gazette and once in a newspaper with widespread national circulation. The Respondent State must also, within the six (6) months period earlier referred to, publish the full judgments on merits and on reparations together with the summaries provided by the Registry of the Court on an official government website where they should remain available for a period of at least one (1) year;

xv. *Orders* the Respondent State to submit, within twelve (12) months from the date of notification of this Judgment, a report on the status of implementation of all the Orders herein;

xvi. *Holds,* that it shall conduct a hearing on the status of implementation of the orders made in this judgment on a date to be appointed by the Court twelve (12) months from the date of this judgment.

On Costs

xvii. *Decides* that each party shall bear its own costs;

Signed:

Imani D. ABOUD, President;

Blaise TCHIKAYA, Vice-President;

Rafaâ BEN ACHOUR – Judge;

Suzanne MENGUE – Judge;

M-Thérèse MUKAMULISA – Judge;

Tujilane R. CHIZUMILA – Judge;

Chafika BENSAOULA – Judge;

Stella I. ANUKAM – Judge;

Dumisa B. NTSEBEZA – Judge;

Modibo SACKO – Judge;

and

Robert ENO, Registrar.

In accordance with Article 28 (7) of the Protocol and Rule 70(1) of the Rules, the Separate Opinion of Judge Blaise TCHIKAYA is appended to this Judgment.

Done at Arusha, this 23rd Day of the month of June in the year Two Thousand and Twenty-Two, in English and French, the English text being authoritative.

COUR AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

AFFAIRE

Commission africaine des droits de l'homme et des peuples

c.

République du Kenya

Requête n° 006/2012

Arrêt du 23 juin 2022

(Réparations)

Opinion individuelle

du

Juge Blaise Tchikaya, Vice-Président

Introduction

Conclusion

1. Je souscris entièrement à la décision sur les réparations que la Cour vient de rendre sur *l'Affaire des Ogiek*, ce 23 juin 2022, décision à laquelle j'ai associé

mon vote favorable. Mon adhésion est si intégrale, que dans la présente opinion individuelle, il me faut détailler sur certaines questions, les réponses que j'ai trouvées si justes dans la décision de la Cour.

* * *

2. Après 10 ans, la Cour vient de clore[1] la plus longue affaire de ses seize premières années d'existence. Elle porte sur les droits fondamentaux d'une minorité : celle des Ogiek. Une des communautés de la forêt de Mau au Sud-Est du Kenya aux prises avec diverses mesures imputables à l'Etat-défendeur. La Cour, dans un arrêt sur les réparations rendu à l'unanimité, donc à laquelle mon adhésion fut totale, a reconnu les droits réclamés par la communauté Ogiek, à savoir :

   a) L'Etat défendeur a violé[2] le droit des Ogiek d'avoir un « statut de tribu distincte reconnue aux autres groupes similaires et, en conséquence, les avoir expulsés arbitrairement de la forêt de Mau (…) il leur a privé de leur développement communautaire »[3] ;

   b) Au § 127 de sa décision au fond de 2017, on trouvait déjà l'affirmation de la Cour selon laquelle « Sans exclure le droit de propriété au sens classique du terme, cette disposition met davantage l'accent sur les droits de possession, d'occupation, d'utilisation et d'exploitation des terres »[4]. La possession, l'occupation, l'utilisation et d'exploitation des terres sont restituées aux Ogiek ;

[1] CAfDHP, *Commission africaine des droits de l'homme et des peuples c. Kenya*, 23 juin 2023
[2] La Cour a préalablement reconnu comme victime de violation au sens de la section V des *Principes et directives des Nations Unies* qui entendent par « victimes » : « […] les personnes qui ont subi individuellement ou collectivement un préjudice, notamment une atteinte à leur intégrité physique ou mentale, une souffrance morale, une perte matérielle ou une atteinte grave à leurs droits fondamentaux, par suite d'actes ou d'omissions constituant des violations flagrantes du droit international relatif aux droits de l'homme ou des violations graves du droit international humanitaire.», Assemblée générale, Résolution 40/34, 29 novembre 1985, § 8.
[3] CADHP, *Commission africaine des droits de l'homme et des peuples c. Kenya*, 26 mai 2017, § 146.
[4] On peut lire au § 128 qu' « en l'espèce, l'État défendeur ne conteste pas que la Communauté des Ogiek occupe des terres dans la forêt de Mau depuis les temps immémoriaux ».

c) La décision sur les réparations de 2022[5], en conséquence des violations confirme, en les diversifiant, les droits dûs aux Ogiek.

3. L'affaire commence, aux termes du dossier, le 14 novembre 2009, lorsque la Commission africaine des droits de l'homme et des peuples est saisie d'une Communication émanant du *Centre for Minority Rights Development (CEMIRIDE)* et du *Minority Rights Group International (MRGI)*, introduite au nom de la communauté Ogiek. Y était en cause un préavis d'expulsion émis par le Service des forêts du Kenya en octobre 2009, selon lequel les Ogiek et les autres personnes vivant dans la forêt de Mau devaient la quitter dans un délai de trente (30) jours. La Commission africaine avait pris différentes mesures provisoires (notamment 23 novembre 2009), dont la suspension du préavis d'expulsion, mesures restées sans suite.

4. C'est le 12 juillet 2012, que la Commission (devenue Requérante en application du Protocole)[6] a saisi cette Cour. Le traitement de l'affaire fut long et connu différentes étapes, comme de nombreux échanges d'actes de procédures. Ainsi, le 28 décembre 2012, la Requérante a demandé à la Cour d'ordonner d'autres mesures provisoires visant, notamment, la directive publiée le 9 novembre 2012 par le ministère des Domaines, relatives aux terrains de moins de cinq (5) acres dans la zone du complexe forestier de Mau. Comme lors de la phase au fond[7], entre les années 2020 et 2021, la Cour a tenté dans la phase des réparations de tenir une audience publique qui n'a pu avoir lieu à cause de la pandémie de la Covid-19.

5. La question que la Cour africaine avait à trancher ne fut pas de toute simplicité. La décision de 2022 sur les réparations ne fut pas qu'un exercice de style. Elle répondait au moins à deux impératifs : a) traduire au mieux la décision sur le fond de 2017 par laquelle elle avait constaté des violations des droits des Ogiek

[5] CAfDHP, *Commission africaine des droits de l'homme et des peuples c. Kenya*, 23 juin 2022.
[6] L'article 5(1) (a) du Protocole qui attribue la Commission qualité pour saisir la Cour.
[7] Le règlement à l'amiable n'avait pas abouti, la Cour, par lettre du 7 mars 2016, informait les parties de la poursuite de la procédure judiciaire.

[8] ; b) déterminer le contenu précis des réparations à approuver. Outre la revendication sur la restitution des terres ancestrales, la Cour avait à se prononcer sur au moins cinq autres points relatifs aux réparations pour couvrir entièrement le contentieux.

6. La Cour a, sans ambages, reconnu aux Ogiek des droits qu'elle a estimé fondés aux termes de la Charte africaine, il revient à l'Etat-défendeur d'en faire la traduction concrète au sens où il l'a indiqué dans ses demandes :

> « l'État défendeur s'est toujours engagé à mettre en œuvre l'arrêt de la Cour en mettant, notamment, sur pied un Groupe de travail interministériel chargé de superviser la mise en œuvre dudit arrêt »[9].

7. Seront ainsi abordées, d'abord, les questions ayant trait à l'évaluation du préjudice matériel et la question spécifique de la restitution des terres ancestrales (I.), ensuite, les autres formes de réparations (II.) et, enfin, les procédures et modalités des réparations prononcées (III).

I. L'Affaire des Ogiek, le préjudice matériel et la restitution des terres

8. La Cour s'est prononcée d'abord sur les réparations au titre du préjudice matériel subi par les Ogiek. Elle se gardera d'innover. *Ratione jure*, elle est restée encrée dans l'approche prévalant en matière de réparation en droit international.

A. L'évaluation du préjudice matériel

9. Sur l'évaluation du préjudice matériel subi par les Ogiek, comme début du litige, la Cour suivra les règles régulièrement mises en œuvre. Dans l'affaire relative à l'*Usine de Chorzów*, la Cour permanente de Justice internationale précisait que l'indemnisation remplace la restitution en nature, si celle-ci n'est pas

[8] Conformément à l'article 27 (1) du Protocole qui dit : « Lorsqu'elle estime qu'il y a eu violation d'un droit de l'homme ou des peuples, la Cour ordonne toutes les mesures appropriées afin de remédier à la situation, y compris le paiement d'une juste compensation ou l'octroi d'une réparation ».
[9] Arrêt du 23 juin 2017, § 23.

possible. Le montant doit correspondre à la valeur de la restitution en nature, (…) la valeur qui aurait existé, si l'acte illégal n'avait pas été commis[10]. Au paragraphe 60 de l'arrêt, la Cour explique sa méthode marquée par des difficultés du fait de la nature de l'affaire :

> « La Cour tient compte des circonstances de chaque affaire en se fondant sur la cohérence et la crédibilité des déclarations du Requérant à la lumière de l'intégralité de la requête »[11].

10. En définitive, la Cour a choisi la voie de l'équité. Une somme sera versée en toute équité, de sorte que cela ne dépende pas du seul pouvoir discrétionnaire de la Cour. La Cour a, en effet, accordé une attention particulière : a) aux observations et aux pièces justificatives déposées par les Parties ; b) aux *amici curiae* ; c) aux experts indépendants, avant de prendre sa décision sur l'indemnisation; enfin, d) à la demande en réparation qui porte sur le droit de propriété et de disposer librement de ses richesses et de ses ressources naturelles[12].

11. Afin de marquer le caractère collectif de la réparation, la Cour, précisait dans ses motivations qu':

> « il n'est pas approprié d'ordonner que chaque membre de la Communauté Ogiek soit indemnisé à titre individuel ou que cette indemnisation dépende d'une somme due à chaque membre de cette communauté. (…) compte-tenu, non seulement du caractère communautaire des violations, mais également des difficultés pratiques que pose l'octroi de d'indemnités individuelles à un groupe d'environ quarante mille (40 000) personnes ».

12. Cette situation a conduit la Cour à considérer, en toute équité, que l'État

[10] CPJI, *Affaire relative à l'Usine de Chorzów (demande en indemnité) (fond)*, Série, 13 septembre 1928, p. 47.
[11] CAfDHP, *Anudo Ochieng Anudo c. République-Unie de Tanzanie*, Arrêt du 2 décembre 2021 (réparations), §§ 31 à 32.
[12] CAfDHP, *Op. cit*, 23 juin 2022, § 67.

défendeur versera aux Ogiek, un montant de cinquante-sept millions huit cent cinquante mille (57 850 000) shillings kenyans, à titre de compensation pour le préjudice matériel subi.

B. La question de la restitution des terres ancestrales aux Ogiek

13. . Fort de sa jurisprudence et conformément au droit applicable, la Cour formule des réparations à partir du paragraphe 36 de son arrêt. La Cour a toujours appliqué un principe fondamental, l'obligation de réparer toutes les violations constatées[13]. Dans l'affaire bien connue de 2013, *Révérend Christopher Mtikila c. République-Unie de Tanzanie*[14]*,* la Cour avait exprimé son adhésion au principe du droit de la responsabilité internationale selon lequel l'obligation de réparer constituait :

> « L'une des normes coutumières du droit international, qui veut que toute violation d'une obligation internationale ayant causé un préjudice doit être réparée ».

14. La position de la Cour peut être soutenue. Lorsqu'il y a confiscation en violation des droits de l'homme, le *restitutio in integrum* suppose, en principe, la restitution du bien. En cas d'expropriation illégale, comme il a été constaté en l'espèce :

13 CAfDHP, *Ayants-droit de feus Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo et Blaise Ilboudo et Mouvement burkinabé des droits de l'homme et des peuples c. Burkina Faso (réparations),* 5 juin 2015, §§ 20 à 30 ; et Lohe Issa Konaté c. Burkina Faso (réparations) 3 juin 2016. Principe conforme au droit européen des droits de l'homme. La Cour européenne rappelle par l'article 53 de la Convention que les Etats « se sont engagées à se conformer aux décisions de la Cour dans les litiges auxquels elles sont parties; de plus, l'article 54 prévoit que l'arrêt de la Cour est transmis au Comité des Ministres qui en surveille l'exécution. Il s'ensuit qu'un arrêt constatant une violation entraîne pour l'Etat défendeur l'obligation juridique au regard de la Convention de mettre un terme à la violation et d'en effacer les conséquences de manière à rétablir autant que faire se peut la situation antérieure à celle-ci », CEDH, *Affaire Papamichalopoulos et autres c. Grèce (Art. 50)*, 31 octobre 1995, Série A No. 330-B, § 34.

14 CAfDHP, 14 juin 2013*,* 1 *RJCA* 74 §§ 27-29.

«la meilleure forme de réparation consisterait en principe dans la rétrocession du terrain par l'État »[15].

15. L'un des moyens de défense de l'Etat-défendeur a consisté à faire valoir que les terres occupées par les Ogiek relèvent du « domaine de l'État »[16]. L'exercice par l'Etat de ses fonctions y compris l'organisation des possessions diverses n'entame pas son autorité sur son territoire. Ainsi, quelle qu'ait pu être la valeur de cet argument, la Cour considère, au paragraphe 111 de l'arrêt ce qui suit :

> « il est important de conceptualiser et de comprendre les dimensions tout aussi particulières dans lesquelles leurs droits à la propriété sur la terre peuvent se manifester. Le titre de propriété sur les terres des peuples autochtones n'est donc pas nécessairement similaire à d'autres formes de titres de propriété attribués par l'État défendeur, tel que la possession d'un titre en pleine propriété »[17]

16. L'article 16 alinéa 4 de la Convention (n°169) relative aux peuples indigènes et tribaux de 1989 [18] qui porte sur le déplacement de peuples des terres qu'ils occupent prévoit que, si le retour n'est pas possible :

> « Ces peuples doivent recevoir, dans toute la mesure possible, des terres de qualité et de statut juridique au moins égaux à ceux des terres qu'ils

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[15] CDI, *Malawi African Association et al. c. Mauritanie*, Communications 54/91 (27e session ordinaire, mai 2000).

[16] La jurisprudence et la doctrine s'accorde pour dire que le domaine de l'Etat ne peut être que sous le contrôle des règles de droit international. En particulier, comme en l'espèce il y a des violations constatées de certaines règles de droit de l'homme en faveur d'une communauté nationale. La Cour internationale faisait observer en 1960 que le droit de passage dont se prévalait le Portugal à l'encontre de l'Inde était une question de droit international qui ne pouvait être résolue qu'en se plaçant sur le terrain du droit international (…). La question ne relevait donc pas de la juridiction exclusive de l'Inde, puisqu'elle faisait appel à des règles de droit international, même si leur interprétation était contestée. v. CIJ, *Affaire du droit de passage sur le territoire indien*, 12 avril 1960, *Recueil* 1960, p. 6.

[17]Erueti (E.), La démarcation des terres traditionnelles des peuples autochtones : Comparaison des principes de démarcation nationaux avec les principes de droit international en développement, Arizona *Journal of International and Comparative Law,* 2006, 23, 543 p.

[18] La Convention 169 de l'Organisation internationale du travail ou Convention relative aux peuples indigènes et tribaux s'applique avec la Convention 107 « relative aux populations aborigènes et tribales ».

occupaient antérieurement et leur permettant de subvenir à leurs besoins du moment et d'assurer leur développement futur. Lorsque les peuples intéressés expriment une préférence pour une indemnisation en espèce ou en nature, ils doivent être ainsi indemnisés, sous réserve des garanties appropriées ».

17. Dans l'affaire du *Massacre de Caloto*[19], des membres d'une communauté indigène ont été massacrés avec la complicité de la police. Était en cause, outre les diverses réparations, l'exécution intégrale des accords concernant l'attribution des terres par des procédures convenues et dans un délai raisonnable, en collaboration avec les communautés indigènes. Cette question du foncier en lien avec le caractère communautaire du litige avait longtemps retenue l'attention dans ce litige. Elle était au centre des réparations.

18. Ce lien, toujours présent avec le foncier, organise tout le raisonnement dans les réparations[20] qui seront octroyées par la Cour africaine. Il sera nécessaire de s'imprégner de la nature du sujet, en l'occurrence communautaire et autochtone, victime des violations, de plus, une minorité nationale[21]. La *Déclaration des Nations Unies sur les droits des peuples autochtones*[22] énonce d'emblée que :

> « les peuples autochtones sont égaux à tous les autres peuples, tout en reconnaissant le droit de tous les peuples d'être différents, de s'estimer différents et d'être respectés en tant que tels » (Préambule),

19. Et à l'article premier, on peut lire :

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[19] Rapport No. 36/00, Affaire 11.101, *Massacre de Caloto c. Colombie*, 13 avril 2000, § 75, 3 ; A. Cajas-Sarria M., The Massacre of Caloto: A Case Study on the Rights and the Indigenous Mobilization in the Inter-American System of Human Rights, *Boletín Mexicano de Derecho Comparado No. 130, pp. 73-106, 2011.*

[20] La Cour cite volontiers *les Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire*, 16 décembre 2005 (Résolution 60/147 des Nations Unies).

[21] Sur la complexité de la notion, v. Tchikaya (B.), Le droit international et le concept de minorité, Quelques observations à partir du cas de l'Afrique*, Miskolc Journal of International Law*, Vol. 5, 2008, numéro 2, pp. 1-15.

[22] Résolution adoptée par l'AG ONU, 13 septembre 2007 (A/61/L.67 et Add.1) 61/295.

> « Les peuples autochtones ont le droit, à titre collectif ou individuel, de jouir pleinement de l'ensemble des droits de l'homme ».

20. On sait que le pouvoir souverain est territorialisé. L'État est compétent pour connaitre de faits, conflictuels ou non, survenant sur son territoire et à l'intérieur de ses frontières. Il reste, en quelque sorte, le dépositaire des titres territoriaux. En cela, il peut affecter, en cas de besoin et conformément au droit international du domaine public, des zones du territoire à des peuples ou individus ressortissants de son territoire. De plus, dès lors qu'il était posé que le droit de propriété dans l'entendement de l'article 14 de la Charte pouvait être individuel ou collectif, il pouvait s'appliquer aux groupes ou aux communautés[23].

21. Les paragraphes 94 et suivants de l'arrêt revêttent une importance centrale dans la considération que la Cour porte aux réparations non-pécuniaires. En effet, la Cour estime qu':

> « en se fondant sur le constat de violation de l'article 14 de la Charte, que l'une des conséquences naturelles de cette reconnaissance est la restitution des terres ancestrales des Ogiek. (…) il est possible de remédier à cette violation en restituant les terres ancestrales par la délimitation et la démarcation des terres et l'attribution de titres de propriété ou par tout autre moyen visant à clarifier le statut de toutes ces terres et assurer leur protection (…) »[24].

22. Sans se départir de sa décision de 2017, la Cour se prononce sur le droit aux terres de la manière suivante :

> « le droit de propriété comprend non seulement le droit d'avoir accès à ses biens et de ne pas voir ses biens envahis ou subir un empiètement, mais aussi le droit de posséder, d'utiliser et de contrôler ces biens sans être dérangé, de la manière jugée appropriée par les propriétaires »[25] .

[23] Arrêt de 2017, § 23.
[24] Arrêt sur les Réparations, *Op. cit*., § 96.
[25] Tribunal de la CEDEAO, *SERAP c. Nigeria*, 30 Novembre 2010

23. L'arrêt de la Cour est davantage clarifié par le paragraphe 112. La Cour reconnait que :

> « chez les peuples autochtones, il existe une tradition communautaire concernant une forme de propriété collective de la terre, de sorte que la propriété de la terre n'est pas centrée sur un individu, mais plutôt sur le groupe et sa communauté. Les peuples autochtones ont donc, de par leur existence, le droit de vivre librement sur leur propre terre »[26].

24. Cette décision ne trahit pas l'évolution du droit des gens sur la question. Elle s'installe certes sur deux notions dont le cadrage n'est pas stable en droit international : celle de peuple dont l'affirmation a été élargie par la Charte africaine des droits de l'homme et des peuples, et celle de propriété dont le régime doit toujours être rappelé et précisé. Il est question, en l'occurrence, d'une application collective de la propriété[27]. C'est la formule précitée de la Cour contenue dans la décision au paragraphe 112 : la propriété de la terre n'est pas centrée sur un individu, mais plutôt sur le groupe et sa communauté[28].

25. Une similitude peut être faite avec de nombreuses affaires, notamment celle dans laquelle la Cour interaméricaine avait ordonné les mêmes mesures, en 2021, contre l'État du Nicaragua, . qui avait fait bénéficié à une compagnie étrangère une concession pour le prélèvement du bois sur les terres ancestrales de la communauté *Mayagna Awas Tingni*[29]. La Cour interaméricaine des droits de l'homme avait considéré que le Nicaragua, avait violé le droit à la propriété des membres de la communauté, et ce en se fondant sur la conception indigène de la propriété foncière. En bien des points, cette démarche de la Cour interaméricaine, favorable aux droits fondamentaux des communautés fut considérée comme innovante.

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[26] Arrêt sur les Réparations, *Op. cit*., § 112.
[27] v. CIADH, *Saramaka People c. Suriname*, 28 novembre 2007 ; Affaire *Indigenous Community Yakye Axa c. Paraguay,* 17 juin 2005; Afaire *Moiwana Community c. Suriname*, 15 juin 2005.
[28] Arrêt sur les Réparations, *Op. cit*., §§ 137 et s.
[29] Affaire *Mayagna (Sumo) Awas Tingni Community c. Nicaragua*, 31 août 2001.

26. L'obligation de rétrocéder, emportant celle de délimiter, l'État fautif, devra, comme en a décidé la Cour :

> « Prendre toutes les mesures nécessaires (…) pour identifier, en consultation avec les Ogiek et/ou leurs représentants, et délimiter, démarquer la terre ancestrale des Ogiek ainsi qu'octroyer un titre foncier collectif sur ces terres afin de garantir l'utilisation et la jouissance par une certitude juridique ».

27. D'autres formes de réparation vont retenir l'attention de la Cour en faveur des Ogiek.

II. L'Affaire des Ogiek : les autres formes de réparations

28. Comme pour la restitution des terres, les autres formes de réparation sont également éclairées par *Les Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international relatif aux droits de l'homme et de violations graves du droit international humanitaire* adoptés par l'Assemblé Générale des Nations-Unies. Il s'agit d'une œuvre importante, issue de 15 années de travail[30], qui fixe quelques approches bien utiles dans les procédures, souvent longues, de réparation.

29. En réalité, il existe différentes formes de réparations. L'État, conformément au droit international, peut emprunter l'une ou l'autre. L'article 34 du *Projet d'Articles sur la responsabilité de l'État* indique que la réparation « prend la forme de restitution, d'indemnisation et de satisfaction, séparément ou conjointement ». La CDI (Commission du droit international) avait noté que,

[30] *Les Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international relatif aux droits de l'homme et de violations graves du droit international humanitaire,* Résolution AGONU, 1989/13 du 31 août 1989.

dans certains cas, la réparation aura lieu en joignant les différentes formes[31].

30. En l'espèce, la Cour prononce diverses réparations au sens des dommages subis par les Ogiek. Il en sera ainsi du préjudice moral constaté.

A. Le préjudice moral

31. Sur la réparation du préjudice moral dont la complexité est indéniable[32], la Cour est restée conforme à sa jurisprudence. Sa prise de position s'appuie sur différents manquements conventionnels que résume le paragraphe 85 de l'arrêt[33].

32. Il résulte de l'arrêt que le préjudice moral intègre :

> « la souffrance et la détresse causées aux victimes directes et à leurs familles, ainsi que l'atteinte à des valeurs qui sont très importantes pour elles, de même que d'autres changements de nature non-pécuniaire dans les conditions de vie des victimes ou de leur famille »[34].

33. Les dommages subis par les Ogiek et les violations de droits de l'homme en litige dont l'État défendeur a été déclaré responsable. En 2017, la Cour considérait pour déterminer l'étendue des droits reconnus aux communautés

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[31] Commentaire de la CDI sur l'article 34 du *Projet d'Articles sur la responsabilité de l'État pour fait internationalement illicite*, compte rendu officiel de la 56e session de l'AGONU, A/56/10.

[32]Cette complexité est attestée en droit des gens par une affaire classique, Les Veuves du Lusitania. Un revirement jurisprudentiel a été nécessaire, v. SA, *Veuves du Lusitania*, États-Unis c. Allemagne, Commission mixte de réclamations américano-allemandes, 1er novembre 1923. C'est que dit aussi une étude remarquée, Jean-François Flauss (J.-François) et Abdelgawad (E. Lambert), *L'indemnisation du dommage par la Cour européenne des droits de l'homme et ses effets en droit français*, Institut international des droits de l'homme, Prisme (CNRS), 2009 :« La réparation du préjudice moral est en effet susceptible de conduire, en substance, à indemniser un manque à gagner, composante classique du préjudice materiae. Il arrive également que la réparation du préjudice moral s'apparente à une forme à peine déguisée de l'indemnisation d'une perte de chances ».

[33]La Cour a retenu que relève que, dans son arrêt sur le fond, elle a constaté que l'État défendeur a violé le droit des Ogiek, protégé par l'article 2 de la Charte, pour ne leur avoir pas reconnu le statut de tribu à part entière donné aux autres groupes ; a été également violé l'article 8 de la Charte, pour avoir empêché les Ogiek de continuer de pratiquer leur religion, les articles 17(2) et (3) de la Charte, pour les avoir expulsé de la zone de la forêt de Mau, les empêchant ainsi d'exercer leurs activités et pratiques culturelles et l'article 22 de la Charte, en raison de la manière dont les Ogiek ont été expulsés de la forêt de Mau, v. § 85 de l'Arrêt.

[34] CAfDHP, *Op. cit*., 2023, § 86.

autochtones sur leurs terres ancestrales comme c'est le cas en l'espèce, (…) que l'article 14 de la Charte africaine[35] devait être interprété à la lumière des principes applicables, notamment dans le cadre des Nations Unies[36].

34. Dans *l'Affaire du Lusitania* se trouvent ces lignes très évocatrices consignées dans une Opinion. Il peut y lire qu':

> « il est manifestement impossible d'évaluer mathématiquement, ou avec un certain degré d'exactitude, ou par l'emploi d'une formule précise le dommage subi (...). Ceci ne justifie cependant pas que l'auteur d'un dommage soit exempt de réparer le mal qu'il a fait, ni que la victime ne doive pas recevoir une réparation calculée suivant des règles qui se rapprochent de l'exactitude autant que l'esprit humain peut l'imaginer. Refuser cette réparation reviendrait à méconnaitre le principe fondamental qu'il existe un recours pour toute atteinte portée à un droit »[37].

35. Le préjudice moral apportait une difficulté que la Cour semble avoir bien perçu. Il ne fallait pas, en l'espèce, confondre les préjudices individuels qui se cumulaient avec le préjudice collectif. Ce dernier préjudice était diffus, il ne pouvait s'apprécier par la somme de tous les préjudices individuels. La difficulté a été comprise par la Cour et le dispositif l'exprime en parlant des :

> « (…) Violations constatées dans la présente Requête concernent des droits qui sont au cœur de l'existence même des Ogiek »[38].

36. Ainsi, sur le préjudice moral une indemnisation forfaitaire a été allouée[39].

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[35] Article 14 se lit : **«** Le droit de propriété est garanti. Il ne peut y être porté atteinte que par nécessité publique ou dans l'intérêt général de la collectivité, ce, conformément aux dispositions des lois appropriées ».
[36] CAfDHP, *Op. cit*., 2017, § 125.
[37] *Opinion dans l'affaire du Lusitania*, 1er novembre 1923*,* précité, *Recueil de sentences arbitrales*, Volume VII, p. 32, § 36.
[38] *Idem.,* § 93
[39] Ibidem., § 160, Dispositif : iii) *Ordonne* à l'État défendeur de verser la somme de cent millions (100 000 000) de shillings kenyans, en franchise de tout impôt gouvernemental, à titre de réparation du préjudice moral subi par les Ogiek.

B. Le statut de population autochtone, de leur culture et de leur langue

37. Il résulte de l'arrêt sur le fond rendu par la Cour en 2017 que les Ogiek devaient être reconnus en tant que population autochtone. L'État défendeur a violé l'article 2 de la Charte, pour leur avoir pas reconnu le statut de tribu à part entière similaire aux autres groupes. La Cour précisait que cette reconnaissance devait s'accompagner, au bénéfice des Ogiek, de mesures de « protection totale de leur langue et de leurs pratiques culturelles et religieuses dans les douze (12) mois après la signification de l'arrêt.

38. Les arrêts de la Cour, rendus dans cette affaire, vont dans le sens de l'histoire. L'Assemblée générale des Nations Unies a proclamé la période 2022-2032 Décennie internationale des langues autochtones, et a invité l'UNESCO à être l'organisme devant coordonner un Programme au sein du système des Nations Unies[40] à cet effet**.**

39. Cette demande a été exaucée depuis la décision de la Cour en date du 26 mai 2017. Elle a été renouvelée dans la décision du 23 juin 2023, ainsi seront prises :

> « les mesures appropriées, dans un délai d'un (1) an, pour garantir efficacement la reconnaissance totale des Ogiek en tant que population autochtone du Kenya, y compris, (….) leur langue et de leurs pratiques culturelles et religieuses.

40. Pour ce faire, la Cour a estimé qu'un dialogue direct avec la communauté

[40] v. aussi la Résolution AGONU, 18 décembre 2019 *(A/74/396)*] 74/135, Droits des peuples autochtones ; v. *Pacte international relatif aux droits civils et politiques*, 16 décembre 1966 (article 27) ; *Pacte international relatif aux droits économiques, sociaux et culturels, v.* les préambules : « L'être humain ne peut pas être libre si l'on ne crée pas les conditions qui lui permettent de jouir autant de ses droits civils et politiques que de ses droits économiques, sociaux et culturels » ; Résolution AGONU, *Déclaration des droits des personnes appartenant à des minorités nationales ou ethniques, religieuses et linguistiques*, n° 47/135, du 18 décembre 1992.

concernée est nécessaire.

C. Dialogue direct avec le Conseil des sages Ogiek

41. Dans son arrêt, la Cour ne fait pas droit à l'idée de l'excuse publique au bénéfice des Ogiek, ni à celle de l'édification d'un monument en guise de réparation[41]. Elle considère, cependant, l'idée d'engager un dialogue direct avec les Ogiek comme efficiente. Ce dialogue pourrait avoir lieu par le biais du Conseil des sages des Ogiek, organe faisant en général l'objet de consensus chez les Ogiek[42]. L'engagement à apporter une solution globale et durable au problème des Ogiek de la Forêt de Mau a, du reste, été constaté.

42. En vue de mettre fin à un conflit, les parties ont toujours cherché des solutions concertées, voire consensuelles et négociées, encore plus dans les conflits de droits de l'homme engageant des droits collectifs. Ceci vaut aussi pour la mise en œuvre de droits garantis. A une autre échelle, la Cour internationale de justice ne s'y trompait pas en renvoyant les parties, la Hongrie et la Slovaquie, aux prises dans la gestion durale du Danube à la négociation[43].

D. Les garanties de non-répétition

43. La Cour estime qu'il est dans la logique de sa décision que les mesures législatives et administratives que prendra l'État défendeur permettront d'éviter la répétition des violations constatées. La Cour poursuit en soulignant que la restitution des terres et toutes les autres mesures suffisent à garantir la non répétition[44].

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[41] Au § 133 de la décision et, de façon claire, la Cour a précisé que « qu'un arrêt rendu peut à lui seul constituer une réparation suffisante. Et, « considérant toutes les circonstances en l'espèce, notamment les autres mesures qu'elle a ordonnées sur les réparations, (…) il n'est pas nécessaire que l'État défendeur érige un monument en la mémoire des violations des droits des Ogiek (…).

[42] CAfDHP, Arret du 23 juin 2022, v. §§ 134 et s.

[43] CIJ, *Projet Gabcikovo-Nagymaros*, Slovaquie c. Hongrie, CIJ, arrêt, 25 septembre 1997 ; on peut utilement lire au point B. du dispositif de cet arrêt que : « la Hongrie et la Slovaquie doivent négocier de bonne foi en tenant compte de la situation existante et doivent prendre toutes mesures nécessaires à l'effet d'assurer la réalisation des objectifs du traité du 16 septembre 1977, selon des modalités dont elles conviendront ».

[44] CAfDHP, *Arret du 23 juin 2022*, v. §. 150.

44. La jurisprudence abondante sur cet aspect le montre. Elle établit à suffisance que normalement, la non-répétition des mesures dommageables est implicite et inhérente aux décisions de réparation prises[45]. Il existe un corps de décisions considérables indiquant les différents moyens que l'État-défendeur pourra utiliser - notamment l'adoption de lois - pour veiller à la bonne réalisation des réparations décidées[46].

45. Il est reconnu, en réalité, que les garanties de non-répétition constituent l'une des formes de réparation (recours) à laquelle les Ogiek, comme victimes, ont droit. La non-répétition est étroitement liée à l'obligation de cessation des violations. Les garanties ont une fonction préventive et peuvent être considérées comme un renforcement positif de l'exécution des réparations[47]. La Cour a considéré que toutes les mesures insérées dans l'arrêt suffisent à garantir la non répétition[48].

46. Dans l'approche suivie par la Cour, divers éléments liés aux modalités aux procédures de mise en œuvre de réparations retenues peuvent être notées. C'est sans doute dans le souci d'obtenir une suite à l'arrêt prononcée.

III. Les aspects procéduraux liés à la mise en œuvre des réparations

47. De façon globale, une attention particulière devrait être portée à ce que la Cour installe dans son dispositif comme ouverture de la manière suivante :

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[45] V. notamment : Affaire *Velásquez Rodríguez c. Honduras (indemnisation),* Arrêt du 21 juillet 1989, Série C No 7, §§ 34, 35 (devoir de prévenir d'autres disparitions forcées); Affaire *Castillo Páez c. Pérou,* Arrêt du 3 novembre 1997 (devoir de prévenir d'autres disparitions forcées); Affaire *Trujillo Oroza c. Bolivie (réparation),* Arrêt du 27 février 2002, Série C No 92, § 110; Commission interaméricaine des droits de l'homme Rapport No. 63/99, Affaire 11.427, *Víctor Rosario Congo* (Equateur), 13 avril 1999, § 103.

[46] Commission africaine des droits de l'homme et des peuples : Affaire *The Social and Economic Rights Action Center and the Center for Economic and Social Rights c. Nigeria*, Communication 155/96 (30e session ordinaire, octobre 2001), §§ 57, 61.

[47] Commission du droit international, commentaire sur l'article 30 du *Projet d'articles sur la responsabilité de l'État pour fait internationalement illicite*, Documents officiels de l'AGONU, 56ème session, supplément n° 10 et rectificatif (A/56/10). V. aussi, Tigroudja (H.), *E. Lambert-Abdelgawad & K. Martin-Chenut, eds.,* Réparer les violations graves et massives des droits de l'homme : La Cour interaméricaine, Pionnière ou modèle ?, Société de législation comparée,

[48] CAfDHP, *Idem*, v. §. 150.

« lorsque des concessions ou des baux ont été accordés sur des terres ancestrales des Ogiek, l'État défendeur engage un dialogue et des consultations entre les Ogiek (…) en vue de s'accorder sur l'autorisation ou non de la poursuite des activités des bénéficiaires desdites concessions sous forme de bail et ou de partage de redevances et d'avantages, avec les Ogiek, (…) Au cas où il est impossible de parvenir à un compromis, l'État défendeur doit indemniser les tiers concernés et restituer les terres aux Ogiek »

48. Des mécanismes et modalités de travail ont été considérés, auxquels s'ajoutera le fonds de développement communautaire en faveur des Ogiek.

A. Les mécanismes et modalités de travail sur les réparations

49. Un organisme dédié est nécessaire afin de superviser l'entreprise de réparation. Une étude de 2013[49] à l'initiative de la Commission africaine des droits de l'homme et des peuples disait à cet effet que :

« le groupe identifié comme tel peut avoir droit à une réparation collective (…) Dans les cas impliquant par exemple des violations à grande échelle, à côté de l'attribution de la réparation collective à un groupe spécifique, il sera donc important d'établir un mécanisme qui permette aux victimes individuelles de se présenter et de présenter leur demande de réparation ».

50. Sans doute, l'une des premières actions internes sera de constituer un organe *ad hoc* afin de mieux répondre à l'ensemble des obligations. C'est ce à quoi appelle la *Déclaration des Nations Unies sur les Droits des Peuples Autochtones*. La Déclaration n'a pas été démentie par le *Mémorandum* de la Rapporteure des Nations-Unies sur les peuples autochtones[50] : Une approche

[49] CADHP, *L'étendue du droit à réparation : Qui a droit à réparation ?,* Etudes, 2013, p. 39.
[50] Rapporteuse Spéciale des Nations Unies sur les droits des peuples autochtones Témoignage de l'experte à la demande de la Cour Africaine des droits de l'homme et des peuples sur les

essentielle de la réparation est de considérer la nature collective des dommages.

51. De cet organe *ad hoc*, pourrait venir un mécanisme efficace de délimitation, de démarcation et d'attribution de titres de propriété. Cela pourrait se faire en renforçant notamment l'organe ou le groupe de travail mis en place à la suite de l'arrêt de la Cour du 23 octobre 2017.

52. En l'espèce, il existe donc une sorte d'obligation de consulter les Ogiek de « manière active et informée », dans le respect de leurs coutumes et traditions[51]. Ces consultations doivent être menées en toute bonne foi. Ces procédures doivent être justes et équitables comme le précise l'article 40 de la Déclaration des Nations Unies sur les peuples autochtones. Dans son arrêt la Cour a estimé que « (…) les processus mis en œuvre jusqu'à présent n'ont pas contribué de manière significative à l'exécution de son arrêt sur le fond »[52].

B. Le Fonds de développement communautaire

53. De l'avis de la Requérante, la mise en œuvre globale et la matérialisation des réparations exigerait la création d'un fonds de développement. Elle le présente de la manière suivante :

> « Un fonds de développement communautaire fournit « le cadre de gouvernance dédié à l'allocation de fonds à des projets d'intérêt collectif pour la communauté autochtone, tels que l'agriculture, l'éducation, la sécurité alimentaire, la santé, le logement, l'eau et les projets d'assainissement, la gestion des ressources et d'autres projets que la communauté autochtone considère comme bénéfiques ... ».

54. Ainsi, il sera ordonné à l'État-défendeur de créer :

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réparations dans l'affaire *Commission Africaine des droits de l'homme et des peuples c. Kenya*, Requête 006/2012 29 avril 2020.

[51]CIADH *Affaire Peuples indigènes Kichwa de Sarayaku c. Équateur*, 27 juin 2012, § 177.

[52] Arrêt, *Op. cit*., 23 juin 2022, § 125.

« un fonds de développement communautaire au profit des Ogiek, qui devrait être le dépositaire de tous les fonds ordonnés à titre de réparations dans le présent arrêt ».

55. Le fonds de développement devrait permettre de conduire des projets Ogiek dans les domaines de la santé, de l'éducation, de la sécurité alimentaire, de la gestion des ressources naturelles…Les mesures administratives, législatives et autres nécessaires à la mise en place de ce fonds devraient être prises dans un délai de douze mois à compter de l'arrêt dument notifié. Cette décision marque une prise d'initiative de la Cour suite à la demande des Ogiek. L'importance de cette mesure s'apparente bien à celle prise en faveur des Ogoni par la Commission de Banjul[53]. La Commission avait, notamment, exhorté le Nigéria à l'informer de la mise en place d'une Commission pour la Mise en valeur du Delta du Niger (NDDC) instituée par la loi pour traiter des problèmes environnementaux et autres problèmes sociaux dans la zone du Delta du Niger et d'autres zones de production de pétrole du Nigéria.

56. L'exemple de réparation collective due par le Guatemala en compensation des massacres du *Plan de Sanchez* sont suggestives[54]. Dans cette affaire du *Massacre de Plan de Sánchez,* la Cour interaméricaine des droits de l'homme avait ordonné à l'État de réaliser un Plan quinquennal de développement qui comprenait la mise en place de structures relatives à l'enseignement, aux services de santé, à l''irrigation d'eau et à la production[55]. Cet exemple montrait, une fois encore, que la recherche de réparation après un dommage

[53]L'Affaire des Ogoni concerne des violations de masse. La communication indiquait que aussi que le consortium pétrolier a exploité les réserves d"Ogoni (…) déversant les déchets toxiques dans l"air et dans les cours d"eaux de la région, en violation des règles internationales applicables en matière d'environnement. Le consortium n"a pas pu entretenir ses infrastructures, ce qui a causé beaucoup d"accidents prévisibles à proximité des villages. La contamination de l'eau, du sol et de l"air qui en a résulté a eu de graves conséquences à court et à long termes sur la santé… ; CADHP, *Social and Economic Rights Action Center (SERAC) Economic and Social Rights (CESR) c. Nigeria, Communication* and Center for 155/96 (30e session ordinaire, octobre 2001), § 68.

[54] L'un des plus funestes massacre, celui de Plan de Sánchez eut lieu dans un village guatémaltèque, le 18 juillet 1982. Plus de 250 personnes (principalement des femmes et des enfants, et quasi exclusivement des membres de l'ethnie *Achi Maya* furent maltraitées et assassinées. En 2004, la Cour interaméricaine prononça deux verdicts. Elle établit la responsabilité du Guatemala et ordonna un ensemble de compensations monétaires, non-monétaires… La Cour interaméricaine des droits de l'homme a rendu un arrêt *Masacre Plan de Sanchez.*

[55]CIADH, *Affaire du Massacre de Plan de Sánchez* (Réparation), Arrêt du 19 novembre 2004, §§ 109-111.

profond pouvait être complexe. En matière de réparation collective, on compte aussi l'ouverture d'une école et d'un dispensaire dans l'affaire *Aloeboetoe c. Surinam*, de 1993 jugée par la même Cour[56].

57. Cette décision de la Cour consacre donc une jurisprudence constante. Le paragraphe 160 en témoigne :

> « La mise en place et en activité d'un Comité de gestion du Fonds de développement »[57].

58. De façon générale, sur la restitution qui constitue l'un des points majeurs, il conviendra de suivre les prescriptions des *Principes fondamentaux et directives*[58] concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme (…), précitée dont le point IX souligne :

> *« (…).* La restitution comprend, selon qu'il convient, la restauration de la liberté, la jouissance des droits de l'homme, de l'identité, de la vie de famille et de la citoyenneté, le retour sur le lieu de résidence et la restitution de l'emploi et des biens ».

Conclusion

59. Les différentes mesures qui ressortent de l'arrêt de la Cour en matière de réparation, auxquelles je réitère mon adhésion, sont conformes à l'état du droit international actuel. Elles stimulent les attributions territoriales traditionnelles de l'État et leur exercice. Ces attributions n'entament en rien l'exercice souverain,

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[56]CIADH, *Affaire Aloeboetoe et al. c. Surinam (Réparation),* Arrêt du 10 septembre 1993, § 96.
[57] CAfDHP, *Arret du 23 juin 2022*, v. §. 160, xiii.
[58] AGONU, *Les Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international relatif aux droits de l'homme et de violations graves du droit international humanitaire,* précité § 17.

exclusif et indépendant de la compétence territoriale de l'État-défendeur. La jurisprudence internationale confirme que la souveraineté territoriale emporte des effets absolus, tant positivement que négativement, négativement, parce que l'État doit se refuser à lui-même toute activité non conforme au droit international[59].

60. La Cour d'Arusha et la Commission de Banjul font, à travers cette décision, en quelque sorte, œuvre commune. Outre le fait de s'être en procédure subrogée aux Ogiek, comme Requérante dans présente affaire, la Commission de Banjul avait préalablement rendu une décision dans la Communication *Endorois Welfare Council* c. *Kenya*[60] par laquelle elle soulignait que les droits des *Endorois* avaient été violés lorsque leur avait été refusé l'accès à leurs terres traditionnelles. Ces terres avaient été transformées en réserve de chasse. L'État Kenyan était tenu de reconnaître les droits fonciers communaux des peuples autochtones *Endorois*. Il devait leur accorder une compensation ainsi que la restitution des terres ou leur proposer d'autres terres de même étendue et de même qualité, en accord avec la communauté autochtone.

61. La notion de peuple ou de groupe communautaire connaît un approfondissement à la suite de ces deux arrêts rendus par la Cour en 2017 et 2022. Pour le système africain des droits de l'homme, la catégorie juridique de peuple, titulaire de droits se trouve résolument renforcée. Ces deux décisions vont constituer solidement une étape dans la jurisprudence de la Cour. Elles contribuent incisivement à la fin d'une époque. Celle où « l'individu était les droits de l'homme ». Celle où, avec raisons sans doute, Mme D. Lochack

[59]Dans sa sentence de 1928 (*Île de Palmas*, RSA vol. II, p. 281), Max Huber évoque le lien entre les activités que l'État pourrait exercer sur son comme expression directe du principe d'indépendance. La souveraineté territoriale implique le droit exclusif d'exercer les activités étatiques. L'État défendeur est dans le déploiement d'actions aux fins de bien-être et d'équilibre sur son territoire ; v. SA, *Ile de Palmas*, États-Unis c. Pays-Bas, Max Huber, CPA, 4 avril 1928, *RSA*, vol. II, p. 839 ; C.I.J, *Détroit de Corfou,* Royaume-Uni c. Albanie, CIJ, exceptions préliminaires, 25 mars 1948, *Rec.* 1948, p. 15 ; fond, 9 avril 1949, *Rec.* 1949, p. 4 ; fixation du montant des réparations,15 décembre 1949, *Rec.* 1949, p. 244.

[60] *Centre for Minority Rights Development (Kenya) et Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication, No. 276/2003, 2009. v. en plus, CIADH, *Affaire Peuple Saramaka c. Suriname,* (exceptions préliminaires, fond, réparations et dépens), Arrêt du 28 novembre 2007; *Affaire Communauté Mayagna (Sumo) Awas Tingni c. Nicaragua*, Arrêt du 31 août 2001; *Affaire Communauté autochtone Yakye Axa c. Paraguay*, Arrêt du 17 juin 2005.

déclarait qu'« on ne peut penser les droits de l'homme qu'à partir du moment où l'on postule que l'homme est un sujet de droit, doté de la capacité d'avoir des droits et de s'en prévaloir face au pouvoir »[61]. Que de chemins parcourus depuis le fameux Avis consultatif de 1928 (*Affaire Compétence des Tribunaux de Dantzig*)[62] pour remettre le groupe, la communauté et le peuple au centre des élaborations internationalistes du droit ? La Cour africaine vient d'y mettre une touche de plus.

Juge Blaise Tchikaya
Vice-Président

[61]Lochak (D.), Mutation des droits de l'homme et mutation du droit, *RIE*, 1984. 13, p. 55 ; v. Les analyses de Colliard (Cl.-Albert) selon lesquelles le droit des libertés publiques suppose une « conception individuelle du monde » et qu'en l'absence d'une telle conception « il n'existe pas de véritables libertés publiques, dans *Les libertés publiques*, Dalloz, 1982, 904 p.

[62] CPJI, Avis consultatif, *Compétence des Tribunaux de Dantzig*, 3 mars 1928, série B, n° 15, p. 17, on peut lire « un principe de droit international bien établi, un accord international ne peut, comme tel, créer directement des droits et des obligations pour les particuliers ».