AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

IN THE MATTER OF

African Commission on Human and Peoples' Rights

v.

Republic of Kenya

Application No. 006/2012

Judgment of 23 June 2022

(Reparations)

Individual Opinion

of

Judge Blaise Tchikaya, Vice-President

Introduction

Conclusion

1. I fully endorse the decision on reparations that the Court has just rendered in *the Ogiek Case*, on June 23, 2022, to which I have voted in favour. My

concurrence is so complete that in this separate opinion I must elaborate on some of the issues that I found so correct in the Court's decision.

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2. After ten years, the Court has just concluded[1] the longest case in its first sixteen years. It concerns the fundamental rights of a minority: the Ogiek. One of the communities in the Mau Forest in southeastern Kenya, the Ogiek have been struggling with various measures taken by the Respondent state. The Court, in a unanimous decision on reparations, which I fully supported, recognized the rights claimed by the Ogiek community, namely:

    a) The Respondent State[2] violated the right of the Ogiek to have a "distinct tribal status recognized to other similar groups and, as a result, having arbitrarily expelled them from the Mau Forest (...) it deprived them of their community development"[3] ;

    b) In § 127 of its 2017 decision on the merits, there was already the Court's assertion that "Without excluding the right to property in the classical sense, this provision places greater emphasis on the rights of possession, occupation, use and exploitation of land"[4]. The possession, occupation, use and exploitation of the land are restored to the Ogiek;

    c) The decision on reparations of 2022[5], as a result of the violations, confirms and diversifies the rights due to the Ogiek.

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[1] ACHPR, *African Commission on Human and Peoples' Rights v. Kenya*, June 23, 2023
[2] The Court has previously recognized as a victim of a violation within the meaning of Section V of the UN Principles and Guidelines, which understands "victims" as "...persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or serious impairment of their fundamental rights, as a result of acts or omissions that constitute gross violations of international human rights law or serious violations of international humanitarian law.", General Assembly, Resolution 40/34, November 29, 1985, § 8.
[3] ACHPR, African Commission on Human and Peoples' Rights v. Kenya, 26 May 2017, § 146.
[4] It is stated in § 128 that "in the present case, the Respondent State does not dispute that the Ogiek Community has occupied land in the Mau Forest since time immemorial".
[5] ACHPR, *African Commission on Human and Peoples' Rights v. Kenya*, June 23, 2022.

3. According to the case file, the case began on November 14, 2009, when the African Commission on Human and Peoples' Rights received a communication from the Centre for Minority Rights Development (CEMIRIDE) and Minority Rights Group International (MRGI), submitted on behalf of the Ogiek community. At issue was an eviction notice issued by the Kenya Forest Service in October 2009, which required the Ogiek and other people living in the Mau Forest to leave within thirty (30) days. The African Commission had taken various interim measures (including November 23, 2009), including suspending the eviction notice, but these measures were not implemented.

4. On July 12, 2012, the Commission (which had become an Applicant under the Protocol)[6] filed an application with the Arusha Court. The processing of the case was long and went through various stages, as well as numerous exchanges of procedural documents. Thus, on December 28, 2012, the Applicant requested the Court to order further interim measures aimed, in particular, at the directive issued on November 9, 2012 by the Ministry of Lands, relating to land of less than five (5) acres in the area of the Mau Forest complex. As in the merits phase[7], between the years 2020 and 2021, the Court attempted in the remedies phase to hold a public hearing which could not be held due to the Covid-19 pandemic.

5. The issue before the African Court was not a simple one. The 2022 decision on reparations was not just an exercise in style. It had at least two imperatives: (a) to best reflect the 2017 decision on the merits in which it had found violations of the Ogiek's rights; and[8] ; b) to determine the precise content of the reparations to be approved. In addition to the claim for the return of ancestral lands, the Court had to decide on at least five other reparations issues to fully cover the dispute.

[6]Article 5(1) (a) of the Protocol, which grants the Commission standing to bring the case before the Court.
[7] The amicable settlement had not been successful, the Court, by letter of March 7, 2016, informed the parties of the continuation of the judicial proceedings.
[8] In accordance with Article 27 (1) of the Protocol, which states: "Where it considers that there has been a violation of a human or peoples' right, the Court shall order all appropriate measures to remedy the situation, including the payment of just compensation or the granting of reparation.".

6. The Court has unambiguously recognized the Ogiek's rights as well-founded under the African Charter, it is up to the Respondent state to translate this into practice in the sense that it has indicated in its claim:

> "the Respondent State has always committed itself to implementing the Court's judgment by, among other things, setting up an Inter-Ministerial Working Group to oversee the implementation of the said judgment"[9].

7. The following sections of this paper will address, first, issues related to the assessment of material damages and the specific issue of restitution of ancestral lands (I.), second, other forms of reparations (II.) and, third, the procedures and modalities of the reparations awarded (III).

I. The Ogiek Case, Material Loss and Land Restitution

8. The Court first ruled on the reparations for the material damage suffered by the Ogieks. It was careful not to innovate. Ratione jure, it remained rooted in the prevailing approach to reparation in international law.

A. Assessment of the material damage

9. On the assessment of the material damage suffered by the Ogieks, as the beginning of the dispute, the Court will follow the rules regularly applied. In the Chorzów Plant case, the Permanent Court of International Justice stated that compensation replaces restitution in kind, if the latter is not possible. The amount must correspond to the value of restitution in kind, (...) the value that would have existeḑ, if the illegal act had not been committed[10]. In paragraph 60 of the judgment, the Court explains its method marked by difficulties due to the nature of the case:

[9] Judgment of June 23, 2017, § 23.
[10] PCIJ, *Case Concerning the Chorzów Factory (Claim for Compensation) (Merits)*, Series, 13 September 1928, p. 47...

"The Court takes into account the circumstances of each case based on the consistency and credibility of the Applicant's statements in light of the entire application"[11].

10. Ultimately, the Court has chosen the path of equity. An award will be made in equity, so that it does not depend solely on the Court's discretion. The Court has paid particular attention to: (a) the submissions and supporting documents filed by the Parties; (b) the amici curiae; (c) the independent experts, before making its decision on compensation; and (d) the claim for reparations, which relates to the right of ownership and free disposal of one's natural wealth and resources[12].

11. In order to emphasize the collective nature of the reparation, the Court specified in its reasons that':

"it is not appropriate to order that each member of the Ogiek Community be compensated individually or that such compensation be dependent on a sum due to each member of that community. (...) in view not only of the communal nature of the violations, but also of the practical difficulties involved in awarding individual compensation to a group of approximately forty thousand (40,000) people".

12. This situation has led the Court to consider, in all fairness, that the Respondent State shall pay the Ogiek an amount of fifty-seven million eight hundred and fifty thousand (57,850,000) Kenyan shillings as compensation for the material damage suffered.

B. The Issue of Restitution of Ancestral Lands to the Ogiek

13. Based on its jurisprudence and in accordance with applicable law, the Court formulates reparations from paragraph 36 of its judgment. The Court has always

[11] AFCHPR, *Anudo Ochieng Anudo v. United Republic of Tanzania*, Judgment of 2 December 2021 (reparations), §§ 31-32.
[12] AFCHPR, Op. cit, June 23, 2022, § 67.

applied a fundamental principle, the obligation to remedy all violations found[13]. In the well-known 2013 case, *Reverend Christopher Mtikila v. United Republic of Tanzania*[14] :

> "the Court expressed its adherence to the principle of the law of international responsibility that the obligation to make reparation constitutes"…

14. The Court's position can be supported. Where there is confiscation in violation of human rights, restitutio in integrum implies, in principle, the return of the property. In the case of unlawful expropriation, as was found in the present case:

> "the best form of reparation would in principle consist in the retrocession of the land by the State"[15].

15. One of the defenses of the Respondent State was that the land occupied by the Ogiek was "State property"[16]. The exercise by the State of its functions, including the organization of various possessions, does not affect its authority over its territory. Thus, whatever the value of this argument may have been, the Court considers, in paragraph 111 of the judgment, the following:

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[13] AfCHPR, Beneficiaries of late Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo and Blaise Ilboudo and the burkinabé human and Peoples's Rights Movement v. Burkina Faso (reparations), June 5, 2015, §§ 20 to 30; and Lohe Issa Konaté v. Burkina Faso (reparations) June 3, 2016. Principle consistent with European human rights law. The European Court recalls through Article 53 of the Convention that States "have undertaken to abide by the decisions of the Court in disputes to which they are parties; moreover, Article 54 provides that the judgment of the Court shall be transmitted to the Committeé of Ministers, which shall supervise its execution. It follows that a judgment finding a violation entails for the respondent State a legal obligation under the Convention to put an end to the violation and to erase its consequences in such a way as to restore as far as possible the situation prior to the violation. "ECHR, Case of Papamichalopoulos and Others v. Greece (Art. 50), 31 October 1995, Series A No. 330-B, § 34..

[14] CAfDHP, June 14, 2013, 1 RJCA 74 §§ 27-29.

[15] ILC, *Malawi African Association et al. v. Mauritania*, Communications 54/91 (27th Regular Session, May 2000).

[16] Case law and doctrine agree that the domain of the State can only be controlled by the rules of international law. In particular, as in this case there are violations of certain rules of human rights in favor of a national community. The International Court observed in 1960 that the right of passage claimed by Portugal against India was a question of international law which could only be resolved on the basis of international law (...). The question was therefore not within the exclusive jurisdiction of India, since it involved rules of international law, even if their interpretation was disputed. See ICJ, Case concerning the Right of Passage over Indian Territory, 12 April 1960, Reports 1960, p. 6.

"it is important to conceptualize and understand the equally particular dimensions in which their rights to ownership of the land may manifest themselves. Title to indigenous peoples' lands is therefore not necessarily similar to other forms of title granted by the Respondent State, such as freehold title".[17]

16. Article 16 paragraph 4 of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)[18], which deals with the removal of peoples from the lands they occupy, provides that, if return is not possible:

"These peoples shall be provided, as far as possible, with lands of at least equal qualitý and legal status to those of the lands previously occupied by them and enabling them to meet their present needs and ensure their future development. Where the peoples concerned express a preference for compensation in cash or in kind, they shall be so compensated, subject to appropriate safeguards».

17. In the case of the *Caloto Massacre*[19], members of an indigenous communitý were massacred with the complicity of the police. At issue, in addition to various reparations, was the full implementation of agreements regarding the allocation of land through agreed procedures and within a reasonable timeframe, in collaboration with the indigenous communities. This issue of land in relation to the communal nature of the dispute had long been the focus of attention in this litigation. It was the focus of the reparations.

[17]Erueti (E.), The Demarcation of Indigenous Peoples' Traditional Lands: A Comparison of Domestic Demarcation Principles with International Law Principles in Development, *Arizona Journal of International and Comparative Law*, 2006, 23, 543 p.

[18] Convention 169 of the International Labour Organization, or the Indigenous and Tribal Peoples Convention, applies together with Convention 107 "concerning Indigenous and Tribal Populations"

[19] Report No. 36/00, Case 11.101, Massacre of Caloto v. Colombia, April 13, 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.

18. This link, always present with land, organizes all the reasoning in the reparations[20] that will be granted by the African Court in this case as well. It will be necessary to take into account the nature of the subject, in this case community and indigenous, victim of the violations, moreover, a national minority[21]. *The United Nations Declaration on the Rights of Indigenous Peoples*[22] states at the outset that:

> "indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different and to be respected as such" (Preamble),

19. And in Article 1, it states:

> "Indigenous peoples have the right, collectively or individually, to the full enjoyment of all human rights."

20. We know that sovereign power is territorialized. The State is competent to deal with facts, conflicting or not, occurring on its territory and within its borders. It remains, in a way, the depositary of territorial titles. In this respect, it may assign, if necessary and in accordance with the international law of public domain, areas of the territory to peoples or individuals who are nationals of its territory. Moreover, once it was established that the right of ownership within the meaning of Article 14 of the Charter could be individual or collective, it could apply to groups or communities[23].

21. Paragraphs 94 and others. of the judgment are central to the Court's consideration of non-pecuniary remedies. In effect, the Court considers that:

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[20] The Court readily cites the 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, December 16, 2005 (UN Resolution 60/147).
[21] On the complexity of the notion, see 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, Issue 2, pp. 1-15.
[22] Resolution adopted by the UN GA, September 13, 2007 (A/61/L.67 and Add.1) 61/295.
[23] 2017 Judgment, § 23.

"based on the finding of a violation of section 14 of the Charter, that one of the natural consequences of this recognition is the restitution of the ancestral lands of the Ogiek (...) this violation can be remedied by restitution of the ancestral lands through the delimitation and demarcation of the lands and the granting of title deeds or by any other means aimed at clarifying the status of all such lands and ensuring their protection (...)"[24] .

22. Without departing from its 2017 decision, the Court pronounces on the right to land as follows:

"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 possess, use and control that property without being disturbed, in the manner deemed appropriate by the owners" [25].

23. The Court's judgment is further clarified by paragraph 112. The Court recognizes that :

"among aboriginal peoples, there is a communal tradition regarding a form of collective ownership of land, such that ownership of land is not centered on an individual, but rather on the group and its community. Indigenous peoples therefore have, by their very existence, the right to live freely on their own land".[26]

24. This decision does not betray the evolution of the law of nations on this issue. It is certainly based on two concepts whose framing is not stable in international law: that of people, whose affirmation has been broadened by the African Charter on Human and Peoples' Rights, and that of property, whose regime must always be recalled and specified. It is a question, in this case, of a

[24] Judgment on Reparations, op. cit. at § 96.
[25] ECOWAS Tribunal, SERAP v. Nigeria, 30 November 2010
[26] Judgment on Reparations, op. cit. at § 112.

collective application of property[27]. It is the above-mentioned formula of the Court contained in the decision at paragraph 112: the ownership of land is not centered on an individual, but rather on the group and its community[28].

25. A similarity can be made with many cases, including the one in which the Inter-American Court ordered the same measures, in 2021, against the State of Nicaragua, . which had granted a foreign company a concession to take timber from the ancestral lands of the *communitý Mayagna Awas Tingni* [29]. The Inter-American Court of Human Rights had considereḑ that Nicaragua, had violateḑ the right to propertý of the members of the communitý, and this based on the indigenous conception of land ownershiṕ. In many ways, this approach of the Inter-American Court, favorable to the fundamental rights of the communities was considered innovative.

26. Since the obligation to retrocede carries with it the obligation to delimit, the offending State should, as the Court decided:

> "Tak all the necessary measures (…) to identify, in consultation with the Ogiek and/or their representatives, and to delimit, demarcate the ancestral lands of the Ogiek and issue to them a collective land title on these lands in order to guarantee the use and enjoyment through judicial certainty».

27. Other forms of redress will come to the attention of the Court in favor of the Ogieks.

II. The Ogiek Case: Other Forms of Reparation

28. As with land restitution, other forms of reparation are also informed by *the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims*

[27] v. IACtHR, *Saramaka People v. Suriname*, 28 November 2007; *Indigenous Community Yakye Axa v. Paraguay*, 17 June 2005*; Afaire Moiwana Community v. Suriname*, 15 June 2005.
[28] Judgment on Reparations, op. cit. at §§ 137 et seq.
[29] Case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001.

of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by the United Nations General Assembly. This is an important work, the result of 15 years of work[30], which sets out some useful approaches in the often-lengthy procedures for reparation.

29. In reality, there are different forms of reparations. The State, in accordance with international law, may choose either one or the other. Article 34 of the Draft Articles on State Responsibilitý states that reparation "shall take the form of restitution, compensation and satisfaction, separately or jointly." The ILC (International Law Commission) had noted that, in some cases, reparation will take place by joining the different forms[31].

30. In the present case, the Court pronounces various reparations in the sense of the damage suffered by the Ogieks. This will be the case for the moral damage found.

A. Non-material damage

31. With regard to compensation for non-material damage, which is undeniably complex[32], the Court has remained consistent with its case law. Its position is based on various breaches of the Convention, as summarized in paragraph 85 of the judgment.[33]

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[30] *The 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, UNGA Resolution, 1989/13 of 31 August 1989*.

[31] ILC Commentary on Article 34 of the Draft Articles on Responsibilitý of States for Internationally Wrongful Acts, Official Records of the 56th Session of UNGA, A/56/10.

[32] This complexity is evidenced in the law of nations by a classic case, The Widows of the Lusitania. A jurisprudential reversal was necessary, see SA, Widows of the Lusitania, United States v. Germany, Joint American-German Claims Commission, 1 November 1923. This is also stated in a remarkable study, Jean-François Flauss (J.-François) and 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: "Compensation for non-material damage is in fact likely to lead to compensation for loss of earnings, which is a classic component of injury to property. It also happens that compensation for moral prejudice is similar to a thinly disguised form of compensation for a loss of opportunity.

[33] The Court noted that in its judgment on the merits, it found that the respondent State had violated the right of the Ogiek, protected by Article 2 of the Charter, by not recognizing them as a full tribe, as is the case with other groups; It also violated article 8 of the Charter, for preventing the Ogiek from continuing to practice their religion, articles 17(2) and (3) of the Charter, for expelling them from the Mau Forest area, thus preventing them from exercising their cultural activities and practices, and article 22 of the

32. It follows from the judgment that non-material damage includes:

> "the suffering and distress caused to the direct victims and their families, as well as the damage to values that are very important to them, as well as other changes of a non-pecuniary nature in the living conditions of the victims or their families"[34] .

33. The damages suffered by the Ogieks and the human rights violations at issue for which the Respondent state was found responsible. In 2017, the Court considered that in order to determine the extent of the rights recognized to indigenous communities on their ancestral lands, as is the case here, (...) that Article 14 of the African Charter[35] must be interpreted in light of the principles applicable, in particular, within the framework of the United Nations[36] .

34. In *the Lusitania case*, there are these very evocative lines recorded in an Opinion. It states that:

> "it is manifestly impossible to evaluate mathematically, or with a certain degreé of accuracy, or by the use of a precise formula the damage suffered (...). This does not, however, justify that the author of a damage should be exempt from repairing the wrong he has done, nor that the victim should not receive reparation calculated according to rules which come as close to accuracy as the human mind can imagine. To deny such reparation would be to disregard the fundamental principle that there is a remedy for any infringement of a right".[37]

35. The difficulty with moral prejudice was one that the Court seems to have

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Charter, because of the manner in which the Ogiek were expelled from the Mau Forest, v. § 85 of the Judgment.

[34] CAfDHP, *Op. cit.* 2023, § 86.

[35] Article 14 reads: "The right of ownership is guaranteed. It may not be infringed except by public necessity or in the general interest of the community, in accordance with the provisions of appropriate laws."

[36] CAfDHP, *Op. cit.* 2017, § 125.

[37] *Opinion in the Lusitania case*, 1 November 1923, supra, *Reports of Awards*, Volume VII, p. 32, § 36.

understood well. In this case, it was important not to confuse the individual prejudices that were cumulative with the collective prejudice. This latter prejudice was diffuse and could not be assessed by adding up all the individual prejudices. The difficulty was understood by the Court and the operative part expresses it by speaking of:

> "(...) Violations found in the present Application concern rights that are central to the very existence of the Ogiek" [38].

36. Thus, a lump-sum compensation was awarded for non-material damage[39].

B. The status of the indigenous population, their culture and language

37. It follows from the judgment on the merits handed down by the Court in 2017 that the Ogiek should be recognized as an indigenous population. The Respondent state violated Article 2 of the Charter for not recognizing them as a full tribe similar to other groups. The Court specified that this recognition should be accompanied by measures to "fully protect their language and their cultural and religious practices within twelve (12) months of service of the judgment.

38. The Court's rulings in this case are consistent with history. The United Nations General Assembly has proclaimed the period 2022-2032 as the International Decade of the World's Indigenous Languages, and has invited UNESCO to be the coordinating agency for a program within the United Nations[40] system to this effect.

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[38] *Idem.,* § 93

[39] Ibidem, § 160, Operative part: iii) Orders the Respondent State to pay the sum of one hundred million (100,000,000) Kenyan shillings, free of all governmental taxes, as compensation for the non-pecuniary damage suffered by the Ogieks.

[40] See also AGONU Resolution, 18 December 2019 (A/74/396)] 74/135, Rights of Indigenous Peoples; see International Covenant on Civil and Political Rights, 16 December 1966 (Article 27); International Covenant on Economic, Social and Cultural Rights, v. preambles: "Human beings cannot be free unless conditions are created whereby they may enjoy civil and political as well as economic, social and cultural rights"; UNGA Resolution, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, No. 47/135, 18 December 1992.

39. This request has been granted since the Court's decision of May 26, 2017. It was renewed in the decision of June 23, 2023, thus will be taken:

> "Appropriate measures, within one (1) year, to effectively ensure full recognition of the Ogiek as an indigenous people of Kenya, including, (....) their language and cultural and religious practices".

40. In order to achieve this, the Court found that direct dialogue with the community concerned is necessary.

C. Direct dialogue with the Ogiek Council of Elders

41. In its judgment, the Court did not support the idea of a public apology for the Ogiek, nor the idea of a monument as a form of reparation[41]. However, it does consider the idea of engaging in direct dialogue with the Ogiek as efficient. This dialogue could take place through the Ogiek Council of Elders, a body that is generally agreed upon by the Ogiek[42]. The commitment to a comprehensive and sustainable solution to the problem of the Ogiek of the Mau Forest has been noted.

42. In order to end a conflict, the parties have always sought concerted, even consensual and negotiated solutions, especially in human rights conflicts involving collective rights. This also applies to the implementation of guaranteed rights. On another scale, the International Court of Justice was not mistaken when it referred the parties, Hungary and Slovakia, involved in the management of the Danube River to negotiations[43].

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[41] In § 133 of the decision, the Court made it clear that "a judgment alone may constitute sufficient reparation. And, "considering all the circumstances of the case, including the other measures it has ordered on reparations, (...) it is not necessary for the respondent State to erect a monument in memory of the violations of the rights of the Ogiek (...).

[42] AfCHPR, Judgment of 23 June 2022, see §§ 134 et seq.

[43] ICJ, *Gabcikovo-Nagymaros Project*, Slovakia v. Hungary, ICJ, Judgment, 25 September 1997; it is useful to read in point B. of the operative part of this judgment that: "Hungary and Slovakia must negotiate in good faith, taking into account the existing situation, and must take all necessary measures to ensure the attainment of the objectives of the Treaty of 16 September 1977, in accordance with the procedures to be agreed upon".

D. Guarantees of non-repetition

43. The Court considers that it is consistent with its decision that the legislative and administrative measures to be taken by the Respondent State will prevent the repetition of the violations found. The Court goes on to emphasize that the restitution of land and all other measures are sufficient to guarantee non-repetition[44].

44. The abundant jurisprudence on this aspect shows this. It sufficiently establishes that normally the non-repetition of harmful measures is implicit and inherent in the reparation decisions taken[45]. There is a considerable body of decisions indicating the various means that the Respondent-State may use - including the adoption of legislation - to ensure the proper implementation of the reparations decided upon[46].

45. It is recognized, in fact, that guarantees of non-repetition are one of the forms of reparation (remedy) to which the Ogiek, as victims, are entitled. Non-repetition is closely linked to the obligation to cease violations. Guarantees have a preventive function and can be seen as a positive reinforcement of the implementation of reparations[47]. The Court considered that all the measures included in the judgment are sufficient to guarantee non-repetition[48].

46. In the approach followed by the Court, various elements related to the modalities and procedures for implementing the selected reparations can be

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[44] AfCHPR, *Judgment of 23 June 2022*, see § 150.

[45] See in particular: Case of *Velásquez Rodríguez v. Honduras (compensation)*, Judgment of July 21, 1989, Series C No. 7, §§ 34, 35 (duty to prevent further enforced disappearances); Case of *Castillo Páez v. Peru*, Judgment of November 3, 1997 (duty to prevent further enforced disappearances); Case of *Trujillo Oroza v. Bolivia (Reparation),* Judgment of February 27, 2002, Series C No. 92, § 110; Inter-American Commission on Human Rights Report No. 63/99, Case 11.427, *Víctor Rosario Congo* (Ecuador), April 13, 1999, § 103.

[46] African Commission on Human and Peoples' Rights, Case of *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96 (30th Ordinary Session, October 2001), §§ 57, 61.

[47] International Law Commission, Commentary on Article 30 of the *Draft Articles on Responsibilitý of States for Internationally Wrongful Acts*, Official Records of the UNGA, 56th Session, Supplement No. 10 and Corrigendum (A/56/10). See also, Tigroudja (H.), *E. Lambert-Abdelgawad & K. Martin-Chenut, eds*, Remedying Serious and Massive Violations of Human Rights: La Cour interaméricaine, Pionnière ou modèle?", Société de législation comparée,

[48] CAfDHP, Idem, v. § 150.

noted. It is undoubtedly in the interest of obtaining a follow-up to the judgment pronounced.

III. Procedural aspects of implementing reparations

47. Overall, particular attention should be paid to what the Court installs in its operative part as an opening as follows:

> "where concessions or leases have been granted on Ogiek ancestral lands, the Respondent State shall engage in dialogue and consultations among the Ogiek (...) with a view to agreeing whether or not to allow the continuation of the activities of the beneficiaries of the said concessions in the form of leases and or sharing of royalties and benefits, with the Ogiek, (...) In the event that a compromise cannot be reached, the Respondent State shall compensate the third parties concerned and return the land to the Ogiek."

48. Mechanisms and working methods were considered, in addition to the community development fund for the Ogiek.

A. Mechanisms and modalities for working on reparations

49. A dedicated organization is needed to oversee the repair enterprise. A 2013[49] study initiated by the African Commission on Human and Peoples' Rights said to this effect that:

> "the group identified as such may be entitled to collective reparations (...) In cases involving, for example, large-scale violations, alongsidé the allocation of collective reparations to a specific group, it will therefore be important to establish a mechanism that allows individual victims to come forward and present their claim for reparations."

[49] ACHPR, The scope of the right to reparation: Who is entitled to reparation, Studies, 2013, p. 39.

50. Undoubtedly, one of the first internal actions will be to set up an *ad hoc* body in order to better meet all the obligations. This is what the *UN Declaration on the Rights of Indigenous Peoples* calls for. The Declaration was not contradicted by the *Memorandum* of the UN Rapporteur on Indigenous Peoples[50]: An essential approach to redress is to consider the collective nature of the harm.

51. From this ad hoc body, an effective mechanism for delimitation, demarcation and titling could come. This could be done by strengthening, among other things, the body or working group established following the Court's judgment of October 23, 2017.

52. In this case, therefore, there is a kind of obligation to consult the Ogiek in an "active and informed manner", respecting their customs and traditions.[51] These consultations must be conducted in good faith. These procedures must be fair and equitable as specified in Article 40 of the UN Declaration on Indigenous Peoples. In its judgment, the Court found that "...the processes implemented to date have not contributed significantly to the execution of its judgment on the merits.[52]

B. The Community Development Fund

53. In the Applicant's view, the overall implementation and realization of reparations would require the creation of a development fund. She puts it this way:

> "A community development fund provides "the governance framework dedicated to allocating funds to projects of collective interest to the aboriginal community, such as agriculture, education, food security, health, housing, water and sanitation projects, resource management, and other projects that the aboriginal community considers beneficial..."

[50] UN Special Rapporteur on the Rights of Indigenous Peoples Expert testimony at the request of the African Court on Human and Peoples' Rights on reparations in African Commission on Human and Peoples' Rights v. Kenya, Application 006/2012 April 29, 2020.
[51] IACtHR Case of Kichwa Indigenous Peoples of Sarayaku v. Ecuador, 27 June 2012, § 177.
[52] Judgment, Op. cit. 23 June 2022, § 125.

54. Thus, the Respondent State will be ordered to establish:

> "a community development fund for the benefit of the Ogiek, which should be the repository of all funds ordered as reparations in this judgment."

55. The development fund should allow for Ogiek projects in the areas of health, education, food security, natural resource management...The administrative, legislative and other measures necessary for the establishment of this fund within twelve months of the judgment being duly notified. This decision marks an initiative of the Court following the request of the Ogiek.

56. The importance of this measure is similar to that taken in favour of the Ogoni by the Banjul Commission[53]. The Commission had, inter alia, urged Nigeria to inform it of the establishment of a Niger Delta Development Commission (NDDC) set up by law to deal with environmental and other social problems in the Niger Delta area and other oil producing areas of Nigeria; and (the establishment of) the Legal Commission of Inquiry set up to investigate issues of human rights violations.

57. The example of collective reparations owed by Guatemala in compensation for the *Sanchez Plan massacres* are suggestive.[54] In the *Plan de Sanchez Massacre case*, the Inter-American Court of Human Rights ordered the State to carry out a Five-Year Development Plan that included the establishment of

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[53] The Ogoni Case concerns mass violations. The communication also stated that the oil consortium exploited the Ogoni reserves (...) discharging toxic waste into the air and waterways of the region, in violation of applicable international environmental rules. The consortium has not been able to maintain its infrastructure, which has caused many foreseeable accidents near the villages. The resulting contamination of water, soil and air had serious short and long-term health consequences...; ACHPR, Social and Economic Rights Action Center (SERAC) Economic and Social Rights (CESR) v. Nigeria, Communication and Center for 155/96 (30th Ordinary Session, October 2001), § 68.

[54] One of the worst massacres, that of Plan de Sánchez, took place in a Guatemalan village on July 18, 1982. More than 250 people (mainly women and children, and almost exclusively members of the Achi Maya ethnic group) were mistreated and murdered. In 2004, the Inter-American Court issued two verdicts. It established Guatemala's responsibility and ordered a package of monetary, non-monetary compensation... The Inter-American Court of Human Rights issued a ruling on the Masacre Plan de Sanchez.

structures for education, health services, water irrigation and production.[55] This example showed, once again, that the search for reparation after a profound damage could be complex. Another example of collective reparation is the opening of a school and a dispensary in the 1993 case of *Aloeboetoe v. Suriname*, of 1993, judged by the same Court.[56]

58. This decision of the Court thus enshrines a consistent jurisprudence. Paragraph 160 testifies to this:

> "The establishment and operation of a Development Fund Management Committee"[57] .

59. Generally speaking, on restitution, which is one of the major points, it is appropriate to follow the requirements of the *Basic Principles and Guidelines*[58] on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law (...), cited above, point IX of which emphasizes:

> " (...). Restitution includes, as appropriate, the restoration of liberty, the enjoyment of human rights, identity, family life and citizenship, the return to the place of residence and the restitution of employment and property.

Conclusion

60. The various measures in the Court's judgment relating to reparation, to which I reiterate my support, are consistent with the current state of international law. They promote the traditional territorial powers of the State and their exercise. These powers do not affect the sovereign, exclusive and independent exercise of territorial jurisdiction by the Respondent State. International jurisprudence

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[55] IACtHR, Case concerning the Plan de Sanchez Massacre (Reparation), Judgment of November 19, 2004, §§ 109-111.
[56] IACtHR, Case of Aloeboetoe et al. v. Suriname (Reparation), Judgment of September 10, 1993, § 96.
[57] aFchpr, Judgment of 23 June 2022, see § 160, xiii.
[58] AGONU, 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, supra § 17.

confirms that territorial sovereignty has absolute effects, both positively and negatively, because the State must deny itself any activity that is not in conformity with international law.[59]

61. The Arusha Court and the Banjul Commission are, in a way, working together in this decision. In addition to the fact that the Banjul Commission, as the Applicant in this case, had previously rendered a decision in the Communication *Endorois Welfare Council v. Kenya*[60] in which it emphasized that the rights of the *Endorois* had been violated when they were denied access to their traditional lands. These lands had been turned into a hunting reserve. The Kenyan state was obliged to recognize the communal land rights of the Endorois indigenous peoples. It had to compensate them and return the land or offer them other land of equal size and quality, in agreement with the indigenous community.

62. The concept of a people or community group is being further developed as a result of these two judgments by the Court in 2017 and 2023. For the African human rights system, the legal category of people, holder of rights, is resolutely reinforced. These two decisions will constitute a solid step in the Court's jurisprudence. They contribute incisively to the end of an era. The one where "the individual was the human rights". The time when, with good reason, Ms. D. Lochack declared that "the individual is the human right". Lochack declared that "human rights can only be thought of from the moment when we postulate that man is a subject of law, endowed with the capacity to have rights and to avail

[59] In his award of 1928 (Island of Palmas, RSA vol. II, p. 281), Max Huber evokes the link between the activities that the State could exercise on its as a direct expression of the principle of independence. Territorial sovereignty implies the exclusive right to carry out State activities. The defendant State is in the business of carrying out actions for the purpose of welfare and equilibrium in its territory; see SA, Isle of Palmas, United States v. The Netherlands, Max Huber, CPA. Netherlands, Max Huber, CPA, 4 April 1928, RSA, vol. II, p. 839; I.C.J., Corfu Channel, United Kingdom v. Albania, ICJ, Preliminary Objections. Albania, ICJ, Preliminary Objections, 25 March 1948, Rec. 1948, p. 15; Merits, 9 April 1949, Rec. 1949, p. 4; Determination of the Amount of Reparations, 15 December 1949, Rec. 1949, p. 244.

[60] *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication, No. 276/2003, 2009. See also IACtHR*, Saramaka People v. Suriname,* (Preliminary Objections, Merits, Reparations and Costs), Judgment of November 28, 2007; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001; Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005.

himself of them in the face of power"[61]. How far we have come since the famous Advisory Opinion of 1928 *(Case of the Jurisdiction of the Tribunals of Danzig)*[62] to put the group, the community and the people back at the center of internationalist elaborations of law? The African Court has just put one more touch to it.

Judge Blaise Tchikaya,

Vice-President

[61] Lochak (D.), Mutation des droits de l'homme et mutation du droit, RIE, 1984. 13, p. 55; see the analyses of Colliard (Cl.-Albert) according to which the law of public liberties supposes an "individual conception of the world" and that in the absence of such a conception "there are no real public liberties, in *Les libertés publiques*, Dalloz, 1982, 904 p.

[62] CPJI, Advisory Opinion, *Jurisdiction of the Courts of Danzig*, March 3, 1928, Series B, No. 15, p. 17, one can read "a well-established principle of international law, an international agreement cannot, as such, directly create rights and obligations for individuals.