INTERNATIONAL FORUM HELD FROM 28-29 OCTOBER 2019, AT KAMPALA UGANDA
ON THE THEME:
“Operationalising the International Human Rights Forum and Enhancing Jurisprudential Dialogue”.

Commentary, at the International Forum of ACHPR, IACHR & ECHR on Reparations for human rights violations against indigenous populations/groups
By Judge Stella ANUKAM, African Court

Talking Points

Introduction

1. It is estimated that there are approximately 50 million persons belonging to indigenous populations across Africa.¹ Commonly across the continent, they face hardship, discrimination, and non-recognition of their rights to lands and natural resources, as well as high levels of economic, social and cultural

marginalization. In many parts of Africa, indigenous communities have been forced out of their ancestral lands to make room for the establishment of wildlife reserves, tourism resorts, or to allow the extraction of natural resources. All these issues have been examined and analysed in a ground breaking report issued in 2003 by the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples’ Rights which provides an in-depth analysis of the situation of indigenous peoples in Africa. As noted in this report, the rights of indigenous populations are often a very controversial and complex issue across the continent. The definition and scope of indigenous populations’ rights are usually contentious in most African countries. Many States are still reluctant to recognize the specific rights of indigenous populations.

2. As its title indicates, the African Charter includes both individual and collective rights. While it does make specific reference to ‘indigenous people’ as such there are a number of provisions in the Charter that may be of particular significance to members of indigenous groups/populations. Article 2 of the Charter lays down a principle that is essential to the spirit of the Charter, one of whose goals is the elimination of all forms of discrimination and to ensure equality among all human beings ‘without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.’

3. Article 3 of the Charter provides that everyone is equal before the law and is entitled to the equal protection of the law. Article 17 thereof states that everyone ‘may freely take part in the cultural life of his community” and goes on to provide that ”[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State. Article 22 sets out the right of peoples to economic, social and cultural development “with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.”

4. In recent times the African Court and the African Commission on Human and Peoples’ Rights (African Commission) as leading human rights institutions of the African Union have considered and determined some cases mainly brought as class actions on violations of indigenous peoples’ rights.

---

2 R Laher and K Singí Oei (eds), Indigenous People in Africa: Contestations, Empowerment and Group Rights (Africa Institute of South Africa 2014); S Dersso (ed), Perspectives on the Rights of Minorities and Indigenous Peoples in Africa (PULP 2010).


Reparations for human rights violations against indigenous population/group before the African Court

5. The African Court in Application no. 006/2012 African Commission on Human and Peoples’ Rights v. Kenya, delivered its judgment on the expulsion of the Ogiek, a Kenyan hunter-gatherer community, from their ancestral lands in the Mau Forest. The case was referred by the African Commission to the Court pursuant to their complementarity relationship and Article 5 of the Court’s Protocol. The Ogiek of the Mau Forest in Kenya alleged the violation of several rights in the Charter particularly the right to non-discrimination (Art. 2), culture (Art. 17(2) and (3)), religion (Art. 8), property (Art. 14), natural resources (Art. 21), development (Art. 22) and Art 1 following their eviction from the Mau forest by the Government of the Republic of Kenya.

6. In determining that the Ogiek are an indigenous population, the Court specifically drew inspiration from the works of the African Commission’s Working Group on Indigenous Populations/Communities and the UN Special Rapporteur on Minority Issues, concluding that the relevant factor to consider when determining if a community is indigenous or not include:

   a) the priority in time with respect to the occupation and use of a specific territory;
   b) a voluntary perception of cultural distinctiveness, which may include aspects of language, social organization, and religion and spiritual values; self-identification as well
   c) a recognition by other groups, or by State authorities that they are a distinct collectivity; and
   d) an experience of subjugation, marginalization, dispossession, exclusion or
e) discrimination whether or not these conditions persist.

7. The Court considered that the Ogiek possess all the characteristics listed above and ruled that they are an indigenous population. It further found a violation of Articles 14, 2, 8, 17(2) and (3), 21, 22 and consequently Article 1 of the Charter as alleged by the Applicants.

8. The Applicants had requested the following orders: restitution of Ogiek ancestral land; compensation for all the damage suffered, the adoption of legislative and other measures ensuring the Ogiek’s right to be effectively consulted, the issuance of a full apology to the Ogiek, the erection of a public

---

5 Judgment (Merits, 26/05/2017)
monument acknowledging the violation of Ogiek rights; and full recognition of the Ogiek as an indigenous people of Kenya.

9. The Court decided to rule on reparation in a separate judgement and this proceeding is pending.

10. Article 27 (1) of the Protocol determines the jurisdiction of the Court in respect to ordering reparations for human rights violations. It states thus ‘When the Court finds that there has been violation of a human or peoples’ right, it shall make appropriate measures to remedy the violation, including the payment of fair compensation or reparation.’

11. Pursuant to Art. 63(1) of the Rules of the Court, the Court may order reparations in the main judgement or separately. Up to the 49th Session, reparations were addressed separately thus the Court would also be ruling on reparations separately in the Ogiek case.

12. In its jurisprudence, the Court determined that there are four (4) principles that shall guide the determination on reparations: the requirement for reparations, completeness of the reparations; evidence of existence of damages, the causal link between the damages and the unlawful act. It is therefore hoped that these criteria would equally guide the determination of reparations in the instant case. Also, reparations may take different forms including pecuniary reparations which involves payment of material damages (loss of income, costs of proceedings before the domestic courts) and non-material loss (moral prejudice both to the Applicant and his family members as in Application No. 013/2011 Beneficiaries of Late Nobert Zongo, Abdoulaye Nikiema alias Ablassee, Ernest Zongo and Blaise Ilboudo and the Burkinabe Human and People’s Rights Movement v Burkina Faso 6 and non-pecuniary reparations which includes restitution (release of an individual from prison as in Application No. 006/2016 Mgosi Mwita Makungu v. United Republic of Tanzania7 as well as measures of satisfaction (publication of judgment) guarantees of non-repetition re-opening of investigations, and amendment of legislation as in Application 004/2013 Lohe Issa Konate v Burkina Faso8.

The African Commission and reparations for violation of indigenous peoples/groups rights

13. In its landmark decision in Communications 276/2003 Centre for Minority Rights Development, Minority Rights Group International and Endorois Welfare

---

6 (Ruling on Reparations of 5/6/2015)
7 Judgment of 7/12/2018 (Merits)
8 Judgment of 5/12/2014 (Merits).
Council (On Behalf Of the Endorois Community) v Kenya (the ‘Endorois’ case) the African Commission declared the expulsion of the Endorois from their ancestral lands illegal. The African Commission found that the Kenyan Government had failed to recognise and protect the Endorois’ ancestral land rights and failed to provide sufficient compensation or alternative grazing land following their eviction, or to grant restitution of their land, and similarly failed to include the community within the relevant development processes.

14. The Endorois are semi-nomadic pastoralists who were evicted from their ancestral land in and around Lake Bogoria in Kenya’s Rift Valley in the 1970s, in order to pave way for the creation of a national park. Their case before the African Commission challenged the lack of consultation or compensation for the forced displacement, and lack of protection afforded to their traditional way of life, and claimed violations of their rights to non-discrimination, property, access to natural resources on their land, religious and cultural life, and to development contained in Articles 2, 14, 21, 8, 17, and 22 of the Charter respectively).

15. Finding a violation of all these provisions of the Charter the African Commission made a series of wide-reaching recommendations for the Kenyan Government to follow including to ‘recognize rights of ownership of the Endorois ancestral land, ensure unrestricted access to Lake Bogoria, pay adequate compensation to the community for all the loss suffered and pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve.’

16. The decision is unique as it contains a couple of ‘firsts’. It represents the first legal recognition of an African indigenous populations’ rights over traditionally owned land and is also the first case globally which found a violation of the right to development. However, implementation of the recommendations on the part of the Respondent State has been a challenge. It has been noted that except for the creation of a taskforce for the implementation of the 2010 decision in September 2014 following an implementation hearing by the African Commission in April 2014 as a means of pressurizing the government for compliance nothing else has been done to ensure the implementation of the Recommendations.

17. The Government of Kenya has taken a similar approach with regard to the implementation of the African Court’s judgment on merits in the Ogiek case.

---

9 Decision of 4 February 2010.
10 Centre for Minority Rights Development & Minority Rights Group International on behalf of the Endorois Community v The Republic of Kenya, Communication 276/2003, para. 162 (Recommendations 1 (c) and 1 (d)).
12 https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1022/Latest-on-Endorois-Case (accessed 17 October 2019).
In June 2019, the Task Force organised public forums to collect information on the process of implementation of the Court’s Judgment.

Conclusions

The above two cases represent the African Court’s and African Commission’s determination of issues of violations of indigenous groups’ rights. Whilst the proceedings on reparations are pending before the African Court with regard to the Ogiek’ case, It is hoped that the government of Kenya would eventually take all necessary measures to ensure full implementation and compliance of the African Commission’s recommendations in the Endorois case.