Indigenousness and peoples' rights in the African human rights system: situating the Ogiek judgement of the African Court on Human and Peoples' Rights

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Abstract: In May 2017, the African Court on Human and Peoples' Rights delivered its first indigenous rights case dealing with the expulsion of the Ogiek from their ancestral lands in the Kenyan Mau forest. The article highlights the judgement's most interesting features in light of the ongoing debates surrounding indigenousness and indigenous rights in Africa. Regarding the legal concept of indigenousness, the Court's approach reflects this ambiguity: on the one hand, it took recourse to the characteristics of indigenousness circulating in the UN that had been rejected by the African Working Group on Indigenous Populations/ Communities and it failed to contribute to a coherent jurisprudence with regard to the right to equality and non-discrimination. On the other hand, it seems to accept indigenousness as a stand-alone prohibited ground of discrimination.Besides that, the Court applied several of the African Charter's collective rights, which are highly relevant for indigenous and other marginalised communities. It derived the communal right to land from the right to property, contributing to a new regime of protection of the right to land. It also subsumed the right to food under the right to sovereignty over natural resources, which is a very innovative and new approach. Only with regard to consultation rights, the African Court's position remains blurry. It is questionable, whether the Court would have applied the collective rights in a different way, if the Ogiek had not been classified as an indigenous community. Hence, the African Court's position with regard to indigenousness and indigenous rights is thus neither fish nor fowl and reflects the conflicts between African Union member states, its organs as well as the growing influence of non-state actors like NGOs.

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A. Introduction

On Friday, 26 May 2017 the African Court on Human and Peoples' Rights (African Court) delivered its long-awaited judgement on the expulsion of the indigenous Ogiek people from their ancestral lands in the Kenyan Mau forest.[1]

It was the first indigenous rights case to be decided by the African Court. The legal concept of indigenousness and indigenous rights is comparatively new in the African human rights system. Noteworthy in this context are the "peoples' rights"[2], collective rights that are a prominent feature of the African Charter and that have only been applied a few times by the African Court and the African Commission on Human and Peoples' Rights (African Commission).[3]

This article argues that the judgement is reflective of the controversies surrounding indigenousness and indigenous rights in many parts of sub-Saharan Africa. Negotiations of indigenousness take place in an area of conflict between the transnational sphere of indigenous rights, which was shaped and dominated by non-African experiences and actors, and the *de facto* marginalization of many communities in sub-Saharan Africa. It is a controversy that concerns hierarchies within African states, as well as the relationship between states and international institutions. The judgement thus highlights the difficulties of the regional human rights system to manoeuvre these troubled waters and to develop a coherent position with regard to indigenousness and peoples' rights.

In the following, (1) the characteristics of indigenousness and (2) non-discrimination in relation to indigenous groups, (3) the right to land, (4) the right to food and (5) the duty to obtain the free, prior and informed consent (FPIC) of local communities will be explored in light of these tensions. It will be shown how the new judgement interferes with and relates to earlier decisions of the African Commission (particularly the well-known Ogoni[4] and Endorois[5] decisions), as well as to international law.

1 African Commission on Human and Peoples' Rights v. Republic of Kenya, African Court on Human and Peoples' Rights.

2 E.g.: right to development, right to a healthy environment, right to sovereignty over natural resources, right to self-determination.

3 E.g.: Katangese Peoples' Congress v. Zaire, African Commission on Human and Peoples' Rights (1995); Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v. Mauritania, African Commission on Human and Peoples' Rights (2000); Kevin Mgwanga Gumne et al. v. Cameroon, African Commission on Human and Peoples' Rights (2009).

4 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, African Commission in Human and Peoples' Rights (2001).

5 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on Behalf of Endorois Welfare Council) v. Kenya, African Commission on Human and Peoples Rights (2009).

B. Background

I. The institutional framework

The African human rights system came into being in 1986, when the African Charter on Human and Peoples' Rights[6] entered into force and the African Commission was created. Since then, the institutional system has increasingly been expanded. Several Protocols have been signed, and in 2004, the Additional Protocol on the creation of the African Court on Human and Peoples' Rights entered into force. The relationship between African Court and African Commission is somewhat complicated, contributing to a high number of inadmissible claims before the African Court.[7]

The African Commission, just like its Inter-American counterpart, is a quasi-judicial organ, which can receive governmental and "other complaints"[8]. The competence of the Commission is acknowledged by all African Union (AU) member states. The African Court is less well-recognized, as the Protocol on the creation of the African Court has only been ratified by 30 of them to date.[9] According to the Protocol, the African Court may receive communications by the African Commission, member states and African intergovernmental organizations. Additionally, according to Art. 5(3) and 35(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, states can submit a declaration allowing for individual and NGO complaints.[10] The ratification status of the Special Protocol is still very low though.[11]

The Protocol on the Statute of the African Court of Justice and Human Rights, which will replace and merge the African Court on Human Rights and Peoples' Rights and the African Court of Justice and which has not entered into force yet, originally allowed for individual and NGO complaints.[12] However, this was amended by the 2014 Protocol on the Amendment of the Statute of the African Court of Justice and Human Rights, which also requires an additional declaration for individual complaints.[13] So, with very few exceptions,

6 African Charter on Human and Peoples Rights (adopted on 27 June 1981, entered into force on 21 October 1986), OAU Doc CAB/LEG/67/3 rev. 5, 21 I.

7 African Court on Human and Peoples' Rights, Finalised Cases, http://en.african-court.org/index.php/cases#finalised-cases (last accessed on 26 June 2017).

8 African Charter, note 6, Art. 55.

9 The ACtHPR Monitor, Country Tracker, http://www.acthprmonitor.org/country-tracker/ (last accessed on 10 April 2017).

10 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted on 10 June 1998, entered into force on 25 January 2004), OAU Doc OAU/LEG/MIN/AFCHPR/PROT.1 rev. 2.

11 The ACtHPR Monitor, note 9.

12 Protocol on the Statute of the African Court of Justice and Human Rights (adopted on 1 July 2008, not entered into force yet), Art. 30(f).

13 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (adopted on 27 June 2014, not entered into force yet), Art. 17.

the African Court does not receive individual complaints. The same will be the case for the integrated African Court of Justice and Human Rights.

Regarding the law to be applied by the two organs, the African Court may apply the African Charter, as well as any other human rights instrument ratified by the state in question.[14] The African Commission is mandated to "interpret all the provisions of the present Charter"[15]. As the African Court shall "complement the protective mandate"[16] of the African Commission, it can be assumed that it should take note of the African Commission's decisions and interpretations of the African Charter. Consequently, the Ogiek judgement will particularly be explored in light of the African Commission's jurisprudence.

II. Summary of facts

The Ogiek are a community of hunter-gatherers living mostly in Kenya's Mau forest "since time immemorial"[17]. The Ogieks' land struggles date back to the 1960s.[18] The situation escalated in the 2000s, when the Ogiek community received a 30-days eviction note from the government for forest conservation reasons. In 2009, two NGOs, the Centre for Minority Rights Development (CEMIRIDE) and the Minority Rights Group International (MRGI), sent a communication on behalf of the Ogiek to the African Commission. As the Kenyan government ignored the African Commission's order for provisional measures, the case was being transferred to the African Court under Art. 84 of the Rules of the African Commission.

In 2013, following a directive of the Kenyan government amending the national land legislation to the detriment of the Ogiek, the African Court issued an order of provisional measures, as the eviction was of sufficient gravity and possibly constituted, amongst others, a violation of the Ogiek people's right to property and the right to development.[19] The amicable settlement process under Art. 9 of the Court's Protocol did not produce any results. In May 2017, the African Court found violations of the right to non-discrimination (Art. 2), the right to practice religion (Art. 8), the right to property (Art. 14), the right to culture (Art. 17(2) and (3)), the right to development (Art. 22) and the right to natural resources (Art. 23). It found no violation of the right to life.[20]

The Kenyan government now has to take appropriate measures and the Court will decide on the reparations in the following months.

14 Protocol on the Establishment of the African Court of Human and Peoples' Rights, note 10, Art. 7.

15 African Charter, note 6, Art. 45(3).

16 Protocol on the Establishment of the African Court of Human and Peoples' Rights, note 10, Art. 2.

17 Ogiek judgement, note 1, para. 103.

18 Ogiek judgement, note 1, para. 92.

19 African Commission on Human and Peoples' Rights v Republic of Kenya (Provisional Measures), App 006/2012 (15 March 2013), para. 20.

20 Ogiek judgement, note 1, paras. 154, 155.

C. Indigenousness as a legal concept in Africa

I. Characteristics

In sub-Saharan Africa, the concept of indigenousness is more controversial than in other regions of the world, as the transnational indigenous movement has its origins in the Americas and African experiences have been ignored for quite a while.[21] From the late 1980s on, local African communities and NGOs increasingly transplanted indigenous rights to sub-Saharan Africa, contributing to their recognition on the national and regional level.[22] Many African states tend(ed) to be critical of the idea of indigenous rights, which was also reflected in the earlier opposition of the African Commission to the necessity for a legal protection regime for indigenous groups.[23] They fear particularly that the concept may privilege certain ethnic groups over others and facilitate secessions. But also some scholars and communities struggle with the concept for being an "artificial construction"[24] to Africa and for reinforcing colonial stereotypes.[25]

In view of the ongoing debates on indigenousness, the African Commission's Working Group on the Situation of Indigenous Populations/Communities in Africa was established in 2003.[26] It assumes a triple function: the elaboration of an African concept of indigenousness, the exploration of the impact of the African Charter on indigenous peoples and the issuance of recommendations for the monitoring and protection of the rights of indigenous peoples.[27] It is thus at the core of the indigenous rights debate within the African human rights system and collaborates strongly with NGOs and communities that self-identify as indigenous.[28]

The African Charter contains several collective or "peoples' rights". They were introduced for reflecting the supposedly more collective African understanding of human rights. Peoples', as well as minority and indigenous rights are often portrayed as being opposed to

21 *Felix Mukwiza Ndahinda*, Indigenousness in Africa: A Contested Framework for Empowerment of "Marginalized Communities", The Hague 2011, p. 59.

22 *George Mukundi Wachira/Tuuli Karjala*, The Struggle for Protection of Indigenous Peoples in Africa, in: Corinne Lennox/Damien Shorts (eds.), Handbook of Indigenous Peoples, London/New York 2011, p. 396 ff.

23 *Megan Davis*, Indigenous struggles in standard-setting: The United Nations Declaration on the Rights of Indigenous Peoples (2008), Melbourne Journal of International Law 9 (2008), pp. 18-19.

24 *Mukwiza Ndahinda*, note 21, p. 59.

25 African Commission on Human and Peoples' Rights, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005), p. 86.

26 African Commission on Human and Peoples' Rights, Resolution on the Adoption of the "Report of the African Commission's Working Group on Indigenous Populations/Communities" (2003).

27 African Commission on Human and Peoples' Rights, Resolution on the Rights of Indigenous Peoples' Communities in Africa, 2000.

28 *Mukundi Wachira/Karjala,* note 22, p. 401.

the predominantly individual, Western understanding of human rights.[29] However, as the African Charter contains both collective and individual rights and in view of the diversity of cultures in sub-Saharan Africa, this clear distinction seems to be overgeneralizing.[30] Still, the African Charter is the human rights convention with the strongest focus on collective rights worldwide. In practice, the collective rights have sparked quite some controversy in the past. Many states tend to interpret "people" as amounting to the state, which legitimately represents the interests of its inhabitants, while more progressive forces stress that "peoples" can also be communities within a state.[31]

The difference between minorities, indigenous peoples and "peoples" is not clear cut the African human rights system.[32] The authors of the Charter deliberately included no definition of "peoples" and the characteristics of "peoples" elaborated by the African Commission bear strong resemblance to those of indigenous groups.[33] The status of the community in question is relevant insofar, as it can allow for the application of the international indigenous rights.[34] In the present case, Kenya has neither voted in favour of the United Nations Declaration on the Rights of Indigenous People (UNDRIP), nor adopted International Labour Organization (ILO) Convention 169, but the African Court still took these documents into consideration.

The Ogiek's indigenous status was thus one of the most contentious issues in the process. The African Court, even though it made reference to the AU Working Group, tested the Ogieks' indigenous status by using the characteristics elaborated by Erica-Irene Daes, the former Chairperson-Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities:[35]

29 *Rhoda Howard,* Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons, Human Rights Quarterly 6 (1984), pp. 163-4.

30 E.g. *Makau W Mutua*, The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties, Virginia Journal of International Law 35 (1995), p. 357; *Thaddeus Metz*, African Values, Human Rights and Group Rights: A Philosophical Foundation for the Banjul Charter, in: Oche Onazi (ed.), African Legal Theory and Contemporary Problems: Critical Essays, Dordrecht/Heidelberg/New York/London 2014, p. 148.

31 *Basil E Ugochukwu/Opeoluwa Badaru/Obiora Chinedu Okafor,* Group Rights under the African Charter on Human and Peoples' Rights: Concepts, Praxis and Prospects, in: Manisuli Ssenyonjo (ed.), The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights, Leiden/Boston 2012, p. 106.

32 *Mukwiza Ndahinda*, note 21, p. 191 ff.

33 *Ugochukwu/Badaru/Okafor,* note 31, p. 106.

34 Protocol on the Establishment of the African Court on Human and Peoples' Rights, note 10, Art. 7.

35 United Nations Economic and Social Council*,* Standard-setting Activities: Evolution of Standards Concerning the Rights of Indigenous People: Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene Daes*,* on the Concept of "Indigenous People", 10 June 1996, UN Doc. E/CN.4/Sub.2/AC.4/1996/2, para. 69.

(1) The presence of priority in time with respect to the occupation and use of a specific territory;
(2) A voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions;
(3) Self-identification as well as recognition by other groups, or by State authorities that they are a distinct collectivity;
(4) And an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[36]

This differs considerably from the characteristics developed by the AU Working Group:

(1) Principle of self-identification;
(2) A special attachment to and use of their traditional land, whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;
(3) A state of subjugation, marginalization, dispossession, exclusion or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic or dominant model.[37]

In the Endorois decision, the African Commission had confirmed these characteristics stressing that the principle of self-identification and the link between the people, their culture and their land are the most important features.[38]

The African Court's recourse to Daes' understanding of indigenousness is not convincing. Firstly, with regard to the cultural distinctiveness, it is questionable, whether this element is not already covered by the principle of self-identification. Moreover, it seems to convey an essentialist understanding of culture, which does not sufficiently acknowledge that cultures are constantly changing through endogenous and exogenous influences.

Secondly, while the identification by other communities may be a reasonable indicator for the status of a group, it is quite problematic to take the point of view of state institutions as measurement: the vast majority of sub-Saharan African states does not recognize indigenous rights and the concept of indigenousness itself is still contested by many governments.[39]

36 Ogiek judgement, note 1, para. 107.

37 Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples 2007, http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf (last accessed on 12 June 2017), para. 12.

38 Endorois decision, note 5, paras. 151, 154, 157.

39 *Jérémie Gilbert,* 'Litigating Indigenous Peoples' Rights in Africa: Potentials, Challenges and Limitations, http://roar.uel.ac.uk/5560/1/Article_Final%20Version%20%20%281%29%20-%20J.%20Gilbert.pdf (last accessed on 21 June 2017), p. 2.

Thirdly, the "priority in time" or aboriginality was one of the criteria deliberately rejected by the AU Working Group.[40] Most African regions have not encountered settler colonialism threatening the existence of indigenous groups and it is one of the reasons, why many Africans feel that the concept of indigenousness does not fit the African experiences. Even though many ethnic groups have experienced land grabs and domination, both by foreign powers and by other ethnic groups within the continent, the disruption by settlers did in most cases not occur to the same extent as in the Americas, Australia and New Zealand, where settlers became a dominant majority within a very short period of time and where many indigenous communities were brought to the verge of extinction. Consequently, the African Commission stated in 2007 that "every African can consider him/herself indigene to the continent"[41].

And fourthly, it devaluates the work of the African Commission and the AU Working Group, which have contributed significantly to the protection of indigenous groups in Africa and which have sought to "indigenize" indigenous rights.

Internationally, the Cobo Martinez study as well as Daes' characteristics are still the main documents being cited, when discussing the characteristics of indigenous peoples.[42] The United Nations Working Group in Indigenous Populations equally takes the view that "no formal universal definition of the term is necessary", while emphasizing that the characteristics provided by the Cobo Martinez study are still commonly used for practical reasons.[43] Hence, the African Court's decision could reflect its willingness to stronger align the African human rights system to the international concept of indigenous rights.

It could as well be an attempt to raise the threshold for qualifying as indigenous, which certainly corresponds to the interests of many states. The decision could certainly throw the gates wide open for denying indigenous rights by contesting the indigenous status of marginalized communities in sub-Saharan Africa. The impact of this decision on the work of the African Commission and, more particularly, the AU Working Group, is yet to be seen.

40 African Commission on Human and Peoples' Rights/ International Work Group for Indigenous Affairs, Indigenous Peoples in Africa: The Forgotten Peoples (2006), http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf (last accessed on 26 June 2017), p. 11.

41 African Commission on Human and Peoples' Rights, Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples (2007), http://www.achpr.org/mechanisms/indigenous-populations/un-advisory-opinion/ (last accessed 30 October 2014), para. 13.

42 FAO, Policy on Indigenous and Tribal Peoples (2017), http://www.fao.org/3/a-i4476e.pdf (last accessed on 9 August 2017), p. 4.

43 UN Department of Economic and Social Affairs, The Concept of Indigenous Peoples: Background Paper Prepared by the Secretariat of the Permanent Forum on Indigenous Issues, 2004, UN Doc. PFII/2004/WS. 1/3, para. 8.

II. Non-discrimination and indigenousness

Closely related to the concept of indigenousness itself, is the question of how indigenousness can be subsumed under the prohibited grounds of discrimination of the African Charter. The principle of non-discrimination is firmly enshrined in international law.[44]

The African human rights system enumerates more grounds of discrimination than the international and regional human rights documents. According to Art. 2, "every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status". A differential treatment becomes discriminatory, when there is no objective and reasonable justification and when it is not proportionate.[45]

Indigenousness could be subsumed under different grounds of discrimination:

In the African Commission's Mauritania case, an indigenous group was subjected to discrimination based on colour.[46] The African Court found that the Ogiek were discriminated based on their "ethnicity and/or other status". The former non-recognition of the Ogiek as a tribe, as well as the ongoing eviction policy amounted to a discrimination of Art. 2. The differential treatment was based on the hunter-gatherer status of the Ogiek, as opposed to other ethnic groups.[47] The environmental concerns expressed by the government were not found to be a satisfactory justification.

It seems to be a rather obvious choice to subsume indigenous groups under ethnicity as a prohibited ground. Ethnicity generally assumes a common culture, which tends to be the case for groups claiming to be indigenous. At the same time, ethnicity and its link to culture risk to convey an essentialist understanding of culture as being static and strictly distinguishable from the country's mainstream culture or other ethnic groups. This in turn can allow for contestations, for instance, when not all members of the community stick to their culture to the same degree. This could explain why the Court also found a discrimination based on another ground ("and/or other status"). Hence, indigenousness seems increasingly to be seen as stand-alone ground of discrimination.

Closely related to the right to non-discrimination is the right to equality (Art. 3 and 19). Art. 3 lays down the equality of individuals before the law as well as the right to equal legal

44 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 1965, entered into force 1969) UNTS 660, Art. 1(2); International Covenant on Civil and Political Rights (adopted 1966, entered into force 1976) UNTS 999, Art. 26; International Covenant on Economic, Social and Cultural Rights (adopted 1966, entered into force 1976) UNTS 993, Art. 2(2); Convention on the Rights of the Child (adopted 1989, entered into force 1990) UNTS 1577, Art. 2(1).

45 Kenneth Good v. Republic of Botswana, African Commission on Human and Peoples' Rights (2010), para. 219.

46 Malawi decision, note 3, para. 131.

47 Ogiek judgement, note 1, para. 142.

protection. According to the African Commission, a violation of Art. 2 automatically constitutes a violation of Art. 3.[48]

In cases concerning groups, Art. 19 may apply.[49] According to Art. 19, "all peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another.[50] Hence, according to Fatsah Ougergouz, Art. 19 is the collective equivalent of Art. 3.[51] The African Commission stressed the applicability of Art. 19 also to forms of domination within states.[52] As the Ogiek as an indigenous group were discriminated, it would have been possible and logical to invoke Art. 19. It remains unclear why the Ogiek judgement did not align itself to the African Commission's understanding of non-discrimination and equality.

The African Court's approach to indigenousness is thus characterized by ambiguity: On the one hand, it seems to have raised the threshold for qualifying as indigenous and deviated from the African Commission's position on non-discrimination and the right to equality. On the other hand, it understands indigenousness as a prohibited ground of discrimination This reflects the fact that indigenousness continues to be a highly controversial and politicised issue in the AU. The different organs continue to struggle to find a common position on indigenousness and the Ogiek decision does little to clarify the matter.

D. Right to Land

Land assumed a central role in the Ogiek case. While the indigenous right to land is recognised by ILO Convention 169 and the UNDRIP, the African Charter does not explicitly contain a right to land, neither individually nor collectively. In the African human rights system, it has been derived in three different ways: from the right to property (Art. 14), the right to practice religion (Art. 8) and the right to culture (Art. 17). The African Court discussed it mainly as a derivate of the right to property (Art. 14), but different aspects of the right to land also reappeared in relation to other rights.

In the Endorois case, the African Commission found a violation of the indigenous community's right to access religious sites, which constituted a violation of the right to practice religion.[53] Citing the UN General Assembly, it stated that religious communities have the

48 Open Society Justice Initiative v. Côte d'Ivoire, African Commission on Human and Peoples' Rights (2016), para. 155.

49 Democratic Republic of Congo v. Burundi, Rwanda, Uganda, African Commission on Human and Peoples' Rights (2003) Holding; Sudan Human Rights Organisation & Centre on Housing & Evictions (COHRE) v. Sudan, African Commission on Human and Peoples' Rights (2009), para. 223.

50 African Charter, note 6, Art. 19.

51 *Fatsah Ouguergouz*, The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa, The Hague/London/New York 2003, p. 214.

52 Sudan Human Rights Organisation, note 49, para. 222.

53 Endorois decision, note 5, para. 173.

right to "worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes"[54]. This reminds very much of Art. 25 of the UNDRIP, which states that indigenous peoples have the right to maintain and strengthen their spiritual relationship with their lands.[55] Restrictions to Art. 8 are only possible if they are foreseen by the national law and for exceptionally good reason. They must be proportional and directly related to that reason.[56] The African Court followed the African Commission's jurisprudence by finding that the denial of access to religious sites constitutes a violation of Art. 8. It emphasized that the "practice and profession of religion are usually inextricably linked with land and the environment"[57].

Reading the right to land as an aspect of the right to culture is quite common in the context of minority rights and the approach has also been applied to indigenous groups.[58] The African Commission emphasized in the Endorois decision the intrinsic link between culture and land.[59] A place for living culture is crucial for marginalised communities. The African Charter does not allow for restrictions of the right to culture. Consequently, the Court rejected the respondent's claim that the protection of the environment constituted a public interest exception under Art. 27(2).[60]

On the one hand, subsuming land under the right to culture and the right to religion holds advantages: minorities or "peoples" as under the African Charter can be easily accommodated under the right to culture or religion approach to land. This can be particularly advantageous when the community in question's indigenous status is subject to controversies.

On the other hand, these approaches also bear dangers. They allow for easy contestations by states that argue that there exists no distinct culture anymore or that the community or parts of it has embraced another religion, which deprives the traditional religious sites of their significance and worthiness of specific protection. Moreover, religious and cultural sites can be interpreted in a geographically narrow way.

Subsuming the communal right to land under the right to property is a rather recent development. This approach is driven by the principle of non-discrimination and challenges

54 UN General Assembly, Resolution adopted by the General Assembly, Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (2009) UN Doc A/RES/63/131, para. 9(g); Endorois decision, note 5, para. 165.

55 United Nations Declaration on the Rights of Indigenous Peoples (2007) UN Doc. A/RES/61/295, Art. 25.

56 Endorois decision, note 5, para. 172.

57 Ogiek judgement, note 1, para. 164.

58 UN Human Rights Committee, CCPR General Comment No.23: Article 27 (1994) UN Doc. CCPR/C/21/Rev. 1/Add.5, paras. 3.2, 7; Lubicon Lake Band v. Canada, Human Rights Committee (1990) UN Doc. A/45/40 at 1, para. 33.

59 Endorois decision, note 5, para. 244.

60 Endorois decision, note 5, para. 188.

the individualistic, Western understanding of property.[61] Just like the Inter-American Court of Human Rights, the African Commission found in earlier cases that the communal right to land of traditional communities can be derived from Art. 14.[62] According to Art. 14, "the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."[63]

Formal title is no precondition for the right to land.[64] The African Commission emphasized in the 2011 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights that the right to property includes "rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership" without restricting its scope to indigenous groups.[65] This was also confirmed in the Kibera decision.[66] Hence, states are obliged to grant recognition to communal land tenure systems, not only of indigenous, but also of other vulnerable groups.

It is thus not very surprising that the African Court aligned itself to the African Commission's position. It derived a communal right to land from the right to property by interpreting the African Charter in the light of the UNDRIP.[67] Art 14 can thus be both an individual and a collective right.[68] Restrictions are only allowed in the public interest or in the interest of the community and in conformity with national legislation. It came to the conclusion that the eviction was neither proportionate nor necessary in the public interest. As the expulsion occured against the Ogiek's will, without prior consultation and without sufficient public interest, the Kenyan government was in breach of Art. 14.[69] Consequently, the African Court's position is in line with the approach of the African Commission, the other regional human rights courts, as well as the ILO Convention 169 and the UNDRIP.

Besides these three approaches, the right to land could also have been discussed in relation to the right to self-determination. However, generally speaking and possibly due to the

61 *Jérémie Gilbert*, Indigenous Peoples' Land Rights Under International Law. From Victims to Actors, Leiden/Boston 2016, p. 110 ff.

62 Malawi decision, note 3, para. 128; Ogoni decision, note 4, para. 61 ff.; Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-American Court for Human Rights (2001), para. 148.

63 African Charter, note 6, Art. 14.

64 Sudan Human Rights Organisation, note 49, para. 205; Endorois decision, note 5, para. 187.

65 African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf (last accessed on 21 June 2017), para. 54.

66 E.g.: The Nubian Community in Kenya v. the Republic of Kenya, African Commission on Human and Peoples' Rights (2016), para. 160.

67 Ogiek judgement, note 1, para. 128.

68 Ogiek judgement, note 1, para. 123.

69 Ogiek judgement, note 1, para. 131.

high number of collective rights in the African Charter, the right to self-determination seems to play a less central role in the African human rights system.[70]

E. Right to Food

Besides that, the Ogiek judgement contributed to a broad understanding of the right to natural resources. According to Art. 21(1), "all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it."[71]

Hence, unlike the American Convention on Human Rights, the African Charter recognises the right to natural resources as a stand-alone right. Restrictions are possible in the public interest and in accordance with national laws.[72] The African Commission takes the view that natural resources vest in indigenous peoples inhabiting the land in question, even when they do not make use of them.[73] The African Court adopts the same approach and states that communities within a state can well be right holders, as long as they "do not call into question the sovereignty and territorial integrity of the State without the latter's consent"[74].

The African Court found that the Kenyan state had violated Art. 21 by depriving the Ogiek "of the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands"[75]. This can be interpreted as reflecting the African Court's willingness to see food as a natural resource and to derive the right to food from the right to natural resources. The understanding that the indigenous right to use their land for agriculture falls under their sovereignty to natural resources is noteworthy and innovative. In the Endorois case, the applicants had claimed that the "fertile soil"[76] was a natural resource. The Commission, however, only considered a violation of Art. 21 with regard to the extraction of ruby.[77]

Generally, the right to food and its relation to the right to land are mainly discussed as an aspect of the right to an adequate living or the right to life.[78] Communities, whose access to land is denied, are not able to carry out agricultural activities, which in turn can impair their right to adequate living. In the Ogoni decision, the African Commission derived the

70 See also the section on the right to free, prior and informed consent.

71 African Charter, note 6, Art. 21(1). .

72 Endorois decision, note 5, para. 267.

73 Ogoni decision, note 4, para. 48.

74 Ogiek judgement, note 1, para. 199.

75 Ogiek judgement, note 1, para. 201.

76 Endorois decision, note 5, para. 124.

77 Endorois decision, note 5, para. 267.

78 *Olivier de Schutter*, Large-scale Land Acquisitions and Leases: A Set of Core Principles and Measures to Address the Human Rights Challenge (2009), http://www2.ohchr.org/english/issues/food/docs/BriefingNotelandgrab.pdf (last accessed on 21 June 2017).

right to food from the right to life (Art. 4), the right to health (Art. 16) and the right to development (Art. 22) and found a violation of these articles as the development activities prevented the Ogoni people from feeding themselves.[79]

The African Court adopted a more conservative stance towards the right to life than the African Commission by interpreting Art. 4 more like "physical existence" than decent living conditions. As the applicant failed to show the causal link between the eviction policy and the physical existence of the group, it found no violation of the right to life.[80] This position reflects the mainstream of international law.[81] However, in view of the "minimalist approach"[82] of the African Charter that recognises only a small number of economic and social rights and their poor implementation, this interpretation fails to challenge the marginalisation of economic and social rights in international human rights law and particularly the African human rights system.[83]

In view of this reading of Art. 4, it was thus the only option to subsume the right to food under Art. 21. This also holds the advantage that the threshold for finding a violation of the right to food as an aspect of the right to natural resources tends to be lower. Moreover, the Court's interpretation again demonstrates the relevance and justiciability of the African Charter's collective rights.

F. Free, Prior and Informed Consent

One of the most controversial issues in the field of indigenous and minority rights, is the right to free, prior and informed consent (FPIC). FPIC is the right of communities to meaningfully participate in decisions affecting their territories or natural resources. It is mostly seen as a derivate of the indigenous right to self-determination. While FPIC is not explicitly mentioned in the African Charter, it has nevertheless been discussed by the African Commission and other regional organizations in the last years.

The Ogiek case is thus not the first one dealing with consultations and consent in the AU. According to the African Commission in its function as applicant, the Kenyan state had failed to ensure the Ogiek's right to be consulted according to their customs and traditions, including the right to give or withhold their free, prior and informed consent.[84] The Court interpreted the right to development (Art. 22) in light of the UNDRIP and, as the

79 Ogoni decision, note 4, para. 64 ff.

80 Ogiek judgement, note 1, paras. 154, 155.

81 *Niels Petersen*, Right to Life, Max Planck Encyclopedia of Public International Law, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e841 (last accessed on 22 June 2017).

82 *Manisuli Ssenyonyo*, Economic, Social and Cultural Rights in the African Charter, in: Manisuli Ssenyonyo (ed.), The African Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights, Leiden/Boston 2012, p. 55 ff.

83 African Charter, note 6, Art. 14, 15, 16, 17(1), 17(2), 17(3), 18(1) and (2).

84 Ogiek judgement, note 1, para. 43(E)(iii).

Kenyan state had failed to "effectively consult" with the Ogiek, it had violated Art. 22 of the Charter. Moreover, the lack of "prior consultations" with regard to the evictions constituted a violation of the right to property (Art. 14).[85]

In this regard, the African Court has missed an opportunity to clarify and extend the African Commission's position on FPIC and to contribute to the development of a coherent understanding of FPIC. Consultations do not necessarily amount to consent and generally do not give communities the right to veto development projects. At the same time, the fact that the duty to consult was derived from the right to development and the right to property indicates that the African institutions, unlike the majority of international documents, seem to detach it from the right to self-determination.

The African Commission's position with regard to FPIC is a little more illuminating: in the Ogoni decision, the African Commission derived the obligation to provide information, as well as meaningful opportunities to be heard and to participate from the right to a healthy environment. The failure to involve the Ogoni people in the oil production constituted equally a breach of Art. 21, the right to development. Hence, it appealed to the government to provide "meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations"[86].

In the Endorois decision the right to consultation was derived from the right to development. Art. 22 needs to fulfil five criteria: equitability, non-discrimination, participation, accountability and transparency, with freedom of choice being one of the overarching themes. Governments are therefore obliged to obtain the FPIC of communities.[87]

So while it remains unclear whether the African Charter imposes an obligation to FPIC and under which circumstances, it is still noteworthy that the African institution's do not see the right to self-determination as the only or principal source of FPIC or consultations. Instead, it has been derived from the right to a healthy environment, the right to development and the right to property. Only the African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights, interpret the right to self-determination as imposing a duty to obtain the FPIC from indigenous groups for matters concerning their traditional lands.[88]

The recognition of different legal sources for FPIC renders it easier to argue also for the applicability of FPIC to non-indigenous groups, as the right to self-determination is still widely seen as a governmental and (increasingly) an indigenous right.[89] Despite the vague wording of the judgement, a general move towards the full recognition of FPIC can be ob-

85 Ogiek judgement, note 1, para. 131.

86 Ogoni decision, note 4, para. 53.

87 Endorois decision, note 5, para. 290.

88 Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights, note 65, para. 44.

89 *Daniel Thürer/Thomas Burri*, Self-Determination, Max-Planck-Encyclopedia for Public International Law, para. 33 ff.

served on the African continent in view of the growing recognition of FPIC both nationally and in the regional organizations.[90]

G. Conclusion

The judgement of the African Court has been much celebrated amongst indigenous activists and it certainly is a success for the Ogiek people.[91] It is a success insofar, as it shows that the rights of disenfranchised communities are increasingly on the African human rights system's plate and that the African Charter has a particularly great potential to accommodate such claims. A good example for this is the collective right to natural resources, but also the willingness of the African Court to interpret the right to property as a communal right to land. The Ogiek judgement, but also the African Commission's jurisprudence are manifestations of a new protection regime of the right to land. The African human rights system assumes a threshold of applicability below the criterion of indigenousness. This development could improve the land rights situation of many marginalised communities in the future.

However, some questions remain open: the scope and implications of the right to free, prior and informed consent remain unexplored. On a more fundamental level, the judgement raises the question, of how much use the concept of indigenousness actually is in sub-Saharan Africa. The outdated characteristics applied by the African Court and the thus possibly higher threshold of indigenousness is astonishing at best. Moreover, it is still unclear how to distinguish indigenous groups from other peoples and it is questionable whether the Ogiek would have been treated any differently, if they had just been classified as a people.

The African Court's position with regard to indigenousness and indigenous rights is thus neither fish nor fowl and reflects the conflicts between AU member states, its organs as well as the growing influence of non-state actors like NGOs. Collective rights challenge the classical individual-state-dichotomy of international human rights law and can interfere with the sovereignty of states.[92] They are located in an area of conflict between different perceptions of development and of culture. Bringing together and mitigating those positions and perspectives requires much courage and intuition.

Hopefully, the African Commission by issuing more General Recommendations or the African Court's advisory opinion procedure will embark on this endeavour and further clar-

90 See *Ricarda Roesch*, The Story of a Legal Transplant: The Right to Free, Prior and Informed Consent in Sub-Saharan Africa, African Human Rights Law Journal 16 (2016), p. 505 ff.

91 Minority Rights Group International, Huge Victory for Kenya's Ogiek as African Court Sets Major Precedent for Indigenous Peoples' Land Rights (26 May 2017), http://minorityrights.org/2017/05/26/huge-victory-kenyas-ogiek-african-court-sets-major-precedent-indigenous-peoples-land-rights/ (last accessed on 26 June 2017).

92 *Sally Engle Merry*, Changing Rights, Changing Culture, in: Jane K Cowan/Marie-Bénédicte Dembour/Richard A Wilson (eds.), Culture and Rights: Anthropological Perspectives, Cambridge 2001, p. 41.

ify the legal concept of indigenousness, as well as its consequences. But also academia should assume responsibility and dedicate more resources to the exploration of the African human rights system.